

Fig. 3.

# *The Federal Reporter*

Payton Boyle, James Wells Goodwin, Robert Desby, District of Columbia,  
Court of Appeals, United States, Commerce Court, United States Circuit ...





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National Reporter System—United States Series

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WITH KEY-NUMBER ANNOTATIONS

VOLUME 201  
PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE  
CIRCUIT COURTS OF APPEALS, DISTRICT  
COURTS, AND COMMERCE COURT  
OF THE UNITED STATES

WITH TABLE OF CASES IN WHICH REHEARINGS HAVE BEEN  
GRANTED OR DENIED

FEBRUARY—MARCH, 1913

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# RULES OF PRACTICE

## FOR THE COURTS OF EQUITY OF THE UNITED STATES

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[The United States Equity Rules, as published by us in Vol. 198 Federal Reporter, pp. xix-xlii, were printed from an official copy of the first edition, supplied by the clerk of the Supreme Court. In a letter dated March 15, 1913, the clerk writes that the "first edition of the Equity Rules contained a few trifling unimportant typographical errors which have since been corrected in the second edition." In order that our publication may be absolutely accurate, we reprint herewith the rules containing errors, with the corrections embodied.]

### 26.

#### JOINDER OF CAUSES OF ACTION.

The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.

### 30.

#### ANSWER—CONTENTS—COUNTER-CLAIM.

The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person non compos and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counter-

claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims.

32.

ANSWER TO AMENDED BILL.

In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had as upon an omission to put in an answer.

# COURT RULES

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## UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

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### ADDITIONAL RULES OF PRACTICE IN EQUITY, ADOPTED BY THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

#### 1.

##### RESIDENT COUNSEL.

Except where a party conducts his own case, no bill or other pleading and no notice required to be signed by counsel shall be accepted by the Clerk, unless it is signed by a solicitor who shall have been admitted to practice in this Court, who shall be a resident of and shall maintain an office in this District, and who shall have entered his appearance of record in the case with the address in the District where notice can be served. This appearance shall not be withdrawn without leave of Court. Service of notices, rules and pleadings on such resident solicitor shall be equivalent to service on the parties for whom he has appeared. Where a party is conducting his own case, he shall file with the bill or other pleading a memorandum of one address within the District where notice can be served.

#### 2.

##### FORM OF BILL AND ANSWER.

The averments of the bill shall be divided into paragraphs consecutively numbered, and each paragraph shall, as far as possible, be restricted to a single fact or group of closely related facts. The prayers for relief may be briefly stated, but shall be explicit and shall be divided and numbered consecutively. The answer shall specifically admit or deny each material allegation of the bill by reference to the paragraph in which it is contained. If a material allegation of the bill be not specifically denied, it shall be deemed to be admitted, unless the answer shall directly assert lack of knowledge or information in reference thereto, but such assertion as to lack of knowledge or information shall not be permitted as to any matter of decision by a court of record, or any grant by the United States, or by a State, or municipality, or officer of either thereof, or as to any matter of public record.

#### 3.

##### COPIES OF BILL AND SERVICE THEREOF.

Counsel presenting a bill in equity to the Clerk to be filed shall also deliver to him one copy of the bill for each defendant in the cause, with the certificate of the resident solicitor for plaintiff, duly endorsed on



such copy that it is a true copy of the bill filed. One of said copies shall be delivered by the Marshal with each attested copy of the writ delivered by him in making service, and in his return he shall so certify; and the service of a subpoena upon a corporation found within the District shall be in the same manner as is provided by the statutes of Pennsylvania for the service upon a corporation of a writ of summons in assumpsit. Unless this rule is complied with, no order to take the bill pro confesso shall be entered by the Clerk without special order of Court.

## 4.

## MARSHAL'S RETURN.

The Marshal shall file his return to the writ of subpoena, and of service of the copy or copies of the bill of complaint, within ten days after service of the same has been completed.

## 5.

## CLERK'S AND MARSHAL'S FEES.

The Clerk shall not be required to issue, nor the Marshal to serve, process unless their fees are paid in advance, or security given therefor, to be approved by the Court.

## 6.

## SECURITY FOR COSTS.

In every proceeding in which the plaintiff is not at the time of filing the bill a resident of this District, or, being so, afterwards removes from the District, and in every other case where a defendant, or a person for him, shall make affidavit that he believes the costs cannot be recovered from the plaintiff by attachment or execution, an order for security for costs may be entered upon reasonable notice, and in default of such security being given at a time designated by the Court, the complainant shall be liable to have his bill dismissed.

## 7.

## PRINTING OF PLEADINGS.

No bill or other pleading, or amendment thereto, shall be received and filed by the Clerk unless printed on pages similar in size and character to the ordinary pages of printed briefs, or unless it has endorsed on it a certificate that the party, by reason of poverty, is unable to pay for printing, or that, in case of urgency of an injunction bill, there has not been time to print. Where printing is omitted for such lack of time to print, the pleading shall be considered as withdrawn, unless a printed copy is filed within ten days after the filing of the unprinted copy. The certificate referred to herein shall be signed by the resident counsel, or by the party, if the latter is conducting the case in person. Whenever a pleading is printed in accordance with this rule, the party or counsel filing the same shall send five printed copies to each resident

counsel appearing for any of the other parties in the cause, or to each party who is conducting his own case. If the pleading is not printed, one typewritten copy shall be so sent. The amount paid for printing or typewriting pleadings shall be allowed as costs of the cause.

8.

**MOTIONS.**

The third Monday of each month shall be a motion day, when motions requiring notice and hearing may be made and disposed of. Motions not requiring testimony or extended argument shall be heard on that day, and motions for preliminary injunctions and other motions requiring extended argument may be listed for that day for the purpose of having a time fixed for their disposal. Application may also be made at any time to the Court, or to a judge in chambers, without awaiting motion day, to fix time for hearing motions for preliminary injunction, or other motions requiring extended argument.

9.

**MOTIONS FOR EXTENSION OF TIME.**

No motion for an order allowing further time for an answer or a reply shall be made without proof of written notice of the motion, with the reasons therefor, to the solicitor of record for the opposite party.

10.

**EX PARTE ORDERS.**

Every ex parte order obtained in the cause must be plainly endorsed by the party obtaining it with the words "Ex Parte Order," and, at the time it is obtained, one copy thereof for each party in the cause affected thereby shall be duly certified by the counsel obtaining the order to be a correct copy, and shall be delivered to the Clerk for the mailing required by Rule 4 of the Equity Rules promulgated by the Supreme Court of the United States; otherwise, the order shall not be effective.

11.

**PRELIMINARY MOTIONS TO ASCERTAIN ISSUES AND  
DIRECT PROCEDURE.**

As soon as the cause is at issue, either party may from time to time apply to the Court, on notice to the opposing party, for directions concerning further procedure. On the hearing of such application, the Court shall, as far as possible, ascertain from counsel the real points of controversy, in order to avoid the taking of evidence as to issues not insisted upon by the parties, and may make orders concerning further procedure, including times, places and method of taking testimony, not inconsistent with the Equity Rules adopted by the Supreme Court of the United States or with statute.

## 12.

## PRINTING OF TESTIMONY.

All testimony in the cause, except that taken in open court at the trial, shall be printed within thirty days after it has been taken, in the same manner as is directed by these rules with regard to the printing of pleadings in the cause, and the cost of such printing shall be allowed as costs in the cause. Five copies of all such printed testimony shall be furnished by the party on whose behalf it is taken to all other parties affected thereby, or to their solicitors, within thirty days after it has been taken, unless such thirty days do not expire before the trial, in which case it shall, whenever possible, be furnished before the trial.

## 13.

## EXHIBITS.

All exhibits deposited by any party to the cause in the Clerk's office shall, if they are of such size or character that they cannot be conveniently filed with the pleadings, be removed, at the request of the Clerk, after the final determination of the cause, by the party on whose behalf they were deposited in the Clerk's office, and if not so removed within fifteen days after notice mailed by the Clerk to the resident solicitor of such party, the Clerk may obtain ex parte from the Court an order for their destruction.

## 14.

## STENOGRAPHERS.

All testimony taken in open Court, or before a Master or Examiner appointed by the Court, shall be taken down stenographically. The Stenographer's fee is fixed at twenty-five cents per folio of one hundred words, which shall include a typewritten transcription of the notes and two carbon copies thereof. The typewritten transcription shall be delivered by the Stenographer to the Clerk and filed of record. The Stenographer's fee shall be paid as prescribed in Rule 50 of the Rules of Practice in Equity adopted by the Supreme Court of the United States.

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We concur in the foregoing additional Rules of Practice in Equity proposed by the Judges of the District Court for the Eastern District of Pennsylvania.

GEO. GRAY,  
JOS. BUFFINGTON,  
JOHN B. MCPHERSON,  
Circuit Judges.

And now, February 25, 1913, the foregoing additional Rules of Practice in Equity are adopted and published as the Rules of the District Court for the Eastern District of Pennsylvania.

JAMES B. HOLLAND,  
J. WHITAKER THOMPSON,  
District Judges.

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# JUDGES

OF THE

## UNITED STATES CIRCUIT COURTS OF APPEALS THE DISTRICT COURTS, AND THE COMMERCE COURT

---

### FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice..... Washington, D. C.  
Hon. LE BARON B. COLT, Circuit Judge<sup>1</sup>..... Providence, R. I.  
Hon. WILLIAM L. PUTNAM, Circuit Judge..... Portland, Me.  
Hon. FREDERIC DODGE, Circuit Judge..... Boston, Mass.  
Hon. CLARENCE HALE, District Judge, Maine..... Portland, Me.  
Hon. JAS. M. MORTON, Jr., District Judge, Massachusetts..... Boston, Mass.  
Hon. EDGAR ALDRICH, District Judge, New Hampshire..... Littleton, N. H.  
Hon. ARTHUR L. BROWN, District Judge, Rhode Island..... Providence, R. I.

### SECOND CIRCUIT

Hon. CHARLES E. HUGHES, Circuit Justice..... Washington, D. C.  
Hon. E. HENRY LACOMBE, Circuit Judge..... New York, N. Y.  
Hon. ALFRED C. COXE, Circuit Judge..... New York, N. Y.  
Hon. HENRY G. WARD, Circuit Judge..... New York, N. Y.  
Hon. WALTER C. NOYES, Circuit Judge..... New Haven, Conn.  
Hon. JAMES P. PLATT, District Judge, Connecticut<sup>2</sup>..... Hartford, Conn.  
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York..... Brooklyn, N. Y.  
Hon. VAN VECHTEN VEEDER, District Judge, E. D. New York..... Brooklyn, N. Y.  
Hon. GEORGE W. RAY, District Judge, N. D. New York..... Norwich, N. Y.  
Hon. GEORGE C. HOLT, District Judge, S. D. New York..... New York, N. Y.  
Hon. CHARLES M. HOUGH, District Judge, S. D. New York..... New York, N. Y.  
Hon. LEARNED HAND, District Judge, S. D. New York..... New York, N. Y.  
Hon. JULIUS M. MAYER, District Judge, S. D. New York..... New York, N. Y.  
Hon. JOHN R. HAZEL, District Judge, W. D. New York..... Buffalo, N. Y.  
Hon. JAMES L. MARTIN, District Judge, Vermont..... Brattleboro, Vt.

### THIRD CIRCUIT

Hon. MAHLON PITNEY, Circuit Justice..... Washington, D. C.  
Hon. GEORGE GRAY, Circuit Judge..... Wilmington, Del.  
Hon. JOSEPH BUFFINGTON, Circuit Judge..... Pittsburg, Pa.  
Hon. JOHN B. McPHERSON, Circuit Judge..... Philadelphia, Pa.  
Hon. EDWARD G. BRADFORD, District Judge, Delaware..... Wilmington, Del.  
Hon. JOHN RELLSTAB, District Judge, New Jersey..... Trenton, N. J.  
Hon. JOSEPH CROSS, District Judge, New Jersey..... Elizabeth, N. J.  
Hon. JAMES B. HOLLAND, District Judge, E. D. Pennsylvania..... Philadelphia, Pa.  
Hon. J. WHITAKER THOMPSON, District Judge, E. Pennsylvania..... Philadelphia, Pa.  
Hon. CHAS. B. WITMER, District Judge, M. D. Pennsylvania..... Sunbury, Pa.  
Hon. JAMES S. YOUNG, District Judge, W. D. Pennsylvania..... Pittsburg, Pa.  
Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania..... Pittsburg, Pa.

<sup>1</sup> Resigned February 7, 1913.

<sup>2</sup> Died January 26, 1913.

## FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice.....	Washington, D. C.
Hon. NATHAN GOFF, Circuit Judge <sup>3</sup> .....	Clarksburg, W. Va.
Hon. JETER C. PRITCHARD, Circuit Judge.....	Asheville, N. C.
Hon. JOHN C. ROSE, District Judge, Maryland.....	Baltimore, Md.
Hon. HENRY G. CONNOR, District Judge, E. D. North Carolina.....	Willson, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....	Greensboro, N. C.
Hon. HENRY A. MIDDLETON SMITH, District Judge, E. and W. D. S. C.....	Charleston, S. C.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....	Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....	Lynchburg, Va.
Hon. ALSTON G. DAYTON, District Judge, N. D. West Virginia.....	Phillippi, W. Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....	Charleston, W. Va.

## FIFTH CIRCUIT

Hon. JOSEPH R. LAMAR, Circuit Justice.....	Washington, D. C.
Hon. DON A. PARDEE, Circuit Judge.....	Atlanta, Ga.
Hon. A. P. McCORMICK, Circuit Judge.....	Waco, Tex.
Hon. DAVID D. SHELBY, Circuit Judge.....	New Orleans, La.
Hon. THOMAS G. JONES, District Judge, N. and M. D. Alabama.....	Montgomery, Ala.
Hon. WM. I. GRUBB, District Judge, N. D. Alabama.....	Birmingham, Ala.
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Hon. WM. B. SHEPPARD, District Judge, N. D. Florida.....	Pensacola, Fla.
Hon. JOHN M. CHENEY, District Judge, S. D. Florida.....	Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....	Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....	Macon, Ga.
Hon. RUFUS E. FOSTER, District Judge, E. D. Louisiana.....	New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....	Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....	Kosciusko, Miss.
Hon. GORDON RUSSELL, District Judge, E. D. Texas.....	Sherman, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....	Dallas, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....	Houston, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....	Austin, Tex.

## SIXTH CIRCUIT

Hon. WILLIAM R. DAY, Circuit Justice.....	Washington, D. C.
Hon. JOHN W. WARRINGTON, Circuit Judge.....	Cincinnati, Ohio.
Hon. LOYAL E. KNAPPEN, Circuit Judge.....	Grand Rapids, Mich.
Hon. ARTHUR C. DENISON, Circuit Judge.....	Grand Rapids, Mich.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....	Maysville, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....	Louisville, Ky.
Hon. ARTHUR J. TUTTLE, District Judge, E. Michigan.....	Detroit, Mich.
Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan.....	Muskegon, Mich.
Hon. JOHN M. KILLITS, District Judge, N. D. Ohio.....	Toledo, Ohio.
Hon. WM. L. DAY, District Judge, N. D. Ohio.....	Cleveland, Ohio.
Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio.....	Cincinnati, Ohio.
Hon. JOHN E. SATER, District Judge, S. D. Ohio.....	Columbus, Ohio.
Hon. EDWARD T. SANFORD, District Judge, E. and M. D. Tennessee.....	Knoxville, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....	Memphis, Tenn.

<sup>3</sup> Resigned March 31, 1913.



## SEVENTH CIRCUIT

Hon. HORACE H. LURTON, Circuit Justice.....	Washington, D. C.
Hon. FRANCIS E. BAKER, Circuit Judge.....	Goshen, Ind.
Hon. WILLIAM H. SEAMAN, Circuit Judge.....	Sheboygan, Wis.
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Hon. ALBERT B. ANDERSON, District Judge, Indiana.....	Indianapolis, Ind.
Hon. FERDINAND A. GEIGER, District Judge, E. D. Wisconsin .....	Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin .....	Madison, Wis.

## EIGHTH CIRCUIT

Hon. WILLIS VAN DEVANTER, Circuit Justice.....	Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge.....	St. Paul, Minn.
Hon. WILLIAM C. HOOK, Circuit Judge.....	Leavenworth, Kan.
Hon. ELMER B. ADAMS, Circuit Judge.....	St. Louis, Mo.
Hon. WALTER I. SMITH, Circuit Judge.....	Council Bluffs, Iowa.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....	Little Rock, Ark.
Hon. F. A. YOUMANS, District Judge, W. D. Arkansas.....	Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado.....	Denver, Colo.
Hon. HENRY THOMAS REED, District Judge, N. D. Iowa.....	Cresco, Iowa.
Hon. SMITH McPHERSON, District Judge, S. D. Iowa.....	Red Oak, Iowa.
Hon. JOHN C. POLLOCK, District Judge, Kansas.....	Kansas City, Kan.
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Hon. PAGE MORRIS, District Judge, Minnesota.....	Duluth, Minn.
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Hon. ARBA S. VAN VALKENBURGH, District Judge, W. D. Missouri.....	Kansas City, Mo.
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Hon. THOMAS C. MUNGER, District Judge, Nebraska.....	Lincoln, Neb.
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Hon. JAMES D. ELLIOTT, District Judge, South Dakota.....	Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah.....	Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....	Cheyenne, Wyo.

## NINTH CIRCUIT

Hon. JOSEPH McKENNA, Circuit Justice.....	Washington, D. C.
Hon. WILLIAM B. GILBERT, Circuit Judge.....	Portland, Or.
Hon. ERSKINE M. ROSS, Circuit Judge.....	Los Angeles, Cal.
Hon. WM. W. MORROW, Circuit Judge.....	San Francisco, Cal.
Hon. RICHARD E. SLOAN, District Judge, Arizona.....	Phoenix, Ariz.
Hon. OLIN WELLBORN, District Judge, S. D. California.....	Los Angeles, Cal.
Hon. JOHN J. DE HAVEN, District Judge, N. D. California.....	San Francisco, Cal.
Hon. WM. C. VAN FLEET, District Judge, N. D. California.....	San Francisco, Cal.
Hon. FRANK S. DIETRICH, District Judge, Idaho.....	Boise, Idaho.
Hon. GEO. M. BOURQUIN, District Judge, Montana.....	Butte, Mont.
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....	Carson City, Nev.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....	Portland, Or.
Hon. ROBERT S. BEAN, District Judge, Oregon.....	Portland, Or.
Hon. FRANK H. RUDKIN, District Judge, E. D. Washington.....	Spokane, Wash.
Hon. EDWARD E. CUSHMAN, District Judge, W. D. Washington .....	Seattle, Wash.
Hon. CLINTON W. HOWARD, District Judge, W. D. Washington.....	Bellingham, Wash.

\* Died January 26, 1913.

## COMMERCE COURT

Hon. MARTIN A. KNAPP, Presiding Judge.....Washington, D. C.  
Hon. ROBERT W. ARCHBALD, Associate Judge<sup>1</sup>.....Washington, D. C.  
Hon. WILLIAM H. HUNT, Associate Judge.....Washington, D. C.  
Hon. JOHN E. CARLAND, Associate Judge.....Washington, D. C.  
Hon. JULIAN W. MACK, Associate Judge.....Washington, D. C.

<sup>1</sup> Removed by impeachment January 13, 1913.

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Rehearing denied Feb. 24, 1913.

201 F.

(xx)†

# CASES

ARGUED AND DETERMINED

IN THE

## UNITED STATES CIRCUIT COURTS OF APPEALS THE DISTRICT COURTS, AND THE COMMERCE COURT

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SOUTHERN HARDWARE & SUPPLY CO. v. CLARK.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1912.)

No. 2,378.

**1. SALES (§ 451\*)—CONTRACTS—WHAT LAW GOVERNS.**

A conditional sale contract between a seller residing in Alabama and a buyer residing in Florida for the sale of chattels in Florida is not within Code Alabama 1907, § 3394, providing for the recording of contracts of conditional sales to make them valid as against judgment creditors without notice.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1323; Dec. Dig. § 451.\*]

**2. CHATTEL MORTGAGES (§ 6\*)—NATURE OF INSTRUMENT—"CONDITIONAL SALE OR MORTGAGE."**

An agreement binding a party thereto to pay the adverse party a specified sum on a specified date for the price of an automobile previously delivered to the party, and stipulating that the title shall remain in the adverse party until the price is paid, and that in case of default the adverse party may take possession of the automobile and sell it, is a "conditional sale" and not a chattel mortgage within Gen. St. Fla. 1906, § 2496, requiring the recording of chattel mortgages to make them effective against creditors, and no title passes to the party where he fails to pay the price.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 23-41; Dec. Dig. § 6.\*]

What constitutes a contract of conditional sale, see note to *Dunlop v. Mercer*, 86 C. C. A. 448.

For other definitions, see Words and Phrases, vol. 2, pp. 1408-1410.]

**3. SALES (§ 468\*)—CONTRACTS—PASSING OF TITLE.**

Where a buyer is by the contract required to do something as a condition precedent to the passing of the title, the title will not pass until the condition is fulfilled, though there is a delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1354, 1355, 1358-1364; Dec. Dig. § 468.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
201 F.—1



**BANKRUPTCY (§ 140\*)—PROPERTY OF BANKRUPT—CONDITIONAL SALES.**

Where no title passed to a buyer in a conditional sale contract because of his failure to pay the price prior to his becoming a bankrupt, no title passed to his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.\*]

Appeal from the District Court of the United States for the Northern District of Florida; William B. Sheppard, Judge.

Action by the Southern Hardware & Supply Company against M. E. Clark, trustee in bankruptcy of the estate of Benn & Roberts, bankrupts. From a decree denying relief, plaintiff appeals. Reversed and remanded.

John C. Avery, of Pensacola, Fla., for appellant.

George W. P. Whip, of Pensacola, Fla., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

SHELBY, Circuit Judge. The appellant, a corporation, and Benn & Roberts, a firm composed of W. J. Benn and H. J. Roberts, entered into the following agreement:

"2490.

"\$1600.00.

Mobile, Ala., 3/4/11. 190.

"162490.

"Eighty days after date, for value received, we promise to pay to the order of the

"Southern Hardware & Supply Co., Mobile, Ala., sixteen hundred and no/100 dollars, with interest at the rate of 7 per cent. per annum, until paid. Negotiable and payable at the City Bank & Trust Company, as part of purchase price of the following described property, to wit:

"Chalmers Touring Automobile, #1266, complete as per catalogue specifications with all extra equipments.

"This note is one of a series of 4 notes which is given as a part of the purchase money of the above-described property, and it is expressly understood, and agreed by and between all parties herein concerned, that all rights, title and interest in and to the above-described property is to remain in the name of the Southern Hardware & Supply Co., its successors or assigns, until all the purchase notes given in payment of the above-described property are fully paid, and should the purchaser make other purchases and become indebted in additional sums of money to the said Southern Hardware & Supply Company, then the above-described property shall stand as security for goods thus purchased until the purchase money for said property and all indebtedness to the said Southern Hardware & Supply Co. is fully paid; and that the said Southern Hardware & Supply Co., its successors and assigns, shall and hereby does have the right and privilege of taking and removing all of said property at its option, without notice to the purchaser, should any part of said purchase money and other indebtedness be not paid when due. In event that Southern Hardware & Supply Co. should take possession of said property as above provided, it may sell the same at auction to the highest bidder for cash, and shall credit the proceeds of said sale, first, to the cost and expenses of taking possession of said property and such reasonable attorney's fees as may be incurred; second, to the amount of other indebtedness, if any, created since the execution of this contract; third, upon the unpaid balance of said notes should there be any surplus after paying all debts and expenses due the Southern Hardware & Supply Co., the same to be paid over to the undersigned.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"It is understood and agreed to further secure the payment of the said purchase money, when due, and any other indebtedness, all rights of exemption under the Constitution and laws of the state of Alabama, or any other state, is hereby expressly waived by the makers and indorsers thereof, who also waive demand and notice and protest, and who further agree that if this note is not paid at maturity, to pay all costs that may be incurred in collecting same, including attorney's fees. It is also understood that the above-described property shall be regarded as personalty until the purchase note and all other indebtedness due to Southern Hardware & Supply Co. has been paid.

"Signed and delivered this the 4th day of March, 1911.

"Benn & Roberts, per H. J. Roberts.

"In the presence of Anita McDonald."

The appellant, at the date of the contract, was engaged in business at Mobile, Ala. Benn & Roberts were engaged in the business of selling automobiles at Pensacola, Fla. Some time before the date of the contract, the automobile described therein, which was the property of the appellant, was delivered to Benn & Roberts as a "demonstrating car." It was so held by them at Pensacola, Fla., when the written agreement was made. Benn & Roberts never paid for the car. It does not clearly appear from the record that they ever made any payment on the purchase price. On January 18, 1912, while still in possession of the automobile under the contract, Benn & Roberts, on their voluntary petition, were adjudicated bankrupts. The appellee, M. E. Clark, was appointed trustee of the bankrupts, and took possession of the automobile as an asset of their estate. The appellant sued the trustee for it in the court below, alleging the foregoing facts, and also averring that the agreement between the appellant and the bankrupts "is in legal effect a retention of title to the said automobile by your petitioner," and a consent to such retention of title by the bankrupts. And petitioner, the appellant in this court, prayed:

"That the court may adjudicate that the said automobile is its property, and order the said trustee (the appellee here) to deliver the same to petitioner."

The trustee answered, denying that there was retention of title, and alleging that the agreement was, in effect, a mortgage, but that it was not available as against the trustee because it was never duly recorded. The referee decided that the automobile was the property of the appellant, and ordered that the trustee deliver it to the appellant. On petition for review, presented by the trustee to the District Court, the order of the referee was reversed; the court holding that the "instrument is a chattel mortgage."

[1] There is an Alabama statute which requires contracts of conditional sale, to make them valid as against judgment creditors without notice thereof, to be recorded in the county in which the party lives who obtains possession under the contract; and also in the county where the property is delivered and remains; and in the county to which it is removed. Code of Alabama 1907, § 3394. But the purchasers lived in Florida, and the property was in that state, and remained there. The Alabama statute, of course, has no extraterritorial force to require registration of instruments in Florida, and is not applicable to this case.



[2] There is a statute of Florida which requires the recordation of chattel mortgages to make them effective against creditors (General Statutes of Florida 1906, § 2496), and the agreement was not so acknowledged or proved as to permit its record as a chattel mortgage (Id. § 2497). It is contended by the appellee that the agreement is a chattel mortgage, and that the failure to properly acknowledge and prove it and to duly record it is fatal to appellant's rights as mortgagee, because the trustee is vested with the rights of a creditor holding a lien by virtue of the amendment to the Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), passed June 25, 1910 (chapter 412, 36 Stat. 838, 840 [U. S. Comp. St. Supp. p. 1491]).

There is no statute of the state of Florida that requires a contract of conditional sale to be recorded. *Campbell Mfg. Co. v. Walker*, 22 Fla. 412, 1 South. 59. If the agreement in question, therefore, is not a mortgage, neither the recordation statutes of Florida nor the said amendment to the bankruptcy law has any application.

If the agreement between the appellant and the bankrupts is a conditional sale, the appellant is entitled to recover the property, for the vendees, in such case, having no title, can pass none to others, and none passed to the trustee.

The proper decision of the case depends on the construction of the contract in question.

It appears from the record that the appellant furnished the bankrupts with four or five automobiles besides the one in litigation, and that it was understood between the appellant and the firm that the latter was to sell them, but only with the consent and approval of the appellant, to be obtained when an offer to purchase was made. The course of dealing between the parties was that the appellant retained the title and the right to approve or disapprove of any proposed sale. All of the machines were disposed of by the firm, excepting the one here in dispute, and no question about them is involved in this case. The evidence offered in reference to them is of no service or relevancy in this case, unless, perhaps, it tends to show the course of dealing between the parties. The contract here involved, however, is in writing, and is sufficiently clear to show what was intended. There is an express retention of title by the seller until the buyer pays for the property. The language is that it is "agreed by and between all parties herein concerned that all rights, title and interest in and to the above-described property is to remain in the name of the Southern Hardware & Supply Co., its successors or assigns, until all the purchase notes given in payment of the above-described property are fully paid. \* \* \*"

[3] When the buyer is, by the contract, bound to do something as a condition precedent to the passing of the title to the property, the title will not pass till the condition is fulfilled, although the property is delivered into the possession of the buyer. The buyer, in such case, acquires no property in the thing bought. He is only a bailee for a specific purpose. The delivery of possession, which, in ordinary cases, passes the title, can only have that effect when the condi-

tion is fulfilled—when, in a case like this, the purchase money is paid. *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285. This rule is recognized in Alabama, where the contract was made (*Sumner v. Woods*, 67 Ala. 139, 42 Am. Rep. 104; *Weinstein v. Freyer*, 93 Ala. 257, 9 South. 285, 12 L. R. A. 700); and in Florida, where the property was held and used at the date of the contract, and where it remains (*Mizell Live Stock Co. v. McCaskill Co.*, 59 Fla. 322, 51 So. 547, 548; *Campbell Mfg. Co. v. Walker*, 22 Fla. 412, 1 South. 59). The agreement in the case at bar contains a provision, ordinarily found in chattel mortgages, which authorized the seller, on default of payment of the purchase money, to take possession of the property and sell it. But the contract in *Harkness v. Russell*, *supra*, contained a like provision, and it was held to be a conditional sale. And it is also true that the agreement in the case at bar contains a stipulation that, in case the buyer should make other purchases, the property in question here should stand as security for the price. But we cannot see that such stipulation in any way affects the agreement, in reference to the automobile here in question, that the title shall not pass till the purchase money is paid. The agreement in *Mizell Live Stock Co. v. McCaskill Co.*, *supra*, contained a similar stipulation as to other debts, and yet the court held it to be a conditional sale.

Our attention is called to *Chicago Railway Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349, and it is argued that that case sustains the contentions of the appellee. In that case, the court said that, with the principles laid down in *Harkness v. Russell*, *supra*, "we are entirely satisfied." It is true that the contract the court was then considering was held to be a mortgage, it being in the form of a series of notes for the purchase of freight cars, the title to which was to remain in the seller till the notes were paid. But the contract contained the provision that all of said notes were "equally and ratably secured on said cars." The court, observing that "each case must depend upon its special circumstances," held the contract to be a mortgage.

We find nothing in the case at bar to take it out of the rule announced in *Harkness v. Russell*, *supra*.

[4] We are of the opinion that, by the agreement, no title passed to Benn & Roberts, they having failed to pay for the automobile, and, as they had no title, none passed to their trustee. An order should have been made to deliver the property to the appellant.

The decree of the District Court is reversed, and the cause remanded for further proceedings in conformity to the opinion of this court.

**AMERICAN PLATE GLASS CO. v. STRUTHERS-WELLS CO.**

(Circuit Court of Appeals, Third Circuit. November 21, 1912.)

No. 1,522.

**1. SALES (§ 354\*)—AFFIDAVIT OF DEFENSE—SUFFICIENCY.**

An affidavit of defense in an action on a contract to recover the purchase price of certain engines built and installed by plaintiff for defendant construed, and *held*, under the rules of the Pennsylvania practice, to fairly put in issue the averments of plaintiff's statement, so as to require evidence in support of the same and entitle defendant to introduce evidence tending to show the failure of the engines to meet the guaranties of the contract, and that for that reason they were not accepted, but were rejected by defendant after plaintiff had been given ample time and opportunity to make them comply therewith.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1005-1024; Dec. Dig. § 354.\*]

**2. APPEAL AND ERROR (§ 1041\*)—PLEADING (§ 268\*)—AMENDMENTS—WHEN ALLOWABLE.**

Under the liberal rule as to amendments prevailing in the federal courts, and under the Pennsylvania practice, on the ruling of a trial judge that an affidavit of defense was insufficient to put in issue an averment of plaintiff's statement of claim, so as to entitle defendant to introduce evidence thereon, defendant should be permitted to amend his affidavit, where such amendment would not work injustice to plaintiff, but would be conducive to a fair trial of the action on the merits, and the denial of such permission was prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041; \* Pleading, Cent. Dig. §§ 809, 810; Dec. Dig. § 268.\*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action at law by the Struthers-Wells Company against the American Plate Glass Company. Judgment for plaintiff, and defendant brings error. Reversed.

John S. Ferguson, of Pittsburgh, Pa., and J. E. Mullin, of Kane, Pa. (R. V. Lindabury, of Newark, N. J., of counsel), for plaintiff in error.

Patterson, Sterrett & Acheson, of Pittsburgh, Pa., and Heyn & Covington, of New York City (Thomas Patterson, of Pittsburgh, Pa., and Herbert A. Heyn and George B. Covington, both of New York City, of counsel), for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. The writ of error in this case brings up for review a judgment recovered in the court below by the Struthers-Wells Company against the American Plate Glass Company, for \$48,461.

The statement of claim sets forth a contract which consisted of a written proposal made by the plaintiff to the defendant under date of March 9, 1906, and accepted by the defendant March 24th of that

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

year. By this contract, the plaintiff undertook to manufacture and supply to the defendant four 600 horse power Warren gas engines, having 600 actual brake horse power, to be 11 feet in height, 7 feet 6 inches wide, 26 feet long, and to weigh approximately 150,000 pounds. The contract also stipulated in other respects, at great length, the details of the structure to be embodied in the engines contracted for. It was provided that one engine should be shipped 5 months after the date of the contract, and one engine each succeeding 20 days thereafter until the order should be completed, subject, however, to delays due to strikes, fires, accidents, or to any causes beyond its (plaintiff's) control. There were several guaranties contained in the contract, among which were the following:

"We guarantee each engine to be capable of delivering continuously 600 brake H. P. at a speed of 180 R. P. M. and one operating in natural gas containing not less than 1,000 B. T. U. per cu. ft. and carrying approximately full load, we guarantee the engines will not consume to exceed 12 cu. ft. of natural gas per brake horse power per hour.

"We also guarantee that each engine will be capable of operating for a short time with a load 10% above its normal rating, and that when driven 25-cycle alternating current generators in multiple, the engines will be capable of running in parallel with a variation in angular velocity not exceeding  $2\frac{1}{2}$  electrical degrees."

There were also guaranties for workmanship, material, etc. Plaintiff also stipulated that after engines had arrived at destination, they would furnish a rigger to superintend the work of placing the engines on foundations; also the services of a capable erecting engineer to supervise the erection, piping and starting of each engine, defendant to prepare the necessary foundations in accordance with blue prints furnished by plaintiff. The contract then provided for tests, as follows:

"After all of the engines have been completely installed and thoroughly prepared for operation, as determined by us, we are to have, if necessary, 60 days for trial runs, tests, and any other work that we consider necessary to put the engines in such condition as will enable them to fulfill contract guaranties hereinbefore mentioned.

"During the first 30 days of the time specified, customers are to furnish us, free of all expenses, the necessary water, gas, and oil that we require for operating the engines. If it should be necessary for us to operate the engines for trial runs, tests, etc., during the second 30 days of the time specified, we agree to pay customers 8c. per thousand cubic feet for all natural gas required by us; also agree to reimburse them for their actual cost of water and oil furnished by them to us for operating the engines.

"As soon as possible after engines have been installed and pronounced ready for operation by us, there is to be an official test, participated in by both customers and engine builders, and if this test should prove that all contract guaranties have been fully met, the entire installation is to be accepted by you.

"If each and every one of the contract guaranties hereinbefore mentioned are not fully met, we are to be allowed the opportunity of making other official test or tests at any time that we may desire during the 60 day trial period, furnishing customers information, at least two days in advance, of our intention to make such tests; and if any of these tests show that the engines are capable of fulfilling contract guaranties, engines are to be accepted. If, however, we should require more than the 60 days above specified for test purposes, all time over and above the 60 days prescribed is to be paid for by us, and we hereby agree to pay for same at the rate of \$200 per day, provided



customers' plant is fully equipped in every detail and ready for operation, but cannot be operated solely by the failure of engines to operate in accordance with contract guaranties.

"The duration of this extended time of test for which we agree to indemnify customers at the rate specified, may be terminated at any time by us by giving written notice to customers that we wish to abandon the installation without securing further time for testing. And in consideration of our being relieved of all responsibility in connection with the contract, excepting the payment of \$200 per day for the extended time of test period consumed by us, we will allow you the privilege of retaining the engines in your plant for a period of time sufficient to enable you to replace any or all of the engines of other make, it being understood that the engines in such event are not to remain in your plant for a period of time longer than six months from date of our giving you notice that we wish to terminate the trial period. And during the period of time that the engines are being used by you in accordance with this agreement, we will furnish to you, at our expense, a competent engineer to supervise their care and operation."

The price of the engines, as described, was stated to be \$68,000; "two-thirds of purchase price on completion of satisfactory test, establishing the fulfillment of all contract guaranties; balance 30 days thereafter." The statement of claim then proceeds to allege performance by the plaintiff of its contract, by the shipping and installation of said engines, fittings and fixtures, beginning on or about the month of March, 1907, and that the same were by the defendant erected on foundations on its premises and connected by defendant with its machinery, and thereafter used and employed by defendant in connection therewith in its business; "that thereafter, about the month of October, 1908, tests of the said engines were made, as provided in the contract, which showed that the engines complied with the terms of the guaranties, but the test for parallel operations on one of said engines not being completed on account of a grounded igniter, the plaintiff requested the opportunity to complete the same and tendered further performance of the contract, but the said defendant wrongfully and willfully forbade and prevented the plaintiff from further performance and discharged the plaintiff from so doing, and defendant did not and would not perform said agreement on its part to be performed, and especially prevented the plaintiff from completing said tests and from further testing and from further performing said contract;" but that defendant nevertheless continued to use the said gas engine and is now using the same, etc.; "that the defendant, although duly requested, has refused and neglected to pay the said sum of \$68,000, or any part thereof, except the sum of \$25,000, paid in December, 1907, and in January and March, 1908," and suit is brought for the balance.

The defendant in due course filed its affidavit of defense, under the rules of practice obtaining in the state of Pennsylvania, a practice adopted by the rules of the Circuit Court of the United States for the Western District of that state, and afterwards entered its plea of non assumpsit, set-off, and the special matter set forth in the said affidavit of defense. Among the rules referred to is the following:

"\* \* \* Also in all actions of assumpsit, the plaintiff's statement of claim may be verified by affidavit; and if so verified, the defendant's affida-

vit of defense or his affidavit in traverse thereof, shall be deemed and taken to be a pleading in the case, and upon trial no evidence on the part of the defendant shall be admitted in defense except such as may be alleged in his affidavit; and such items of claim and material averments of fact of the plaintiff's statement as are not directly and specifically traversed and denied by the defendant's affidavit, shall be taken as admitted. \* \* \*

[1] The case afterwards came on for trial. The plaintiff offered no evidence, other than the averments of its statement of claim, which it contended were not controverted or denied in the affidavit of defense. These averments, seven in number, were especially recited and called to the attention of the court. The first three, relating to the incorporation and citizenship of plaintiff and defendant, respectively, and to the copy of the contract annexed to the statement of claim being a true copy, were not denied by defendant and not objected to as proof of the matters averred. Upon the fourth, fifth, sixth and seventh of these averments, as not being controverted or denied in the affidavit of defense, the plaintiff rests for proof of its claim. They are as follows:

"Fourth: That the plaintiff manufactured and shipped to the defendant four gas engines, with fittings, fixtures and repair parts, and the said engines, fittings and repair parts were, beginning in or about the month of March or April, 1907, shipped and delivered to the defendant and received and assembled by the defendant, and were by it erected on foundations on its premises and connected by defendant with its machinery, and thereafter used and employed by it in connection therewith in its business.

"Fifth: That on or about the month of October, 1908, tests of the said engines were made, as provided in the contract.

"Sixth: That the plaintiff requested an opportunity to complete the test, and tendered further performance of said contract, but said defendant forbade and prevented the plaintiff from further performance, and discharged the plaintiff from so doing, and especially prevented the plaintiff from completing the said tests, and from further testing, and from further performing the said contract.

"Seventh: Nevertheless, defendant continued to use said gas engines, fittings, fixtures and repair parts, and is now using the same in its manufactory and in its business."

Upon the admission of these meager averments in evidence, after objection on the part of the defendant, the plaintiff rested its case, producing, or offering to produce, no other testimony in addition thereto or in support thereof.

The defendant, after refusal of its motion for nonsuit, proceeded to examine certain witnesses in its behalf and produce evidence in support of the affirmative allegations set up by it in its affidavit of defense. It also made various offers of testimony by certain witnesses and of other evidence in support of these allegations, which were refused by the learned judge of the court below; who thereupon instructed the jury that, upon the pleadings, they should find a verdict for the plaintiff, affirming the plaintiff's point to that effect and overruling the points submitted by the defendant.

The remarks with which the learned judge accompanied this instruction, as well as the opinion delivered by him on the motions for a new trial and for judgment non obstante veredicto, show the theory upon which the case was disposed of. That theory was that the facts

essential to the plaintiff's recovery were set forth in the statement of claim and were not denied in the affidavit of defense, and therefore, under the rule of the court to which we have above referred, such facts were to be taken as admitted and entitled the plaintiff to a verdict for the amount claimed. After the plaintiff had closed its case, by calling the attention of the court to these statements of its affidavit of claim as constituting the evidence on which it relied, defendant's counsel moved for leave to amend its affidavit of defense by a supplemental affidavit, stating

"that at the time the original affidavit of defense was filed, by inadvertence no reference was made to the tests alleged in the plaintiff's affidavit of claim as having taken place in October, 1908; that said tests were made and it was developed that the said engines were incapable of fulfilling the guarantees contained in the contract and as defendant expects to be able to prove, said engines could not as they then were, without being substantially redesigned and rebuilt, fill the requirements of the contract."

The affidavit then proceeded to state that for this reason, on November 19, 1908, defendant declined to permit any other or further tests, and on December 8, 1908, proceeded to make contracts for engines to supply the place of plaintiff's engines, and about that time notified the defendant that said engines were rejected, and requesting it to take them off defendant's premises. The court refused to allow the original affidavit of defense to be so amended, and, on the ground that the defendant had not by its original affidavit put the principal, if any, of the averments of fact contained in the plaintiff's statement at issue, refused several important, and to the defendant vital, offers of proof as being irrelevant to any issue in the case. It is necessary, therefore, to examine with some care the frame and substance of the defendant's affidavit.

After stating that the said defendant had a full, just and legal defense to the whole of the claim of the plaintiff in this case, and also a just and legal counterclaim against the plaintiff, the affidavit proceeds to state the nature and character of the defense. It admits that a contract was made between the parties on or about March 9, 1906, and that the copy attached to plaintiff's claim was true and correct. It states that under the terms of the said contract, the plaintiff was bound to deliver the engines, etc., therein specified,—the first on August 9, 1906, the second on August 29, 1906, the third on September 18, 1906, and the fourth on October 8, 1906; yet, in point of fact, the first engine was not delivered until the month of April, 1907, and the other three engines were delivered from time to time thereafter, through a period of four or five months. The affidavit further says that there were no strikes, accidents, or delays as would justify or excuse the plaintiff in delaying the delivery until the dates above named, and that defendant made no agreement or promise condoning the delay. It is admitted, however, that if the engines when delivered had conformed to the requirements of the contract, the defendant would have accepted and paid for the same. But affiant avers that said delay was largely caused by plaintiff's efforts to make the said engines conform to the requirements of the contract. The affidavit further says that, although

the first engine was delivered on the premises of the defendant in the month of April, 1907, and the remaining three during the period of four or five months thereafter, the said plaintiff, through its agents and employes, took entire charge and control of the engines and was engaged for its own purposes in adjusting the same, in order to make them comply with the requirements of the contract, and such control continued until about the close of the month of February, 1908, when the plaintiff, under the provisions of the contract in that behalf, gave written notice to the defendant that they were ready for a trial run of the engines; and that said provision of the contract was as follows:

"Test: After all of the engines have been completely installed and thoroughly prepared for operation as determined by us (plaintiff), we are to have, if necessary, 60 days for trial runs, tests, and any other work that we consider necessary to put the engines in such condition as will enable them to fulfill contract guaranties hereinbefore mentioned."

Upon such notice being given by plaintiff, defendant requested such trial runs to be delayed until it could have present its consulting engineer, Professor Charles E. Lucke, and said request was acquiesced in, engines remaining in control of plaintiff in the meantime. It is further averred that the said Lucke arrived on March 16, 1908, and made an examination of the engines, the result of which was that he reported that the same in many particulars did not fulfill the requirements of the contract, and that as they then were, could not fulfill such requirements; that the said report was in writing, and defendant craved leave to produce the same upon the trial.

The affidavit further states that, upon the reception of said report by defendant, it submitted the same to plaintiff, and that plaintiff, after examination thereof, agreed with said Lucke in substance as to the condition of the engines and abandoned its request for a trial run of the same at that time, and requested permission to modify the engines so as to meet the deficiencies pointed out, and that plaintiff then proceeded practically to rebuild the working parts of the engines, substantially redesigning the same and continuing for that purpose to have possession and control thereof, and that the plaintiff made no further request for any further trial runs of the engines until late in September, 1908. The affidavit then states that, on September 23, 1908, the plaintiff, being represented by its agent duly authorized for that purpose, met Professor Trinks, a mechanical engineer of good repute, connected with the Carnegie Technical Institute of Pittsburgh, and trial runs of said engines were made, said trial runs continuing over several days; that the result thereof showed that the engines did not comply with the requirements of the contract, the affidavit specifying the respects in which they failed to do so.

The affidavit also avers that at the time of making the trial runs, it was admitted and agreed by the representative of the plaintiff present thereat, that the engines did not and could not comply with the aforesaid guaranties required by the contract. Affiant therefore avers that the plaintiff wholly failed to comply with its contract, and that it is entitled to recover no compensation therefor. And affiant further denies that the parallel operators on one side of said engines were



not completed on account of grounded igniter, and avers that it was recognized and admitted that the engines as they then stood were not capable of complying with the parallel run test. The affidavit then admits that shortly after the trial runs were made, plaintiff requested defendant, first, to give it the entire use of engines for a period of 60 days or less, in order to make changes or improvements as would bring the engines up to the required power, and subsequently requested that one engine be turned over to it for the purpose specified in the first request, and that then, when plaintiff was ready for capacity and economy tests, it asked to be permitted to give 2 or 4 days' notice for the running of the test. Affiant admits that defendant refused to comply with this request, but avers that it had good reason to make such refusal, because more than 2 years had elapsed from the time when the last of the said engines was to be delivered, according to the requirements of contract, and more than 1 year had elapsed since the last of the said engines had been, in point of fact, placed upon said premises, and plaintiff, in the latter part of February or first of March, 1908, had announced its readiness for trial run and had abandoned it because of the confessed incapacity of said engines to comply with the contract; that 6 months then elapsed, during which time the plaintiff practically redesigned and reconstructed the said engines, and at the end of that time again announced itself ready for trial runs, and again the engines failed to comply with the terms of the contract; and the condition of the business of defendant, which was well known to plaintiff, was such that it had already suffered great damage by reason of the delay and was likely to suffer more. The affidavit then avers, by way of counterclaim, that defendant is entitled to recover from said plaintiff the sum of \$25,000, paid to the plaintiff between December 3, 1907, and March 12, 1908, each payment being made under the terms of a receipt, the language of which was, in part, as follows:

"And it is expressly understood and agreed that the making of payment by you at the present time is not to be taken by us in any extent as an indication by you of your approval, disapproval, acceptance or rejection of any of the engines furnished you in accordance with contract dated March 9, 1906."

The defendant further states in said affidavit that the said engines were essential to the operation of the plant of the defendant, and that defendant was dependent upon the fulfillment of the contract for the power necessary to the complete operation of its plant; that during the period beginning on the 23d of March, 1908, when plaintiff voluntarily abandoned the trial runs which it had declared its readiness to make, for the reasons already stated, and ending on the 23d of September, 1908, when it again admitted that the engines were not in compliance with the contract, being a period of 6 months, the actual loss to said defendant, by reason of not having said engines, as of right it was entitled to under the terms of said contract, was at least the sum of \$200 a day during said period of 157 working days, to the payment of which it was entitled under the clause of the contract already quoted, and affiant avers that during said period of 6 months, defendant's plant could not be operated, so far as the power

department was concerned, solely by reason of the failure of the engines to operate in accordance with the contract guaranties, and the affiant claims for the defendant, after the failure of the tests, the right to use the said four engines, because, the plaintiff having failed to comply with the requirements of the contract, it had the right under the contract to hold said engines and use the same until it could make satisfactory arrangements to supply their place. Affiant also denies that the said engines were ever delivered in accordance with the said contract.

From the foregoing summary, we think it will appear that the affidavit of defense sufficiently states, though in narrative form and somewhat inartificially, an affirmative defense to the plaintiff's claim. Though specific and technical denials of plaintiff's statement as to performance of the contract on its part, may not in all cases have been made, the facts alleged and set up in the affirmative defense, indirectly and from necessity traverse all the statements made by the plaintiff, essential to establishing liability on the part of the defendant under the contract. Indeed, a categorical denial of the averment as to delivery and of the averment as to tests, might have been objectionable as negatives pregnant. Defendant could not deny a physical delivery, but its statement of when and how that delivery was made, and the circumstances attending it, and its reference to the contract in that regard, was a substantial denial or challenge of the truth of plaintiff's averment that a delivery was made in accordance with the terms of the contract. The theory of the plaintiff, as shown by its statement of claim and presentation of the case, is, as we have pointed out, that no test was demanded or had by the parties under the contract until the October test, as stated in its claim, and that therefore the 60 days' time for adjusting any default in the engines, provided for in the contract, did not commence to run until the date of that test. The defendant, on the other hand, in its affidavit, makes a statement as to the occurrences subsequent to the contract, and as to the conduct of the parties, in necessary contradiction of the essential averments upon which the plaintiff's theory of its case is founded. Defendant's theory of the case, dependent upon the truth of the facts averred in its affidavit, is that, after a long and inexcusable delay in the delivery of the engines, disregarded though not condoned by the defendant, the plaintiff made delivery of the first engine in April, 1907, delivering the last in August or September of that year, and after occupying the interval in endeavoring to make the engines meet the guaranties of the contract, the plaintiff, late in February, 1908, demanded for the first time the test provided for in the contract, and the same was practically held in March, though no trial run was actually made, for the reason that plaintiff acquiesced in the opinion of defendant's expert, that the engines were not in a condition to make such a trial. This fact having been reported to defendant and acquiesced in by plaintiff, it is contended by defendant that from the 23d of March, the date of the report, the 60 days, within which repairs and readjustments of machinery could be made by

plaintiff under the terms of the contract, began to run, and that after the 60 days expired, on the 23d of May, the further time consumed by plaintiff was at its own expense. The defendant also states that a test was made on the 23d of September, at plaintiff's request, which demonstrated the insufficiency of the engines, after all these months in which it is alleged they were being redesigned and rebuilt, to fulfill the guaranties of the contract. This test is not alluded to in the plaintiff's statement of claim, which refers only to an alleged test had in October following. It is with reference to this so-called test that the defendant sought leave to file a supplemental affidavit, averring that reference to it in the affidavit of defense had been omitted by inadvertence. Defendant claims, however, in his argument, that this so-called test was a mere continuance of the abortive test of September, granted by indulgence of the defendant, and that all further tests were thereafter refused, on account of the failure of the tests theretofore made to meet the guaranties of the contract. Defendant claims in argument that the facts show that more than a reasonable time was granted to plaintiff to make good the requirements of the contract, and that the plaintiff was not entitled to more than a reasonable time after the expiration of 60 days from the first test, in which to demonstrate its ability to fulfill the guaranties of the contract.

We think this contention is correct, and that under the terms of the contract, plaintiff was not entitled to any period he chose to demand after the expiration of the 60 days from the 23d day of March, 1908, if that shall be found to be the date of the first test, but is confined by the law of the contract to what a jury shall determine would be a reasonable time after the 60-day period for the performance of its contractual obligation.

It therefore follows that whether defendant's conduct amounted to an acceptance of performance by the plaintiff under the contract depends upon whether the defendant is able to support, by proof, the facts stated by it in its affidavit, by way of defense. Whether there was such an acceptance of performance by the defendant; whether a reasonable time had elapsed after the 60 days mentioned in the contract, beyond which the plaintiff might not, without the assent of defendant, continue its experiments in bringing the engines contracted for up to the guaranties and stipulations of the contract; whether there really was practically a test under the terms of the contract had in the month of March, 1908, and whether plaintiff was entitled, by way of recoupment, to the amounts claimed by it, were questions for the jury.

The character and requirements of an affidavit of defense in Pennsylvania practice are thus stated by Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania, in *Andrews v. Packing Co.*, 206 Pa. 370, 55 Atl. 1059:

"An affidavit of defense should set forth fully and fairly, facts sufficient to show *prima facie*, a good defense, and if it fails to do so, either from omission of essential facts, or manifest evasiveness in the mode of statement, it will be insufficient to prevent judgment. But if not deficient in either of these respects, and on its face fairly setting forth a *prima facie* defense, it is not to be subjected to close technical examination as if it was a special

plea demurred to. Its office is to prevent a summary judgment and for that purpose a showing of a defense, with certainty to a common intent, is sufficient."

No rule of court should be so administered as to contravene or obscure the spirit of this clear exposition of the office of an affidavit of defense.

The views we have expressed are largely determinative of the questions raised by the assignments of error.

The second assignment is to the admission, as evidence under the rule, of the following statement in the affidavit of claim:

"That the plaintiff requested an opportunity to complete the same (i. e., the tests alleged by plaintiff to have been made in October, 1908), and tendered further performance of said contract, but the said defendant forbade and prevented plaintiff from further performance and discharged the plaintiff from so doing, and especially prevented plaintiff from completing the said tests and from further test and from further performing the said contract."

Defendant's counsel objected to the admission of this statement, on the ground that the same had not been admitted by its affidavit of defense, but was in effect and substance denied by the averments thereof. We think that defendant's objection should have been sustained. The following paragraph, recited in the summary we have made of the affidavit of defense, sufficiently answers, by confession and avoidance, the only way in which it could have been answered, this statement of the affidavit of claim. It is as follows:

"Affiant admits that, shortly after said trial runs (those in the last days of September, 1908) were made, the plaintiff requested the defendant, first, to give it the entire use of the engines for a period of 60 days or less, in order to make such changes or improvements as would bring the engines up to the required power, and subsequently requested that one engine be turned over to it for the purpose specified in the first request, and that then, when plaintiff was ready for capacity and economy tests, it asked to be permitted to give 2 or 4 days' notice for the running of the test; and affiant admits that defendant refused to comply with said request, but avers that it had good reason to make such refusal; that more than 2 years had elapsed from the time when the last of the said engines was to be delivered according to the requirements of the contract, more than 1 year had elapsed since the last of the said engines had been in point of fact placed upon the said premises, and plaintiff, in the latter part of February or first part of March, 1908, had announced its readiness for trial run, and had abandoned it because of the confessed incapacity of said engines to comply with the contract. Six months then elapsed, during which time the plaintiff practically redesigned and re-constructed the said engines, and at the end of that time again announced itself ready for trial runs, and again the engines failed to comply with the terms of the contract; and the condition of the business of the defendant, which was well known to the plaintiff, was such that it had already suffered great damage by reason of the delay, and was likely to suffer more."

It will be remembered that the evidence offered by defendant, and rejected, tended to show that the test on October 28th was a mere continuance, by indulgence of the defendant, of the test concluded in the last days of September, and that the refusals of further tests after the September test, referred to in the passage just quoted from the affidavit of defense, may well cover and refer to the refusals in October, as alleged by complainant. However this may be, we



are of opinion that the amendment to his affidavit of defense, offered by defendant to correct what is alleged to have been an inadvertence, in making special reference to the tests alleged in plaintiff's affidavit of claim as having taken place in October, 1908, should have been allowed, and not rejected, by the court below, for reasons hereinafter more fully stated.

The defendant offered in evidence the following written notice, addressed by the plaintiff to the defendant:

"Warren, Pa., March 6, 1908.

"American Plate Glass Company, Kane, Pa.

"Gentlemen: After giving the matter quite careful consideration we have decided that we would like to make a test of the four (4) 600 H. P. gas engines at your James City plant within ten days from present date. If for good reasons of your own you prefer this test to be made on the 13th and 14th instead of the date specified we would be pleased to arrange accordingly; or, if a few days later than the date specified would better suit your convenience, we will be pleased to await your convenience. We trust that you will provide all the necessary instruments and equipment necessary to secure absolutely reliable data from the test concerning capacity, economy and regulation.

"Yours truly,

[Signed] G. C. L——, Secy. & Gen. Mgr."

Defendant then, in connection with this notice, offered the deposition of Charles E. Lucke, mechanical engineer referred to in the affidavit of defense, who, on behalf of the defendant and in pursuance of the said notice, made examination of the engines on defendant's premises in company with the representative of the plaintiff. The deposition was to the effect that the said engines did not come up to the guaranties of the contract and were in other respects defective, and that complainant company acquiesced in this opinion and abandoned an actual trial run at the time fixed by it. This deposition was offered for the purpose of showing that in point of fact, at the date fixed by plaintiff for the tests, the tests were abandoned by plaintiff, because the engines were not in condition to stand the test, and also because it tended to show that the 60 days' time given by the contract for trial runs should be computed from the date of said abandonment. This offer was refused by the court below, upon the objection of the plaintiff. Counsel for plaintiff objected to the offer as not being in accordance with any issue raised by the pleadings, the statement of claim showing only a request for test made in October, 1908, and no issue raised by the pleadings as to any other alleged previous test. The court, sustaining this objection, refused to admit the deposition. In this, we think the court below was in error, as the deposition offered in connection with the letter addressed by plaintiff to defendant, dated March 16, 1908, tended to support the affirmative matter alleged in defense by the defendant in its affidavit, and tended to throw light on the situation of the parties at the time of the tests in October, referred to in the affidavit of claim.

Even conceding that the bald statement by plaintiff in its affidavit of claim, that a test was had on October 28th, and that defendant refused to allow any other or further test to have been admitted by the silence of the affidavit of defense in that regard, that admission did not extend to the legal conclusion deduced from these facts by



plaintiff, and defendant could not with justice be excluded from opportunity to make independent averments of prior occurrences not mentioned by the plaintiff, which tended to negative such legal conclusions and to explain the facts claimed to have been thus admitted by the defendant. We do not think the rule of court above referred to should have been so applied or administered as to have excluded the testimony thus offered by the defendant.

What we have said in regard to the refusal of this deposition, in connection with the letter of March 6, 1908, is applicable to the offers of evidence set forth in the fifth and sixth assignments of error, and for the refusal of which by the court below, error was assigned. These offers were made for the stated purpose of showing that the 60 days for trial runs, tests, and any other work, as provided for in the contract, began to run on or about the 16th day of March, 1908, and had fully expired at the expiration of 60 days thereafter, before any request was made for further tests; and for the purpose of showing that from a time prior to the delivery of any engine down until after the 1st of January, 1909, defendant's plant was fully equipped and ready for operation, except so far as it was interfered with by the defects of the engines in question; and for the purpose of showing that the tests of October, 1908, developed the fact that the engines in question could not be made capable of complying with the guaranties of the contract, without substantially an entire rebuilding of the engines; and for the purpose of showing that ample and reasonable time was given by defendant to plaintiff to comply with the contract in question; and for the further purpose of negating any inference of a waiver or prevention of the performance of a contract arising from the matters given in evidence by the plaintiff. Evidence for these purposes and in support of the affirmative defenses set forth in the affidavit of the defendant, or tending to negative and explain the statements of the affidavit of claim, should not have been excluded from the consideration of the jury.

So also as to the offers of proof, the refusal of which are made the subject-matter of the eighth assignment of error. The evidence there offered was for the stated purpose of showing, first, that the plaintiff had full 60 days provided for in the contract for trial runs, tests, and any other work which it might consider necessary for putting the engines in a condition to fulfill contract guaranties; second, for the purpose of showing that the plaintiff was not in any way prevented from the performance of the contract, but on the contrary was unable to perform; third, for the purpose of showing that the defendant was justified in refusing to let the plaintiff work further with the said engines, and also for showing that plaintiff had a reasonable time after the expiration of the 60 days from the alleged test, on or about March 16, 1908, if the occurrence of such test should be established. Expert testimony was also offered, tending to show that the engines in question not only failed at the tests in December, 1908, and at other times, to come up to the contract guaranties, but that they were, by reason of organic defects in structure, incapable of being made to fulfill such guaranties.

Objections to such testimony by counsel for the plaintiff were sustained by the court, and the refusal of the court to permit such testimony having been excepted to, is covered by the assignments of error. We think such testimony should have been admitted, and that there was error in its exclusion. We can discover nothing in the relation of the affidavit of defense to the affidavit of claim that would warrant the exclusion of any evidence on the part of the defendant, tending to show the failure of the engines to meet the requirements of the contract, or explain the circumstances under which and to what extent engines were used by defendant, and pertinent to the question, whether or not such use amounted to an acceptance. The use of an article by a purchaser does not necessarily imply an acceptance of it. It is a question in this case for the jury, whether the use by the defendant of the engines erected on its premises amounted to an acceptance under the contract. In this respect, the notice of December 10, 1908, which the defendant offered to prove, was pertinent and should have been admitted.

[2] The assignments of error are unnecessarily numerous. Most of those to which we have not referred specifically are sufficiently covered by what we have already said as to the assignments particularly discussed. The seventh assignment, however, challenges our special attention. It is as follows:

"The court erred in refusing to permit the defendant to file the following amendment, to wit:

"Before me, the undersigned authority, personally came James T. Riley, who, being duly sworn, says: That at the time of the transactions involved in this case he was secretary of the defendant company, and was fully informed of all matters connected with the transactions involved in this case; that at the time the affidavit of defense in this case was filed, by inadvertence, no reference was made to the tests alleged in the plaintiff's affidavit of claim as having taken place in October, 1908; that said tests were made and it was developed that the said engines were incapable of filling the guarantees contained in the contract, and as defendant is informed and believes, and expects to be able to prove, said engines could not as they then were, without being substantially redesigned and rebuilt, fill the requirements of the contract. That defendant, therefore, on November 19, 1908, declined to permit any other or further tests, and on December 8, 1908, proceeded to make contracts for engines to supply the place of plaintiff's engines, and subsequently, on or about December 10, 1908, notified the plaintiff that the said engines were rejected, to take them off defendant's premises, and demanded a return of the \$25,000 theretofore paid, and that they were so rejected because they were not such engines as were required by the contract. Affiant makes this affidavit as a supplemental affidavit of defense."

"[Signed] James T. Riley."

This amendment was offered at the trial, when the plaintiff had rested, after offering as its evidence the statements above referred to in its affidavit of claim. Counsel for the plaintiff objected to the filing of this amendment, "in so far as it may seek to change the admissions of the affidavits now entered on the trial of this case under the rule of court No. 1 (above referred to), for the further reason that no expediency (sic) has appeared in the proof of the defendant where such amendment is necessary; also, because the affidavit proposed to be filed is directly contradictory in terms to the affidavit of defense

now on record." For these reasons, and for the additional reason that it came too late, the court refused the motion of the defendant, and directed that the paper be filed, but not received as an affidavit of defense.

We do not think that these objections, under all the circumstances of the case and the manifest hardship to which the defendant was being subjected in the presentation of the case, were sufficient to justify the action of the court in the premises. The inadvertence which the affiant sought to correct by this proposed amendment, while it might injuriously affect the case of the defendant, its correction worked no injustice to the plaintiff. That tests were made in October, which failed, and that permission for further tests were refused by defendant, as stated in the affidavit of claim, was admitted in the proposed amendment. So far, at least, there was express admission, instead of tacit admission, of plaintiff's statement in its affidavit of claim; but it was vital to defendant's case that it should be allowed to show how the test failed, and why permission for further tests was refused. Courts are reluctant to shut out the light from any aspect of a litigated case, as is amply evidenced by the liberal rules permitting amendments to pleading, which in modern times have been adopted by the courts, and so sanctioned by legislative authority as to indicate a public policy in that regard. The burden is generally on the one who objects to an amendment apparently pertinent and important, to show cause why it should not be granted. We do not think that in this case sufficient reason has been shown for the refusal of the court to grant the amendment. It seriously changed no issue and imposed upon the plaintiff no burden which, if it were able to support at all, it was not prepared to support when the amendment was offered. By this amendment, the plaintiff incurred no disadvantage, except that of permitting defendant to avail itself of a defense to which it was justly entitled.

It would more often than not defeat the ends of justice, were we to apply the strict rules applicable to a special traverse to such an affidavit of defense, which, by the rule of court here in question, is made a pleading in the case, and utterly deprive the more liberal rules of modern pleading of their value. We think, therefore, that the refusal of the court below to permit the original affidavit to be amended, as asked for, was manifest error. We think the exercise of its discretion by the court below, in refusing the amendment on the ground stated, worked an injustice to the defendant so serious as to warrant this court in reviewing the same. The rule of court and the Pennsylvania act of 1806 expressly authorize such amendment upon terms that shall prevent injustice being done to the adverse party, and these amendments are authorized both before and during the trial. The seventh assignment of error is therefore sustained.

For the reasons stated, the judgment below is reversed, with directions for a venire de novo.

**MERCHANTS' STOCK & GRAIN CO. et al. v. BOARD OF TRADE OF CITY  
OF CHICAGO et al.†**

(Circuit Court of Appeals, Eighth Circuit. October 24, 1912.)

No. 3,404.

**1. CONTEMPT (§§ 3, 4\*)—"CIVIL CONTEMPTS" AND "CRIMINAL CONTEMPTS" DISTINGUISHED.**

Contempts prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, are criminal and punitive in their nature, the government, the courts, and the people being interested in their prosecution; while those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce such rights, and to administer the remedies to which the court has found the parties to be entitled, are civil and remedial and coercive in their nature, the parties chiefly interested in their conduct and prosecution being the individuals whose rights and remedies they are instituted to protect and enforce.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 4; Dec. Dig. §§ 3, 4.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1194-1195, 1747-1748.]

**2. CONTEMPT (§ 43\*)—CRIMINAL CONTEMPT—PROSECUTION—REAL PARTY IN INTEREST.**

While a criminal contempt involves no element of personal injury, being directed against the dignity of the court in which private parties have little or no interest, yet if a contempt consists in the party's refusal to do an act which the court has ordered him to do for the benefit or advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the agreement is in the nature of an execution to enforce the judgment, and the party in whose favor the judgment was rendered is the real party in interest in the proceedings.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 125-127; Dec. Dig. § 43.\*]

**3. CONTEMPT (§ 51\*)—SUMMARY TRIAL.**

Criminal contempts may be tried summarily, and need not be tried according to the regular course of criminal proceedings.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 140-142; Dec. Dig. § 51.\*]

**4. JURY (§ 21\*)—TRIAL BY JURY—CONTEMPT PROCEEDINGS.**

Accused in a prosecution for criminal contempt is not entitled as of right to trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 134-142; Dec. Dig. § 21.\*]

**5. CONTEMPT (§ 34\*)—CRIMINAL CONTEMPT—PUNISHMENT—JURISDICTION.**

Courts of chancery and other courts without criminal jurisdiction may punish for a so-called criminal contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 99, 101-104; Dec. Dig. § 34.\*]

**6. CONTEMPT (§ 45\*)—PUNISHMENT—COURTS—JURISDICTION—VENUE.**

In a prosecution for criminal contempt, no change of venue can be allowed, since no court except that against which the contempt is committed has power to punish it.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 131, 132; Dec. Dig. § 45.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied November 21, 1912.



**7. CRIMINAL LAW (§ 987\*)—TRIAL—SENTENCE—ABSENCE OF ACCUSED.**

For an actual criminal contempt accused may be sentenced in his absence without waiver or without his consent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2511; Dec. Dig. § 987.\*]

**8. CONTEMPT (§ 40\*)—CONTEMPT PROCEEDINGS—JUDGMENT—FORMER CONVICTION.**

Where an act which constitutes a contempt of court is also a crime, it may be punished both by summary action by the court and by indictment, and neither will bar the other.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 122-124; Dec. Dig. § 40.\*]

**9. WITNESSES (§ 293½\*)—PRIVILEGE—CONTEMPT—OBLIGATION OF ACCUSED TO TESTIFY.**

Const. Amend. 5, providing that no person should be compelled in any criminal case to be a witness against himself, does not apply to contempt proceedings, where the contempt charged does not also constitute a crime.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1011; Dec. Dig. § 293½.\*]

**10. CRIMINAL LAW (§ 662\*)—NATURAL RIGHTS—RIGHT TO BE CONFRONTED WITH WITNESSES—CRIMINAL CONTEMPT.**

Const. Amend. 6, providing that, in all criminal prosecutions, the accused shall enjoy the right to be confronted by the witnesses against him, does not apply to proceedings to punish a person for a criminal contempt of court, in which evidence may be taken before an examiner.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3, 1538-1548; Dec. Dig. § 662.\*]

**11. CONTEMPT (§ 66\*)—WRIT OF ERROR—REVIEW—RULINGS ON EVIDENCE.**

Where evidence in contempt proceedings was taken before an examiner, and objections made, but not ruled on, were not called to the attention of the court on a subsequent hearing, such objections were unavailable on writ of error.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

**12. CONTEMPT (§ 66\*)—WRIT OF ERROR—FINDINGS—REVIEW.**

Objection to findings of the court in proceedings for punishment for criminal contempt could not be sustained on a writ of error, if there was any evidence to sustain the findings.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

**13. CONTEMPT (§ 66\*)—WRIT OF ERROR—EVIDENCE.**

An objection on a writ of error in contempt proceedings that there was no evidence of guilt of the plaintiffs in error raised a question of jurisdiction, and was therefore reviewable.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

**14. INJUNCTION (§ 228\*)—CORPORATION—MANAGING OFFICERS.**

Where a corporation's guilt of contempt in failing to comply with an injunction restraining its use of stock market quotations, except on certain conditions, was conclusive, and it appeared that the corporation's president, general manager, and assistant manager were frequently, if not constantly, in the company's office in the discharge of their official duties while the injunction was being violated, and that the corporation's business very largely consisted in the violation of the injunction, the evidence was sufficient to sustain a finding of guilt against such officers.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 484-495; Dec. Dig. § 228.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



**15. CONTEMPT (§ 72\*)—CIVIL AND CRIMINAL CONTEMPT—APPORTIONMENT OF FINE.**

While it is customary in criminal contempts to assign the entire fine to the government, and in strictly civil contempts to award it to the complainant, yet, where the contempt has been both of the court and of the rights of the adverse party in civil proceedings, it is proper for the court to apportion the fine between the government and the complainant.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 249-256, 273; Dec. Dig. § 72.\*]

**16. CONTEMPT (§ 66\*)—WRIT OF ERROR—APPORTIONMENT OF PUNISHMENT—PREJUDICE.**

Where defendants were properly convicted of a contempt which was not only criminal but also violated the rights of the complainant, defendants were not prejudiced by an order apportioning the fine between the complainant and the government.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

Hook, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Contempt proceedings by the Board of Trade of the City of Chicago and others against the Merchants' Stock & Grain Company and others. From a decree convicting defendants of a criminal contempt and assessing fines directed to be paid one-fourth to the government and three-fourths to the complainants, defendants bring error. Affirmed.

Chester H. Krum, of St. Louis, Mo. (Henry S. Priest, of St. Louis, Mo., on the brief), for plaintiffs in error.

Henry S. Robbins, of Chicago, Ill. (Martin H. Foss, of Chicago, Ill., and Sears Lehmann, of St. Louis, Mo., on the brief), for defendants in error.

Before SANBORN, HOOK, and SMITH, Circuit Judges.

SMITH, Circuit Judge. This case was heretofore submitted and decided by this court. Merchants' Stock & Grain Co. et al. v. Board of Trade et al., 187 Fed. 398, 109 C. C. A. 230. The Supreme Court of the United States having held in *Re Merchants' Stock & Grain Co.*, 223 U. S. 639, 32 Sup. Ct. 339, 56 L. Ed. 584, that the contempt here in question was criminal as distinguished from civil, the case was ordered reargued, and has been again submitted.

The board of trade of the city of Chicago brought suit against the Merchants' Stock & Grain Company, Francis J. Miner, Patrick A. Stephens, and numerous other defendants to enjoin them temporarily and perpetually from receiving, using, selling, or distributing, directly or indirectly, the quotations of complainant or any of them, and from having and obtaining or permitting any telegraph or other wire running into or through its, his, or their offices over which said quotations are passing until they shall have lawfully acquired the right from complainant or some telegraph company authorized by complainant to distribute quotations. November 3, 1909, a preliminary injunction was ordered issued upon complainant giving bond in the sum of \$5,000.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The following day, the bond having been given, a temporary writ of injunction issued substantially as prayed in accordance with the ruling in *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, *Board of Trade v. Cella Commission Co.*, 145 Fed. 28, 76 C. C. A. 28, and *McDermott Commission Co. v. Board of Trade*, 146 Fed. 961, 77 C. C. A. 479, 7 L. R. A. (N. S.) 889, 8 Ann. Cas. 759. The writ was served by the marshal on November 5, 1909, on the Merchants' Stock & Grain Company, and on Patrick A. Stephens, its chief telegraph operator, and on November 11th on Francis J. Miner, president and general manager of the company. On December 22, 1909, an information in contempt was filed in the civil suit against the Merchants' Stock & Grain Company, Francis J. Miner, Patrick A. Stephens, and others. The testimony was taken before a special examiner, who, as directed, reported the evidence without making any rulings on the admissibility thereof, or any findings of fact or conclusions of law. The court heard the matter upon his report, and some additional evidence, and adjudged the Merchants' Stock & Grain Company, Francis J. Miner, and Patrick A. Stephens guilty of contempt, fined them, and directed that three-fourths of the fine be paid to the complainants and one-fourth to the government.

The specifications of error are substantially:

First to third: That the trial court erred in appointing Robert M. Fulton examiner, and directing the testimony to be taken before him, and requiring the defendants to appear before the examiner and submit to the taking of testimony, and in refusing to vacate said order on motion of defendants, and in refusing the defendants a hearing upon the case on evidence adduced in open court.

Fourth to ninth and fourteenth to sixteenth assail the admission of certain evidence.

Tenth to the twelfth assail the findings of defendants' guilt.

Seventeenth alleges that there was no evidence of guilt.

Thirteenth is that the court erred in apportioning the fine between complainant and the government.

Eighteenth asserts that there is no sufficient finding of facts made by the judgment.

[1, 2] "Proceedings for contempts are of two classes: Those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights, and to administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The later are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. *Thompson v. Railroad Co.*, 48 N. J. Eq. 105, 23, 21 A. 182; *Fiendryx v. Fitzpatrick* (C. C.) 19 Fed. 810; *Ex parte Culliford*, 8 Barn. & C. 220; *Rex v. Edwards*, 9 Barn. & C. 652;

People v. Court of Oyer & Terminer, 101 N. Y. 245, 247, 4 N. E. 259, 54 Am. Rep. 691; Phillips v. Welch, 11 Nev. 187, 190; State v. Knight, 3 S. D. 509, 513, 54 N. W. 412, 44 Am. St. Rep. 809; People v. McKane, 78 Hun, 154, 160, 28 N. Y. Supp. 981, 4 Bl. Comm. 285; 7 Am. & Eng. Enc. Law, 68. A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little, if any, interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings." In re Nevitt, 117 Fed. 448, 54 C. C. A. 622. This language was quoted by the Supreme Court with approval in Bessette v. W. B. Conkey Co., 194 U. S. 324, 328, 24 Sup. Ct. 665, 48 L. Ed. 997, and the rule was followed by this court in Clay v. Waters, 178 Fed. 385, 389, 101 C. C. A. 645, 21 Ann. Cas. 897, and in Merchants' Stock & Grain Co. v. Board of Trade, 187 Fed. 398, 109 C. C. A. 230.

In Bessette v. W. B. Conkey Co., 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997, Mr. Justice Brewer said:

"It may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. A significant and generally determinative feature is that the act is by one party to a suit in disobedience of a special order made in behalf of the other. Yet sometimes the disobedience may be of such a character, and in such a manner as to indicate a contempt of the court rather than a disregard of the rights of the adverse party."

No reason can be assigned why disobedience may not at the same time be of such a character as to indicate a contempt of the court and of all authority and a total disregard of the rights of the adverse party.

The first points made by the plaintiffs in error as before stated are with reference to the appointment of Robert M. Fulton as special examiner to take the testimony, and the refusal to set this order aside. It is contended that, under the authorities, this was a criminal contempt case, and that by its reference to a special examiner they were deprived of the privilege of being confronted with the witnesses against them as provided in the sixth amendment to the federal Constitution, and the question is, Does that provision apply to criminal contempt cases? Closely akin to this question is the one as to whether a criminal contempt case is within the provisions of the fifth amendment to the Constitution.

These two amendments read as follows:

"Art. 5. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for

the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Art. 6. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Conceding that the term "criminal contempt" is properly applied to a contempt punished by a punitive as distinguished from a coercive fine arising in an equity case, it does not follow that it is a criminal case within the meaning of the fifth amendment or a criminal prosecution within the meaning of the sixth.

Before entering on the discussion of this question, it seems wise to consider certain cases which involve the question of jurisdiction, because the turning question in them necessarily involves the question of whether contempts are criminal or otherwise, and thus in a measure they bear upon the question as to the rights of a defendant in a criminal contempt case. Anterior to the creation of the Circuit Courts of Appeals, the Supreme Court held it had no jurisdiction by appeal, writ of error, or habeas corpus in criminal contempt cases because of their criminal character. *Ex parte Kearney*, 7 Wheat. 38, 5 L. Ed. 391; *New Orleans v. Steamship Co.*, 20 Wall. 387, 22 L. Ed. 354; *Hayes v. Fischer*, 102 U. S. 121, 26 L. Ed. 95; *Ex parte Fisk*, 113 U. S. 713, 718, 5 Sup. Ct. 724, 28 L. Ed. 1117; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; *O'Neal v. United States*, 190 U. S. 36, 23 Sup. Ct. 776, 47 L. Ed. 945. It held, however, that it had jurisdiction of a writ of error to a state court of last resort in a contempt case (*Tinsley v. Anderson*, 171 U. S. 101, 18 Sup. Ct. 805, 43 L. Ed. 91), and it entertained jurisdiction in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, of an appeal from the action of the Circuit Court in refusing a writ of habeas corpus in a criminal contempt case. It also held that it had jurisdiction by mandamus to direct the reinstatement of an attorney who had in a contempt proceeding been disbarred without notice and without ample opportunity to be heard. *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205. It held it had jurisdiction to review a civil contempt case arising in an equity case on appeal of the principal controversy after final decree. *Worden v. Searls*, 121 U. S. 14, 7 Sup. Ct. 814, 30 L. Ed. 853; *Hayes v. Fischer*, 102 U. S. 121, 26 L. Ed. 95. And in *Re Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782, it held that whenever the circumstances imperatively demand that form of interposition the writ of certiorari may be allowed as at common law to correct excess of jurisdiction and in furtherance of justice, and the writ was allowed in that case to bring up the record in a contempt case.

In *Durant v. Washington County*, 1 Woolw. 377, 8 Fed. Cas. 128,



Mr. Justice Miller, delivering the opinion for the Circuit Court of the United States for the District of Iowa, said:

"We are satisfied, however, upon consideration, that a prosecution for contempt of court is a criminal proceeding, in which the government is interested as plaintiff; and that, whenever it becomes necessary for the government's attorney to appear to vindicate its authority as represented in the courts, it is his duty to do so."

When the act passed creating the Circuit Courts of Appeals, the Supreme Court held that such courts had jurisdiction of writs of error in criminal contempt cases. *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997. But it later held that the Circuit Courts of Appeals did not have jurisdiction on appeal if the contempt adjudged was interlocutory until after the final decree and then upon appeal therefrom. *Doyle v. London Guarantee Co.*, 204 U. S. 599, 27 Sup. Ct. 313, 51 L. Ed. 641. It was held that, if the proceedings be for a civil contempt, an order made is in effect an interlocutory order, and can be reviewed only in equity cases on appeal from the final order. In the *Matter of Christensen Engineering Co.*, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072; *Heller v. National Waistband Co.*, 168 Fed. 249, 93 C. C. A. 551; *Id.*, 168 Fed. 1020, 93 C. C. A. 670; *Ex parte Isaac Heller*, 214 U. S. 501, 29 Sup. Ct. 698, 53 L. Ed. 1060. And, where the adjudication of civil contempt follows the decree in the main case, still the remedy is by appeal, rather than by a writ of error. *Wilson v. Calculagraph Co.*, 153 Fed. 961, 83 C. C. A. 77. In *International Paper Co. v. Chaloux*, 165 Fed. 436, 91 C. C. A. 465, in the Circuit Court of Appeals of the First Circuit, it was held that appeal would not lie in contempt proceedings in a suit at law against a party to the suit, nor would a writ of error lie because the judgment in contempt was not regarded as the final judgment in the case.

These cases have been reviewed because they are the principal ones in which the question has been discussed as to whether contempt cases were civil or criminal but the decisions have been with reference to what is here a collateral question, namely, the jurisdiction of the court. They are entitled to their just weight, bearing in mind that the questions involved were not whether the cases were criminal cases or criminal prosecutions within the meaning of the amendments to the Constitution.

[3] It is to be noted:

First. That criminal contempts are tried summarily, and not in the regular course or way.

[4] Second. That there is no right of trial by jury. *Eilenbecker v. District Court of Plymouth County*, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; *King v. Ohio & M. Ry. Co.*, 7 Biss. 529, 14 Fed. Cas. 539.

[5] Third. Courts of chancery and other courts without criminal jurisdiction can punish for so-called criminal contempt. *Middlebrook*



v. State, 43 Conn. 257, 21 Am. Rep. 650; Cartwright's Case, 114 Mass. 230; Rapalje on Contempt, § 3.

[6] Fourth. As there is no power in any except the court against which the contempt is committed to punish it, that is, as such court has exclusive jurisdiction, no change of venue can be allowed. Rapalje on Contempt, Par. 13.

[7] Fifth. For a criminal actual contempt the defendant may without a waiver and without his consent be sentenced in his absence. Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; Middlebrook v. State, 43 Conn. 257, 21 Am. Rep. 650.

[8] Sixth. An act which is a contempt of court and also a crime may be punished both by the summary provision and by indictment, and neither will bar the other. Bishop's New Criminal Law, 1067; Chicago Directory Co. v. United States Directory Co. (C. C.) 123 Fed. 194; O'Neil v. People, 113 Ill. App. 195. In other words, the provision protecting him against being twice put in jeopardy does not protect him against being punished for contempt and under indictment for the same act. In view of these facts and others, it is not to be wondered that the Supreme Court has characterized contempt proceedings as sui generis. O'Neal v. United States, 190 U. S. 36, 23 Sup. Ct. 776, 47 L. Ed. 945; Bessette v. Conkey, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997. It will probably appear that there are a number of other cases in which provisions as to criminal cases and criminal prosecutions do not apply to criminal contempts.

[9] First take the question of whether the fifth amendment prohibits a defendant in a contempt case from being a witness against himself. This question has not often been considered, but in Ex parte Gould, 99 Cal. 360, 33 Pac. 1112, 21 L. R. A. 751, 37 Am. St. Rep. 57, it was held that, under the state Constitution, the defendant could not be called as a witness against himself in a contempt case, but in that state contempt is made a misdemeanor by statute, and it was held that, if the court proceeds against one summarily, he could by being called as a witness in the contempt case be made to furnish evidence against himself in a criminal proceeding for misdemeanor. Clearly this case was within the rule in Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, and under such circumstances he would not be compelled to testify. Very similar is the case of In re Nickell, 47 Kan. 734, 28 Pac. 1076, 27 Am. St. Rep. 315, where the contempt charged was also a criminal offense, and it was held the defendant could not be compelled to incriminate himself. Finally, in the case of Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, Mr. Justice Lamar said incidentally that:

"Without deciding what may be the rule in civil contempts, it is certain that, in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

This is followed in the opinion by the citation of numerous authorities, but they all go to the presumption of innocence and the quantity of proof required for conviction and no one of the cases

cited has any bearing on the question of whether the defendant can be called as a witness. It has been the practice from an early time to propound interrogatories to a defendant in a contempt case. *Rapalje on Contempt*, 123. Comment is not necessary upon the inconsistency between the proceeding of filing interrogatories by the prosecution to be answered by the defendant, and then holding that the defendant cannot be compelled to be a witness against himself. It is true in the case of *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, as in the cases from California and Kansas, that, if the plaintiffs in error were in fact guilty of the alleged conspiracy, they were criminally liable, and under the decision in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, could not be compelled to testify against themselves. On the other hand, in *State v. Sieber*, 49 Or. 1, 88 Pac. 313, it is held that one may be compelled to be a witness against himself in a so-called contempt case, but cannot be compelled to give answers that would convict him upon a distinct criminal charge. It may be safely said that there is no case to be found where it is held that this portion of the fifth amendment applies except where the contempt charged also constitutes a crime, and, of course, in view of the facts in the case of *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, anything there said to that effect must be limited by the facts and law of that case.

[10] We turn now to the question of whether the provision as to being confronted with the witnesses in the sixth amendment is applicable to a criminal contempt case. In *State v. Mitchell*, 3 S. D. 223, 52 N. W. 1052, it was distinctly held that a contempt case can be tried upon affidavits, and that there was no right to confront the witnesses face to face. *O'Neil v. People*, 113 Ill. App. 195; *Seastream v. New Jersey Ex. Co.*, 69 N. J. Eq. 15, 59 Atl. 914. Judge Reed of Iowa in *New Jersey Patent Co. v. Martin* (C. C.) 166 Fed. 1010, ordered the evidence taken before a special examiner.

In *United States v. Anonymous* (C. C.) 21 Fed. 761, it is said:

"If the accused appears he is heard in any way that suits the convenience of the court, by an examination ore tenus, upon affidavits, or by propounding interrogatories. If he deny the contempt, the court, either for itself or by reference to a master, ascertains the facts upon the proof, either party examining witnesses by affidavit or otherwise."

This language was quoted with approval in *Re Fellerman* (D. C.) 149 Fed. 244.

In *Counselman v. Hitchcock*, 142 U. S. 547, 563, 12 Sup. Ct. 195, 198 (35 L. Ed. 1110), it was said in reference to the sixth amendment that:

"This provision distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury. A criminal prosecution under article 6 of the amendments is much narrower than a 'criminal case' under article 5 of the amendments."

In *United States v. Zucker*, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777, it was held that in a suit against importers to recover

the value of merchandise alleged to have been forfeited to the United States because of false and fraudulent entry, affidavit and invoice the defendants were not entitled to be confronted with the witnesses against them.

In *United States v. Shipp*, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265, and the same against the same in 214 U. S. 386, 29 Sup. Ct. 637, 53 L. Ed. 1041, the United States Supreme Court imprisoned for varying terms six persons for contempt in connection with the lynching of the negro Johnson of Chattanooga upon testimony taken by a commissioner at Chattanooga. This was not objected to by the defendants, but that was a criminal contempt, and the contempt would in fact have been a criminal offense under the law of Tennessee. The court stood five to three, and yet it was never even suggested by the majority or minority that the evidence should have been taken in open court. It has been the practice to thus take evidence by commissioner in contempt cases in England for 200 years. 9 Cyc. 47. And the same practice has prevailed generally in this country. *Rapalje on Contempt*, 124.

It is not necessary to determine the question, but, if it were, grave doubt exists as to whether or not in a trial before the examiner in which the defendants appear and cross-examine the witnesses they are not confronted with the witnesses against them. *State v. Mc-O'Blenis*, 24 Mo. 402, 69 Am. Dec. 435.

We conclude that the following additional differences exist between criminal cases, criminal prosecutions and criminal contempts:

Seventh. That the defendant is not entitled to be confronted with the witnesses against him in open court and, probably,

Eighth. That the defendant in a contempt case may be examined as a witness so long as he is not required to criminate himself in a sense other than to convict him of contempt.

[11-13] So far as the assignment of errors refers to the admission of certain evidence which it was claimed was objectionable, objections were made before the examiner, but not ruled upon, and were never called to the attention of the court, and no ruling on same was made by it, and they therefore cannot be considered, nor can relief be granted on the objections which assail the findings of the guilt of the plaintiffs. If there were any evidence to sustain such findings, the judgment of the Circuit Court was conclusive, but it is urged that there was no evidence of the guilt of the plaintiffs in error, and that this in effect raises a question of jurisdiction.

[14] The evidence of the guilt of the corporation is conclusive, and that Francis J. Miner was the president and general manager, and that Patrick A. Stephens was assistant general manager and chief telegraph operator. Both were present frequently if not constantly in the office of the company in the discharge of their official duties when the injunction was being violated. As very largely the business of the company consisted in the violation of the injunction, and as Miner and Stephens were in charge of the business, the evidence was substantial, and no question of the jurisdiction of the court arises.

[15] So far as the apportioning of the fine is concerned between the

plaintiff and the government, it is, of course, customary in strictly criminal contempts to assign the entire fine to the government, and in strictly civil contempts it is equally the custom to assign the entire fine to the complainant. *Searls v. Worden* (C. C.) 13 Fed. 716; *In re Mullee*, 7 Blatchf. 23, 17 Fed. Cas. 968; *Doubleday v. Sherman*, 8 Blatchf. 45, 7 Fed. Cas. 959; *Schillinger v. Gunther*, 15 Blatchf. 303, 21 Fed. Cas. 693; *In re North Bloomfield Gravel Mining Co.* (C. C.) 27 Fed. 795; *Macaulay v. White Sewing Machine Co.* (C. C.) 9 Fed. 698; *In re Tift* (D. C.) 11 Fed. 463; *Indianapolis Water Co. v. American Strawboard Co.* (C. C.) 75 Fed. 972; *Ready Roofing Co. v. Taylor*, 15 Blatchf. 94, 20 Fed. Cas. 365; *Stahl v. Ertel* (C. C.) 62 Fed. 920; *Fischer v. Hayes* (C. C.) 7 Fed. 96; *Economist Furnace Co. v. Wrought-Iron Range Co.* (C. C.) 86 Fed. 1010.

But, where the contempt has been both of the court and of the rights of the adverse party, it has been quite frequently the custom to divide the fine between the government and the injured party. *Cary Manufacturing Co. v. Acme Flexible Clasp Co.*, 187 U. S. 427, 23 Sup. Ct. 211, 47 L. Ed. 244; s. c., 108 Fed. 873, 48 C. C. A. 118; *Matter of Christensen Engineering Co.*, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072; *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, 135 Fed. 774, 68 C. C. A. 476; *Chicago Directory Co. v. United States Directory Co.* (C. C.) 123 Fed. 194; *Continental Gin Co. et al. v. Murray Co.*, 162 Fed. 873, 89 C. C. A. 563; *Sabin v. Fogarty* (C. C.) 70 Fed. 482. And in *Hendryx v. Fitzpatrick* (C. C.) 19 Fed. 810, Lowell, Circuit Judge, said:

"The process of contempt has two distinct functions—one, criminal to punish disobedience, the other, civil and remedial, to enforce a decree of the court and indemnify private persons. In patent causes it has been usual to combine the two and to order punishment if it is thought proper, or indemnity to the plaintiff, if that is all that justice requires, or both."

McCrary, Circuit Judge, seems to have been of the opinion that the fine must go to the government. *United States v. Atchison, Topeka & Santa Fé Railway Co.* (C. C.) 16 Fed. 853, and he also held in *Re Ellerbe* (C. C.) 13 Fed. 530, that a criminal contempt is a criminal offense within the meaning of section 1014, United States Revised Statutes (U. S. Comp. St. 1901, p. 716).

In the *Matter of Christensen*, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072, where half of the fine was assigned to the government and half to the injured party, the part going to the government was punitive and criminal, and so dominated the case that a writ of error would lie, and this holding applies to this case. In *re Merchants' Stock & Grain Co.*, 223 U. S. 639, 32 Sup. Ct. 339, 56 L. Ed. 584. But it has not been determined by the Supreme Court whether the entire contempt case can be reviewed in error, or only that portion in reference to the punitive or criminal punishment imposed. It has been held by the Circuit Court of Appeals of the Second Circuit (*Christensen Engineering Co. v. Westinghouse Air Brake Co.*, 135 Fed. 774, 68 C. C. A. 476) that, under such circumstances, the whole contempt case will be reviewed on writ of error.

As the main case is not yet disposed of in the Circuit Court or its



successor, the District Court, this court would have no jurisdiction to review under a writ of error the civil contempt, and its jurisdiction rests entirely upon the one fourth going to the government, but, in the view taken of the case, it will not be necessary to pass upon the question as to whether the portion of the fine imposed for the benefit of the board of trade can be reviewed here as an incident to the consideration of the writ of error as to the government's portion of the fine. We have no doubt that, where the conduct of the defendant in a contempt case shows both a lack of respect to the court and a disregard of the rights of the adverse party, he may be punished in a single proceeding in which a part of the fine is awarded to the government and a part is awarded to the adverse party. The holding in the case of *Gompers v. Bucks Stove & Range Co.*, that the contempt there in question was civil, and not criminal, was based in a large measure upon the prayers for relief in the petition, and no question is raised here in that regard.

The fines here have been imposed, and what concern have the plaintiffs in error with the order as to the disposition of the money after being paid? The government has not sued out a writ of error.

We therefore hold:

First. That the imposition of sentence was legal in this respect.

Second. That, if illegal, it was without prejudice to the plaintiffs in error.

[18] It is claimed that there is no sufficient finding of facts, but the finding is that the Merchants' Stock & Grain Company, Francis J. Miner, and Patrick A. Stephens have since the 12th day of November, 1909, willfully and intentionally violated said writ of injunction as alleged in said petition of said board of trade. This was sufficient. *Clay v. Waters*, 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897.

No error of law appearing, it is ordered that the case be affirmed.

HOOK, Circuit Judge. I concur in the foregoing opinion, excepting that part in which it is said that probably a defendant in a charge of criminal contempt may be compelled to testify and incriminate himself. The question is not involved in the case before us and a different view was expressed, at least arguendo, in *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 444, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

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In re MARTIN et al.

MARTIN v. GLOBE BANK & TRUST CO. OF PADUCAH, KY., et al.

(Circuit Court of Appeals, Sixth Circuit. November 7, 1912.)

Nos. 2,091, 2,160.

**1. BANKRUPTCY (§ 401\*)—APPELLATE PROCEEDINGS—NATURE OF ORDER.**

An order of a bankruptcy court, sustaining the claims of three creditors to the entire proceeds of certain land, which had been fraudulently conveyed by the bankrupt and was recovered through attachment suits in-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



stituted by such creditors in a state court within four months of the bankruptcy, and which proceeds were held by direction of the state court subject to the orders of the bankruptcy court, was not a judgment allowing the claims of the creditors, within Bankr. Act July 1, 1898, c. 541, § 25a (3), 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), from which an appeal must be taken within 10 days, but an order made in a controversy arising in a bankruptcy proceeding, appealable under section 24a.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920-923; Dec. Dig. § 461.\*]

**2. BANKRUPTCY (§ 440\*)—APPELLATE PROCEEDINGS—MODE OF REVIEW.**

The remedy by appeal and that by petition for revision, given by Bankr. Act July 1, 1898, c. 541, §§ 24a, 24b, 30 Stat. 553 (U. S. Comp. St. 1901, pp. 3431, 3432), are mutually exclusive.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.\*]

**3. BANKRUPTCY (§ 468\*)—APPELLATE PROCEEDINGS—PROCEDURE IN APPELLATE COURT.**

On an appeal from an order made in a controversy arising in a bankruptcy proceeding, taken under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431), the court is not required to state its findings of fact and conclusions of law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 930; Dec. Dig. § 468.\*]

Appeal and review in bankruptcy cases, see note to 43 C. C. A. 9.]

Petition to Revise and Appeal from an Order of the District Court of the United States for the Western District of Kentucky.

In the matter of T. J. Atkins, bankrupt. As to an order in favor of the Globe Bank & Trust Company of Paducah, Ky., and others, Arthur Y. Martin, trustee, files petition to revise, and also appeals therefrom. On motions to dismiss petition and appeal, for a rehearing (of 193 Fed. 841, 113 C. C. A. 627), and for entry of final decree. Motions to dismiss appeal and for rehearing denied, and motions to dismiss petition to revise and for entry of decree granted.

W. F. Bradshaw, of Paducah, Ky. (Bradshaw & Bradshaw, of Paducah, Ky., on the brief), for appellant.

D. H. Hughes, of Paducah, Ky. (T. L. Crice and Wheeler & Hughes, all of Paducah, Ky., on the brief), for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. February 13, 1912, the decree below was reversed and the cause remanded for further proceedings consistent with the opinion then handed down. 193 Fed. 841, 851, 113 C. C. A. 627. So many things have happened in the case since then that we deem it advisable briefly to allude to them. March 4th, on petition of the Globe Bank and the First National Bank, an appeal was allowed at chambers to the Supreme Court, and bond approved and filed. March 11th these banks filed a motion for allowance of appeal in open court; and on the next day they filed a motion to vacate the decree of reversal and enter final decree, also a request for separate findings of fact and conclusions of law. March 13th they

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

filed a petition for rehearing. An order was then made fixing a time for hearing the motions to vacate and modify the decree and to allow appeal in open court, also directing that the mandate be withheld until such motions were disposed of; and the Old State Bank, on the same day, filed a petition for appeal, the allowance of which was postponed. Prior to July 19th separate findings of fact and conclusions of law were prepared, and on that date the cases were set for hearing at the opening of the October session on questions which then arose as to the proper remedy for reaching the Supreme Court. September 18th motion to extend record on appeal to petition to revise was filed by the trustee; and on the day following motions were filed by all the appellee banks to dismiss both the petition to revise and the appeal. October 7th, the day prior to the expiration of the term, for the purpose of preserving the pending questions of remedy, the appeals theretofore allowed were set aside.

The difficulties that have arisen since the decision in February grow out of the proceedings taken to bring the case as made below into this court and the failure to object to the remedies chosen. The trustee in bankruptcy and certain creditors sought to bring the case here by petition to revise in matter of law (but without transcript of record, which has since been supplied through stipulation), and the trustee alone subsequently resorted to appeal. The petition to revise was filed in this court July 27, 1910, and the transcript on appeal February 23, 1911, and two cases nominally were docketed here. On motion, an order was made postponing the hearing on the petition to revise until the hearing of the appeal; and the cases were, in fact, heard together, in connection with the transcript in the appeal proceeding, as one cause, without objection and without suggestion as to which was the proper remedy. Following the settled course in such circumstances, the court did not consider "any question of remedy or jurisdiction." 193 Fed. 845, 113 C. C. A. 627.

[1] 1. *Jurisdiction*. In the motion to dismiss the petition for revision, the court is asked to determine that question before acting upon any of the other motions. The briefs of counsel are suggestive of another order of disposing of the questions, which we think preferable. Despite the acquiescence of appellees in the remedies adopted and their delay in raising any question of jurisdiction, we feel bound to entertain and determine their motions to dismiss. *M. C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 382, 4 Sup. Ct. 510, 28 L. Ed. 462; *Fore River Shipbuilding Co. v. Hagg*, 219 U. S. 175, 177, 31 Sup. Ct. 185, 55 L. Ed. 163; *Chi., B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 419, 31 Sup. Ct. 460, 55 L. Ed. 521. It is urged that the action of the court below was, in effect, a judgment allowing a debt or claim of more than \$500, and consequently that an appeal should have been taken within 10 days after the rendition of such judgment. The final order of the court below was entered July 16, 1910, and the appeal was prayed for and allowed December 3d, upon the execution of a bond, with surety "to be approved" by the court, which approval was given January 10, 1911. It follows that, if the contention that the action of the court below was a judgment of allowance

within the meaning of section 25a (3) of the Bankruptcy Act be sound, the motion to dismiss the appeal must be granted, because the limitation to 10 days is both distinct and imperative. *Conboy v. First Nat. Bk. of Jersey City*, 203 U. S. 141, 145, 27 Sup. Ct. 50, 51 L. Ed. 128; *Brady v. Bernard & Kittinger*, 170 Fed. 576, 578, 95 C. C. A. 656 (C. C. A. 6th Cir.); *In re McCall*, 145 Fed. 898, 904, 76 C. C. A. 430 (C. C. A. 6th Cir.); *Carriere & Son v. United States* (C. C.) 163 Fed. 1009, 1010; *Old Nick Williams Co. v. United States*, 215 U. S. 541, 544, 30 Sup. Ct. 221, 54 L. Ed. 318.

However, we do not think the final order was the allowance of debts or claims. The claims in question are those of the three appellee banks before named. Proofs of the claims of the Globe Bank and the First National Bank were made January 9, 1909, and of the Old State Bank March 17, 1909. All of these claims were for moneys loaned, and it is distinctly stated in the claim of the First National Bank and that of the Old State Bank that no security for the debt had in any manner been received. The least of the six promissory notes proved by the Globe Bank, to wit, a demand note of \$500, is stated to have been secured by three collateral notes (not involved here) executed by third persons. It is stated in the proof of the Globe Bank that an action (one of the attachment suits mentioned below) was pending in the McCracken circuit court on its notes, "under which a lien is acquired and held on the real estate therein described, attacking a deed as fraudulent"; but it is further stated that the bank had not "received any manner of security for said debt whatever, except three collateral notes," before mentioned. The record filed here being silent as to formal allowance of these claims, a stipulation was filed in the cause October 16, 1912, in which it was agreed that the stipulation should be considered as part of the record in the two cases, and, in substance, that no order appears or was made in the original record,

"allowing or disallowing any of the claims filed by the respondents and appellees, either in respect of their original proofs of claim, or of any of the amended proofs or petitions of said banks, except the order of the referee of date May 23, 1910."

The essential feature of such order of the referee, as well as that of the final order or decree of the court, is that only those creditors, namely, the three appellee banks, whose claims accrued prior to the date of the execution of the voluntary deed of the bankrupt, were entitled to share in the proceeds derived from the sale of the land covered by such deed; the order of the referee stating:

" \* \* \* It is adjudged that the creditors of the bankrupt whose debts were created prior to the execution of the deed by the bankrupt, T. J. Atkins, to Ed. L. Atkins and others, and which have been proved and allowed herein, are the only class of creditors entitled to share or participate in the distribution of the funds realized from the sale of the real estate sold under the judgment of the McCracken circuit court. \* \* \*"

The amount realized from such sale was stated and was insufficient to pay the debts of these banks; and it was held that they were entitled to the entire fund, subject to costs and taxes, and the trustee

was ordered to pay same to such banks pro rata upon their respective debts. The theory upon which this conclusion was affirmed in the court below is stated in our original opinion, before cited. It is enough to say now that neither the order of the referee, nor the final decree of the court below, purports to be an allowance of the debt or claim, as such, of any of these three banks. Indeed, the debts as originally proved do not appear ever to have been questioned; and the sums so ordered to be paid on such claims were each materially less than the respective debts proved. The true analysis of the order is that it was an order of distribution. It was an order to distribute a fund derived from the recovery and sale of real estate, the conveyance of which had been made by the bankrupt in fraud of the rights of certain of his creditors, as pointed out in our original decision. This fund was so acquired in pursuance of an order of the bankruptcy court; and the validity of the order distributing the fund cannot, we think, be rightly tested by any question of allowance of claim within the meaning of section 25a, but rather by the question whether the pertinent provisions of the Bankruptcy Act, or those of sections 1906, 1907, and 1907a of the Kentucky Statutes (Carroll's Ky. Stat. 1909, pp. 854 to 857), are controlling.

We are not unmindful of the contention that, since in May, 1910, these three banks filed amended and supplemental petitions and proofs of their claims, in which they asserted liens upon the property covered by the judgments of the McCracken circuit court, the effect of the order of the court below was to allow such amended and supplemental claims. The Globe Bank had before filed pleadings in the bankruptcy proceeding, and had been instrumental in securing the order of the court below, authorizing the trustee to institute proceedings in the McCracken circuit court. In the so-called amended and supplemental proofs before alluded to, the judgments obtained in the McCracken circuit court are set up and relied on to sustain the security asserted respecting the claims of the banks, and in each of them the court is asked to apply the fund so obtained toward the payment of their respective claims; but these instruments are not in form or substance proofs of claims.

Furthermore, it is not pretended that any of these banks acquired a lien upon this land at the time they made their loans to the bankrupt, or that they ever obtained a lien upon the land until they began their suits in attachment. These suits were confessedly begun within four months of the commencement of the bankruptcy proceeding against the bankrupt; and it is plain that under the sections of the Kentucky Statutes, before cited, the banks, when commencing such suits, had nothing but rights of action respecting the land alleged to have been fraudulently conveyed. The most, then, that can be said of the asserted liens, is that they were acquired within the four months bankruptcy period. It is hard to perceive how the assertion of such a lien—a lien claimed only to have been created in a case in which the trustee in bankruptcy was a party—can be employed to sustain the theory that the debt (or claim) of any of these banks against the bankrupt was allowed by the order in question of



the referee, within the meaning of section 25a. It was not sought to have any balances that might remain due *allowed*. As it seems to us, a more rational interpretation of these alleged supplemental proofs is that they disclose an intent to intervene in the bankruptcy proceeding, for the purpose alone of securing a distribution of the fund solely among the three banks.

The question thus arises whether this is not a controversy arising in a bankruptcy proceeding (section 24a), rather than a bankruptcy proceeding itself (section 25a). It is too plain for argument that the suit begun and conducted by the trustee in the McCracken circuit court, under the order of the referee and the authority of the bankruptcy court, involved a controversy arising in a bankruptcy proceeding. The land had been conveyed as a gift by Atkins to his son and grandchildren prior to the commencement of the bankruptcy proceeding against Atkins; and the jurisdiction of the court below to make the February order was dependent upon the fact that the banks commenced their attachment suits within four months of the beginning of the bankruptcy proceeding. The grantees under the deed were in actual possession of the land, and were defendants in the consolidated suit (to set aside the deed), in which the trustee was a plaintiff. If the issues in such a case would not present a controversy arising in bankruptcy proceedings, it is difficult to conceive of what would. The land was converted into money and its equivalent in sale bonds; and on April 2, 1910, the McCracken circuit court ordered the trustee, after discharging the costs of the consolidated action, to collect the balance due on the sale bonds and hold same—

"subject to the future orders of the District Court of the United States for the Western District of Kentucky in the matter of T. J. Atkins, bankrupt, therein pending in bankruptcy, and as such court may finally determine the rights of all parties under the judgment of this court as hereinbefore rendered, and upon such other matters as may be pending, or may be presented, in such proceedings pending in bankruptcy" in such court.

Thus the original subject of the controversy so instituted in the state court was converted into a fund and brought into the custody of the bankruptcy court. Did this change in form of subject-matter, and the extension by the banks of their effort to subject the land so as also to reach its proceeds, operate to convert the original controversy arising in bankruptcy proceedings into a bankruptcy proceeding? We think not. So far as this question is concerned, the case is analogous to *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 553, 30 Sup. Ct. 412, 54 L. Ed. 610. There is no apparent difference in principle between Knapp's intervention in that case to have the lien of the mortgages he represented established as the first lien on the property, and satisfied out of the proceeds of sale, and the course pursued here by the three banks to have their asserted rights to the present proceeds of sale established. The purpose of these banks was to have that end accomplished. It was not to have their undisputed debts allowed, and to hold that allowance was the object would be to ascribe to the banks an intent that was not revealed until the lapse of six months after the decree of reversal was entered here. Analogy in



point of remedy is also found in *Hewit v. Berlin Machine Works*, 194 U. S. 296, 300, 24 Sup. Ct. 690, 48 L. Ed. 986. Title was there asserted by petition to certain machines in possession of the trustee in bankruptcy, and this was treated as "an intervention raising a distinct and separable issue," and so was regarded as a controversy arising in bankruptcy proceedings under section 24a. True, title to the machinery was there asserted; but we are unable to perceive any distinguishing principle between assertion of title to property in possession of a trustee, and assertion of a right to have property or its proceeds in his possession applied exclusively to debts of particular creditors, like these banks, as against general creditors. Indeed, the insistence of the banks is the practical equivalent, and the ruling below is in effect a recognition, of a claim of title in the banks to the proceeds of sale; and this at last puts to the test the soundness or not of the decision of this court touching the supremacy of the Bankruptcy Act over the state statutes respecting the distribution of such proceeds. See, also, *Rode & Horn v. Phipps*, 195 Fed. 414, 419 (C. C. A. 6th Cir.); *In re Mueller*, 135 Fed. 711, 68 C. C. A. 349 (C. C. A. 6th Cir.); *In re First Nat. Bank*, 135 Fed. 62, 67 C. C. A. 536.

As it seems to us, the instant case presents stronger features of a controversy arising in bankruptcy proceedings than are to be found in the cases just commented on and cited. We say this because no lien is asserted that does not fall within the ban of section 67f of the Bankruptcy Act; and (apart from statutory liens, or transactions based on present consideration, or past consideration without reason to believe the existence of insolvency) no case is cited, and we have not discovered any, which accords to a creditor a priority over his fellow creditors that is not traceable to a title or lien antedating a period of more than four months prior to the commencement of bankruptcy proceedings. This alone, it may be observed, fairly distinguishes the decision in *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, and its class, from the present case.

The appeal taken in this case was within the six months period prescribed by section 11 of the Court of Appeals Act (Act March 3, 1891, c. 517, 26 Stat. 829), and we are constrained to hold that the case is properly before us. The motion to dismiss the appeal must, therefore, be denied.

[2] As regards the motion to dismiss the petition for revision, we must confess that much has been said in support of that remedy. But since this presents the question whether such a remedy is open to the petitioner in a case where appeal is regarded as allowable, we are disposed to adhere to the ruling of this court in *Barnes v. Pampel*, 192 Fed. 525, 113 C. C. A. 81, in which it was held that the two remedies are mutually exclusive. See, also, *Loveland on Bankruptcy* (4th Ed.) § 814, and pertinent decisions there cited of the Circuit Courts of Appeals for the Third, Seventh, Eighth, and Ninth Circuits.

We do not discover that the Supreme Court has passed upon this question; but it has recently decided that an appeal under section 25, and a petition to revise under section 24b, are not both available in the same case. *Matter of Loving*, 224 U. S. 183, 188, 32 Sup. Ct. 446,

56 L. Ed. 725. It cannot escape observation that grave doubts arise in the practice, as also in the courts, as to what one of the appellate remedies should be adopted for reaching courts of appeals; and although counsel for the trustee ask the court to retain the petition to revise until the Supreme Court can pass upon the other questions of remedy, we think we are bound to grant the motion to dismiss that petition, but we do so with the consciousness that any error committed in this respect can be rectified through writ of certiorari.

2. *Motion to Vacate Decree of Reversal and Enter Final Decree.* The purpose of this motion is simply to avoid the necessity of having the cause remanded, only to return here and proceed thence to the Supreme Court. We think the motion should be granted.

3. *Rehearing.* The petition in this behalf will be denied. We might add that the views expressed in the original opinion respecting section 67f (193 Fed. 846-850, 113 C. C. A. 627) derive further support from a consideration of sections 70a and 70e of the Bankruptcy Act, and also *Security Warehousing Co. v. Hand*, 206 U. S. 425, 426, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789, and *Thomas v. Sugarman*, 218 U. S. 129, 134, 30 Sup. Ct. 650, 54 L. Ed. 967, 29 L. R. A. (N. S.) 250. The contention that the judgments of the state court are res judicata respecting the rights of the trustee and creditors, and also the insistence that a resulting trust in the land in dispute accrued in favor of those banks prior to the four months period, are dependent upon whether, under the Bankruptcy Act, the judgments of the state courts were, or could be, or were intended by either of the state courts to be, binding upon the trustee or the bankruptcy court concerning the distribution of the sales proceeds. The supremacy of the Bankruptcy Act, and the intent of the state courts, as disclosed by their judgments, are, we think, sufficiently considered in the original opinion to indicate our views touching the claims of res judicata and resulting trusts. Counsel still seem to overlook the fact that their suits in the McCracken circuit court were not brought to enforce pre-existing liens, but to create liens. *Metcalf v. Barker*, 187 U. S. 165, 174, 23 Sup. Ct. 67, 47 L. Ed. 122.

[3] 4. *Findings of Fact and Conclusions of Law.* We cannot conceive that such findings and conclusions are either necessary or proper in this case. If the case was appealable under section 25a, the trustee's right in that behalf was lost by lapse of time, as before pointed out; and in appeals taken under the Court of Appeals Act findings of fact or conclusions of law are not required. *Knapp v. Milwaukee Trust Co.*, supra, 216 U. S. 553, 30 Sup. Ct. 412, 54 L. Ed. 610.

The remaining questions will be disposed of by entry, which, with orders appropriate to the holdings herein, will be entered.

## COTTLE, County Treasurer, et al. v. UNION PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit. September 19, 1912.)

No. 3,565.

**1. COUNTIES (§ 192\*)—LEVY OF TAX—REDEMPTION FUND—WYOMING STATUTE.**

Under Comp. St. Wyo. 1910, § 1125, which requires the board of county commissioners to levy annually in addition to all other taxes sufficient to pay the interest on all outstanding bonds of the county, and "at least one year before such bonds become due and in time to provide means for their payment, shall cause to be levied a sufficient additional sum to pay such bonds as they become due," the time for making a levy for such redemption fund is within the discretion of the board, subject to the limitation that it must be at least a year before the maturity of the bonds, and the fact that it might have been made a year later does not invalidate the levy.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 300-302; Dec. Dig. § 192.\*]

**2. COUNTIES (§ 190\*)—VALIDITY OF LEVY—STATUTORY LIMITATION ON AMOUNT.**

Under Comp. St. Wyo. 1910, § 2341, which provides that, unless authorized by a vote, no levy of taxes shall be made by a county board, aside from a tax levied to pay a judgment or bonded debt, which will produce a sum more than 10 per cent. greater than that levied and collected in the preceding year on the same assessed valuation, the tax levied on migratory stock under section 2383, which is distributed between the counties in which such stock ranges, is to be taken into consideration in determining whether or not a levy is excessive, to the extent of the amount which the county making the levy retains as its share.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 303, 304; Dec. Dig. § 190.\*]

**3. TAXATION (§ 611\*)—SUIT TO ENJOIN COLLECTION OF TAX—PARTIAL INVALIDITY—EXCESSIVE LEVY.**

That a tax levy exceeds the constitutional or statutory limit as to amount does not render the entire tax void, and a court of equity will enjoin collection only of the unauthorized excess.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1242, 1245-1257; Dec. Dig. § 611.\*]

**4. TAXATION (§ 611\*)—SUIT TO ENJOIN COLLECTION OF TAX—INTEREST.**

In a suit in equity to enjoin collection of a tax which was in part illegal, where complainant paid the amount it deemed legally due, although the payment was not sufficient, a heavy penalty imposed by statute for delinquency will not be enforced as to the amount remaining due, but complainant will be required to pay only legal interest thereon.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1242, 1245-1257; Dec. Dig. § 611.\*]

Restraining collection of taxes because of excessive or unequal assessments or valuations, see note to *Atchison, T. & S. F. Ry. Co. v. Sullivan*, 97 C. C. A. 16.]

Appeal from the Circuit Court of the United States for the District of Wyoming; John A. Riner, Judge.

Suit in equity by the Union Pacific Railroad Company against Thomas Cottle, Treasurer of Sweetwater County, Wyo., and others. Decree for complainant, and defendants appeal. Reversed.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Walter B. Dunton, of Green River, Wyo., and D. A. Reavill, of Rock Springs, Wyo. (N. E. Corthell, of Laramie, Wyo., on the brief), for appellants.

John W. Lacey, of Cheyenne, Wyo. (Herbert V. Lacey, of Cheyenne, Wyo., on the brief), for appellee.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

SMITH, Circuit Judge. The Union Pacific Railroad extends through Sweetwater county, Wyo., and the company owns a large amount of land in that county. The entire levy upon its property in the county for 1909 was \$70,813.64. Of this it paid \$62,576.48, and brought this suit against the county treasurer and ex officio county collector and the board of county commissioners to perpetually enjoin the collection of the balance of \$8,237.16. A decree was rendered for the company and the treasurer, collector, and the board of county commissioners appeal. The taxes sought to be enjoined are of two classes: First, a levy for bond redemption purposes; second, a levy for general county, school, and library purposes.

As all the statutes of Wyoming here material have been carried into the Compiled Statutes of Wyoming for 1910, references will be made thereto. The county of Sweetwater is a municipal corporation.

"On the first Monday of September of each year, the board of county commissioners shall, by an order to be entered of record among their proceedings, levy the requisite taxes for the year, and the same may be levied any time prior to the first Monday of September, if the statement and notice required by section 2340 has been received from the auditor." Compiled Statutes of Wyoming, § 2343.

The statement and notice required by section 2340 of the Compiled Statutes having been received on August 31, 1909, the board levied  $\frac{6}{10}$  of a mill for bond redemption purposes and  $3\frac{1}{2}$  mills for general county,  $\frac{13}{10}$  mill for school and  $\frac{13}{100}$  of a mill for library, a total of  $4\frac{3}{100}$ . Subsequently, and after the first Monday in September, the board changed  $\frac{24}{100}$  of a mill from the general fund to the bond levy. There is doubt about its power to make such change after the first Monday in September. *Standard Coal Co. v. Independent District of Angus*, 73 Iowa, 304, 34 N. W. 870. This resolution was, however, subsequently rescinded, and, if the board had power to pass it, it undoubtedly had power to rescind it. With limitations not necessary to set out in detail, the county board was authorized to levy for general county expenses, including the school tax, not exceeding 12 mills, for schools not more than 3 mills, and for library not more than  $\frac{1}{2}$  mill. At the time the bonded debt of Sweetwater county was contracted the following law was in force:

"Sec. 1125. The board (of county commissioners) shall cause to be levied annually upon all taxable property of the county, in addition to other authorized taxes, a sufficient sum to pay the interest on all bonds disposed of, in pursuance of the provisions of this chapter, and shall at least one year before such bonds become due, and in time to provide means for their payment, cause to be levied a sufficient additional sum to pay such bonds as they become due, and all such taxes shall be levied, assessed and collected,



as other county taxes, until the bonds so issued are fully paid, including the interest thereof. • • •

Before the levy of 1909 the following law had been enacted:

"Sec. 2341. It shall be unlawful for the state board of equalization or any board of county commissioners, county board of equalization, county officer, city council, or other officer authorized, or whose duties it may be under the laws of the state to direct, fix or make any tax levy on the assessed valuation of property for purposes of taxation, to direct, fix or make any levy upon the assessed valuation of property within their jurisdiction that will produce a sum of money increasing the total sum produced by the tax levied upon such property for the previous year more than ten per cent.; Provided, that the electors of any county, city, town or school district may, by a direct vote at any general or special election held as provided by law in counties, cities, towns, or school districts respectively, authorize an increase in any levy not in excess of the limitation fixed by the Constitution and laws of this state.

"Sec. 2342. The above section shall in no way limit the amount of any levy necessary to be made for the purpose of paying any judgment or bonded debt against any county, municipality or school district. It shall be unlawful for any officer of any county, city or municipality within the state to enter upon the tax roll of such county, city or municipality, any levy made in violation of the provisions of the preceding section. Any officer of any board, commission, or other officer, who shall violate any of the provisions of the preceding section, shall upon conviction be fined in a sum not less than one hundred dollars, nor more than five hundred dollars, for such offense, and any such conviction shall be sufficient grounds for his removal from office."

In passing to the consideration of the bond redemption levy, attention is called to the fact that, being unable to limit the taxes for the payment of bonds below that authorized at the time they were issued if the then authorized limit was needed for their payment, it was expressly provided in section 2342 that the above section 2341 shall in no way limit the amount of any levy necessary to be made for the purpose of paying any bonded debt. Under section 1125 separate levies had been made for the bond redemption fund and its bond interest fund. The principal of the bonded debt of the county was \$20,900, the last of which became due November 3, 1911. The interest on these bonds and the other interest owed by the county on bonds amounted to \$1,868. The county then had on hand in its bond interest fund \$3,637.89, so that the money collected for interest in prior years exceeded the amount necessary to pay the interest by \$1,769.89. The amount then in the bond redemption fund was \$10,095.30. If an excessive interest fund had been collected in prior years, it should have been attacked before collection, and we do not find that there was any authority to compel funds collected for interest to be used in payment of principal.

The assessed value of Sweetwater county for 1909 was \$18,981,753, and from this was deducted as improperly assessed \$1,126,551, leaving the net amount \$17,855,202. Of this amount \$2,743,841 was upon what are known as migratory sheep; that is, sheep that graze in one county part of the year and in others the balance. The net assessment after all corrections and deducting migratory sheep was \$15,111,361.

"Sec. 2383. Migratory Stock Fund. All taxes collected under the provisions of this chapter shall be held by the county treasurer collecting the same, in a special fund—to be known as 'The Migratory Stock Fund'—and such



fund shall be paid out and disbursed as provided by section 2382 and not otherwise. Payments from said fund shall be made first to the state. Second, to the several counties interested. Third, the balance remaining in said 'The Migratory Stock Fund' after making the payments hereinbefore provided, shall be covered into the general fund of the county." Revised Statutes of Wyoming 1910.

It thus appears that the law, while providing for levying upon these sheep for various purposes, provided the whole amount left to the county should be covered into the general fund instead of distributed. This left for actual appropriation to bond redemptions from the new levy only  $\frac{9}{10}$  of a mill on \$15,111,361 or \$9,066.81. There was to be paid upon the principal of the bonded debt above the amount of the sinking fund \$10,804.70, so the amount realized from the taxes, if all were collected, would be \$1,737.89, less than the amount due. If the entire interest fund was applied to bond redemptions, the levy would produce \$32 too much. This would be about  $\frac{1}{500}$  of a mill in excess of the amount required. The law cares not about very trifling matters.

[1] It is contended that as \$1,000 of the bonded debt did not mature until March 1, 1911, and \$5,300 not until November 3, 1911, a tax levy in 1910 would have been in ample time to have met these obligations. The statute required the levy to be made at least one year before the bonds became due, and in time to provide means for their payment. There are but two limitations as to time of this levy. First, it shall be made at least one year before the bonds become due; and, second, it shall be made in time to provide means for their payment. The second provision clearly contemplates that it may be necessary to levy more than a year before the maturity of the bonds. Under the law taxes become due and payable after the third Monday in September, and become delinquent on December 31st of each year. It does not appear how soon they are usually collected by distress and sale if not voluntarily paid. In any event, it was for the county board to determine whether a 1910 levy would actually be paid in time to meet these bonds at maturity, and it determined that such levy could not be relied on.

[2] The levy for bond redemption purposes was valid. It is claimed that in applying section 2341 of the Wyoming Statutes migratory stock should not be considered. In this we do not concur. Taxes levied upon such stock and turned over to other counties may be regarded as collected as trustee or agent for the other county, but money from this source actually collected and retained by the county is as much a part of its revenues as any other taxes.

The whole tax levied for the purposes in question for 1908 upon Sweetwater county amounted to \$70,898. There was abated \$935.70, leaving the net revenues \$69,962.30. In addition to this, the county collected net on sheep from other counties \$2,631, making the actual receipts \$72,593.30. They were entitled to levy 10 per cent. in addition to this for the year 1909, which would make the legal revenues for the latter year \$79,852.63. The gross assessment for 1909 was \$3,600,202 on sheep and \$15,381,551 on all other property. By abatement for double and erroneous assessments the sheep were reduced

\$856,361, leaving the net assessment on sheep \$2,743,841, and the other property was reduced \$270,190, leaving its net amount \$15,111,361. A levy of  $4^{93}/100$  mills on \$15,111,361 should produce \$74,499. As already explained, the bond tax, although levied on migratory stock, became a part of the general fund, so the tax upon sheep to the amount of \$2,743,841 for general school and library purposes would be at the rate of  $5^{58}/100$  mills, and would amount to \$15,173.44. Sweetwater county paid from this to Uinta county \$993, Carbon county \$3,267, and Fremont county \$1,110, a total of \$5,370. Deducting this sum from \$15,173.44 leaves a balance of \$9,803.44, and adding this to the amount collected on other property, \$74,499, makes \$84,302.44 or \$4,449.81 in excess of the amount that could be lawfully levied for that year. It is provided by section 28 of article 1 of the Constitution of Wyoming that "all taxation shall be equal and uniform."

[3] As the Union Pacific Railroad Company is not entitled to enjoin the bond redemption tax, the sheep owners are not entitled to recover any part of what they paid on that tax, even though by statute it is turned into the general fund. The railroad is entitled to enjoin its pro rata share of \$4,449.81. This is to be arrived at by the relation its taxes for general county, school, and library bear to the entire levy made expressly for those purposes. The whole net amount collected on migratory sheep was \$9,803.44. This was computed at  $5^{58}/100$  mills, but divided between the general county, school, and library tax of  $4^{93}/100$  mills, and the tax of  $9/10$  of a mill for bond redemption purposes, it would be \$8,739.78 for the former and \$1,063.66 for the latter. This would make the total proceeds of the levy of  $4^{93}/100$  mills \$74,499 plus \$8,739.78, or a total of \$83,238.78. The railroad company's levy at  $4^{93}/100$  mills on \$8,237,161 would be \$40,609.20. This tax was therefore excessive as \$83,238.78 is to \$40,609.20 as \$4,449.81 is to \$2,170.90. The company retained \$8,237.16. As the tax imposed on the company in which the illegality existed was \$40,609.20, and the illegal portion of the tax was only \$2,170.90, was the whole tax void or only void to the extent of \$2,170.90? This is a question upon which courts have differed, and in attempting to weigh the authorities upon the subject the form of the litigation becomes material.

In most states, in the absence of statutes, tax sales are void if any portion of the tax for which the property was sold is invalid, and if personal property be distrained, and if suit be brought in trespass or in replevin, the invalidity of a portion of the tax is determinative of the suit. If the taxpayer brings suit to enjoin the taxes, the rule that he who seeks equity must do equity is applicable. These distinctions must be borne in mind in attempting to consider the various cases upon the subject. Thus in Maine it having been held in *Elwell v. Shaw*, 1 Me. 339, that if land is sold for nonpayment of divers taxes one of which is illegal, and the rest legal, the sale is void. It was further held that, when assessors were sued in trespass because a horse had been seized upon their warrant upon a tax in excess of the lawful limit, the action would lie because the excess

vitiating the levy. *Huse v. Merriam*, 2 Me. 375. In *Colman v. Anderson*, 10 Mass. 104, it was held that the assessor's warrant to the collector while it called for an excessive levy would protect the collector, and a tax deed was valid. In *Stetson v. Kempton*, 13 Mass. 271, 7 Am. Dec. 145, in an action of trespass for seizing plaintiff's chaise and harness under a levy, part of which was legal and part illegal, it was held the action would lie, but the court said:

"Whether the damages may not be diminished by the jury in proportion to the sum which shall appear to be a lawful subject of taxation may be considered in the inquiry which is yet to be had by the jury."

In *Libby v. Burnham*, 15 Mass. 144, in an action in trespass against the assessors for the seizure by the collector of the plaintiff's oxen for payment of taxes, the court said:

"It is impossible to distinguish between that part of a tax which might have been rightly assessed, and that for which no authority is given; so that the assessment should be valid for one part, and void for another. This point was settled in the case of *Stetson v. Kempton et al.*"

In *Joyner v. Egremont*, 3 Cush. (Mass.) 569, it is squarely held that where a district votes \$250, and the assessors assess \$285.01, their action was void, and one who paid the collector could recover the whole amount back from the school district. In *Clarke v. Strickland*, 2 Curt. 439, Fed. Cas. No. 2,864, Ware, District Judge, said:

"All the authority they had for levying any tax was derived from the statutes and these limited them to the precise amounts named in the respective acts. The additional tax imposed by them was an excess of power that rendered the whole tax void, so that the state tax was all that was legally due. Such is the settled rule of jurisprudence."

No further argument is made by him, and the only authorities cited are *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145, *Libby v. Burnham*, 15 Mass. 144, and *Joyner v. Egremont School Dist.*, 3 Cush. (Mass.) 569.

In *Johnson v. Colburn*, 36 Vt. 693, a tax was levied to cover the expense of moving schoolhouses and the legal expenses of contesting a former levy previously adjudged illegal for the expenses of moving said houses. The court entered upon a discussion of whether both these expenses were the subject of a legitimate levy, and held they were. As a reason for entering upon the discussion, the court said: "If any part of the tax is void, it being entire, the whole is void." The court cites no authorities, and in fact makes no further argument. The question was not really involved in the case, but, as it was an action for replevin of a cow seized for taxes, the statement was probably correct.

In *Dean v. Lufkin*, 54 Tex. 265, a levy of seven cents on the dollar had been made to pay two distinct classes of warrants. The full statutory tax had already been levied to pay one of these classes. It was held, and manifestly correctly, that there was no way to divide the seven-cent levy, and it must all be enjoined. In the *City of San Antonio v. Raley*, in the Court of Civil Appeals for the Fourth District of Texas, 32 S. W. 180, it was held that the tax of \$1.05 on each \$100 where the statute only authorized a tax of \$1 on the hun-

ered was void in its entirety. This was done upon text-book citations only. *Cummings v. Fitch*, 40 Ohio St. 56, without discussion or the citation of any authorities, declared such taxes void. In *Lacey v. Davis*, 4 Mich. 140, 66 Am. Dec. 524, an action of ejectment in which the controversy had its origin in tax sales, one of these was for taxes, including an unauthorized township tax, the court said:

"In personal actions against the collector and others for collecting or attempting to collect such tax, courts have held that when the tax was divisible, and the excess could be ascertained, such excess might be rejected, and the balance of the tax held good, but that principle has no application to cases of ejectment where the validity of the title depends upon the validity of the tax and subsequent proceedings, and where from the very nature of things there can be no separation of the good from the bad. It is only applicable in personal actions or in direct proceedings to collect the tax and does not operate upon property acquired upon tax sale."

In Michigan the question has been governed by statute from an early date that, when an illegality affects the amount of tax only, the tax shall be sustained so far as it be just and legal. In *Conners v. City of Detroit*, 41 Mich. 128, 1 N. W. 902, where a suit was brought to enjoin certain taxes as excessive, the Supreme Court, in an opinion by Judge Cooley, said:

"There is no equity in the complainant's claim to restrain the collection of the whole city tax because the levies for certain funds are excessive. He should have offered to pay what the common council might legally assess to these funds, and the whole of the remainder. There was no difficulty in ascertaining by mere arithmetical calculation what he should tender. Having failed to do this, the court, while sustaining his bill to the extent of what he ought equitably to pay, should have awarded costs against him."

And in *Hewitt v. White*, 78 Mich. 117, 43 N. W. 1043, it was held that a tax title was void upon a sale for a tax, including an excessive one. To the same effect was *Boyce v. Sebring*, 66 Mich. 210, 33 N. W. 815. In *Mix v. People*, 72 Ill. 241, the Constitution limited the county tax to 75 cents on the hundred dollars. A levy in excess of this was made, and the court said:

"This provision renders all of this tax void which is in excess of the constitutional limit, but the books abound in cases which hold that in the exercise of a power any excessive action beyond the power will not vitiate acts, within the power where the acts well performed can be separated from those that are unauthorized. Here there can be no question that 75 cents on the \$100 valuation was fully warranted, and that sum can be readily separated from the illegal and unauthorized sum levied in excess of that amount. It requires but a simple calculation to make the separation with precision."

To the same effect is *People v. Chicago & Northwestern Ry.*, 249 Ill. 170, 94 N. E. 57. In *State v. McClurg*, 27 N. J. Law, 253, it is declared that an excessive tax is void only as to the excess. In *Bright v. Halloman*, 75 Tenn. (7 Lea) 309, it was held that the fact a larger sum than was lawful was levied does not make the entire levy unlawful, but that it is unlawful only to the extent of the unlawful exaction. In *Whaley v. Commonwealth*, 110 Ky. 154, 61 S. W. 35, where the Constitution prohibited counties from levying more than 50 cents on the hundred dollars in any one year, a county first levied 34 cents and then 25 cents in the same year. It was held that only 9 cents



of the last levy was invalid. In *Mowry v. Mowry*, 20 R. I. 74, 37 Atl. 306, the town of Smithfield levied a tax of \$1.15 on the hundred dollars. The statute forbade more than \$1 on the hundred. The court followed *Mix v. People*, 72 Ill. 241, and held the levy good for \$1. In the *City of Pensacola v. Louisville & Nashville R. Co.*, 21 Fla. 492, it is said:

"An assessment can only be declared unlawful as a whole when the illegality of an assessment is of such a character that it affects every item in the list. If there be items of assessment which are legal and other items which are illegal, the assessment under said act should only be declared unlawful in part—that is, as to those parts that are illegal—and should be allowed to stand as to those parts that are legal, unless the legal and illegal are so blended as to be inseparable."

This case overruled *Basnett v. City of Jacksonville*, 19 Fla. 664. In *Burlington & Missouri River Ry. Co. v. Saunders County*, 16 Neb. 123, 19 N. W. 698, it was held that where taxes were levied for the insane, for which no sum could be levied not expressly authorized, the legal amount would stand and the balance be perpetually enjoined. In *Union Pacific v. Howard County*, 66 Neb. 663, 92 N. W. 579; it was said:

"It has been repeatedly held that an excessive levy does not render the entire levy void, but merely void as to the excess."

And in *Clark v. Colfax County*, 2 Neb. (Unof.) 133, 96 N. W. 607, it is said:

"Where taxes are levied in excess of the amount authorized by law, to the extent of such excess they are levied for an illegal and unauthorized purpose. *C., B. & Q. R. R. Co. v. Nemaha County*, 50 Neb. 393, 69 N. W. 958. As to such excess the levy is void."

In *McPherson v. Foster Bros.*, 43 Iowa, 48, 73, 22 Am. Rep. 215, a bond tax was levied by an independent school district of 4 per cent. when the maximum allowed by law was 1 per cent. The levy was held good as to the 1 per cent. and invalid as to the excess. In *Worthen v. Badgett*, 32 Ark. 496, when the law only allowed a school tax of  $\frac{1}{2}$  of 1 per cent. and  $1\frac{1}{2}$  per cent. was levied, the whole tax was enjoined. In *Wells Fargo & Co.'s Express v. Crawford County*, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371, when a county had the right to levy only 5 mills and was claimed to have levied  $5\frac{1}{2}$  the court said, before it could be enjoined, the plaintiff must tender the 5 mills. That an excessive levy is not void in whole, but void only, so far as the excess may go, was determined in *Clifton v. Wynne*, 80 N. C. 145, and *Board of Education v. Commissioners*, 107 N. C. 110, 12 S. E. 190, and the same rule is laid down in *Taft v. Barrett*, 58 N. H. 447. In *Neenan v. Smith*, 60 Mo. 292, the law authorized the assessment of the cost of paving against the adjacent property, and it was held the fact that some small amount of work may have been charged not contracted for in the contract would not invalidate the proceeding, but the additional amount so charged may be deducted on proper showing. See *De Fremery v. Austin*, 53 Cal. 380, and *Howcott v. Smart*, 130 La. 699, 58 South. 515.

These are substantially all the cases in the United States upon the



subject, and the court is of the opinion that not only is the greater weight of authority in support of the proposition that, where an action is brought to enjoin a tax because it exceeds the constitutional or statutory authority, only so much of the tax will be enjoined as exceeds the constitutional or statutory authority, and especially the court is of the opinion that the tendency of the more modern authorities is to that effect. The plaintiff below was therefore only entitled to have enjoined the collection of the sum of \$2,170.90, leaving the sum of \$6,066.26 still due.

[4] The statutes of Wyoming provide for a penalty of 18 per cent., but, in view of the illegality of the tax, the efforts of the company to pay what was justly due, and the controversy which has existed as to their amount, we think they should draw interest rather than this enormous penalty.

It is therefore ordered that the case be reversed and remanded, with instructions to the District Court, as the successor of the Circuit Court, that if it shall appear at any time within 60 days that the Union Pacific Railroad Company has paid the county treasurer of Sweetwater County the sum of \$6,066.26, with 8 per cent. interest, which is the statutory rate in Wyoming, from December 31, 1909, a perpetual injunction issue restraining the collection of \$2,170.90.

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GIBBS v. ALGER, SMITH & CO. et al.

(Circuit Court of Appeals, Eighth Circuit. December 9, 1912.)

No. 3,685.

**JUDGMENT (§ 660\*)—CONCLUSIVENESS—QUESTIONS CONCLUDED.**

A judgment of a Minnesota court of superior general jurisdiction which determines adverse claims to real estate under Gen. St. Minn. 1894, § 5817, authorizing an action to determine adverse claims or interests in real estate rendered on adjudging that the complaint in the action states a cause of action to determine adverse claims under the statute, and affirmed by the state Supreme Court, treating the action as one to determine adverse claims, is a finality on the question of adverse claims as against the objection that the relief granted is broader than authorized by the complaint, since the construction placed on the complaint is at most erroneous, and the judgment bars a subsequent action to determine rights to the property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1171; Dec. Dig. § 660.\*]

Conclusiveness of judgment as dependent on theory of action or recovery, see note to *Millie Iron Mining Co. v. McKinney*, 96 C. C. A. 163.]

Appeal from the Circuit Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by Clara J. Gibbs, non compos mentis, by Albert L. Gibbs, her guardian, against Alger, Smith & Co. and others. From a decree of dismissal, complainant appeals. Affirmed.

A. L. Agatin, of Duluth, Minn. (Francis H. De Groat, of Duluth, Minn., on the brief), for appellant.

Alfred Jaques and L. C. Harris, both of Duluth, Minn. (Theodore T. Hudson, of Duluth, Minn., on the brief), for appellees.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before ADAMS and SMITH, Circuit Judges, and WILLARD, District Judge.

SMITH, Circuit Judge. Reuben Whiteman owned certain lands in the counties of St. Louis and Cook, in the state of Minnesota. On March 3, 1888, he died, testate. By his will he left these lands to his wife, Rebecca E. Whiteman, for life provided she did not remarry, or, in case of her remarriage, until that took place, and, upon her death or remarriage, to his son Alonzo J. Whiteman and his daughter Clara J. Whiteman, share and share alike. The will authorized the executors to sell any of these lands, and provided that on such sale the proceeds of it should be held and invested and disposed of as the real estate was directed to be disposed of. Rebecca E. Whiteman and Alonzo J. Whiteman were nominated and appointed executors. January 25, 1890, Rebecca E. Whiteman and Alonzo J. Whiteman, individually and as executors of the will of Reuben Whiteman, entered into a contract with Clara J. Whiteman, under which they agreed to convey to her the lands of the estate in Minnesota and particularly the lands in Cook county.

On December 4, 1890, Alonzo J. Whiteman and wife and Rebecca E. Whiteman, as individuals, executed a quitclaim deed of the lands in Cook county to Clara J. Whiteman which was recorded on July 24, 1902. On January 23, 1892, the executors, Rebecca E. Whiteman and Alonzo J. Whiteman, executed to Clara J. Whiteman an executors' deed to said lands. In 1892, and after the execution of said deed, Clara J. Whiteman was married to Albert L. Gibbs. July 2, 1902, Clara J. Gibbs and husband conveyed all the timber upon said lands to Frederick L. Gilbert and Edward T. Buxton in consideration of \$8,000 in cash and \$8,000 when the grantors furnished an abstract showing good title in them. On November 16, 1892, W. H. H. Stowell recovered judgment in the district court for the Eleventh judicial district of Minnesota in St. Louis county against Alonzo J. Whiteman for a debt contracted in 1888, and on December 5, 1892, this judgment was docketed in Cook county where the lands in question were situated. On July 21, 1902, Stowell assigned this judgment to Marion Douglass, execution was issued upon it, and these lands were levied on and sold on September 22, 1902, as the property of the judgment debtor and bought in by Douglass and the certificate of purchase was issued to him.

This certificate was sold on May 22, 1903, to George F. Perkins. February 7, 1895, Rebecca E. Whiteman was married to James Lindsay. On February 14, 1895, Alonzo J. Whiteman, then unmarried, again conveyed the lands in controversy to Clara J. Gibbs. The lands not having been redeemed George F. Perkins brought suit in the district court for the Eleventh judicial district of Minnesota against Clara J. Gibbs, Albert L. Gibbs, her husband, Alonzo J. Whiteman and Julia N. Whiteman, Rebecca E. Whiteman-Lindsay, James Lindsay, Frederick L. Gilbert and wife, and Edward T. Buxton and wife, alleging that he was the owner in fee simple of an undivided half interest in the real estate in question; that the said lands were vacant

and unoccupied; that the defendants and each of them claimed an interest in said premises or a lien thereon adverse to plaintiff. He then set up the original ownership of said lands by Reuben Whiteman, his will, the agreement of November 25, 1890, the executors' deed dated January 23, 1892; alleged that none of the conditions and stipulations contained in said agreement were complied with by Clara J. Gibbs, that the executors' deed was without consideration and in fraud of the creditors of Alonzo J. Whiteman, of whom Stowell was one. The petition continued that the defendants and each of them have no estate or interest in said premises or lien thereon or any portion thereof and said claims of said defendants and each of them is unfounded in law and in fact. Wherefore he prayed:

"Judgment that he be adjudged the owner in fee of said lands, and that his title thereto be quieted as against the claims of said defendants Clara J. Gibbs and Albert L. Gibbs, and the cloud upon his title arising by virtue of the said executors' deed. \* \* \* And that defendants Frederick L. Gilbert and Edward T. Buxton be also adjudged and held to have no right, title, interest, estate, or lien upon or in and to said undivided one-half ( $\frac{1}{2}$ ) interest of the above-described real estate, to the end that plaintiff may be adjudged the absolute owner free from all claims, right, title, interest, estate, or lien in and to the undivided one-half ( $\frac{1}{2}$ ) interest of said real estate as against each and all of the said defendants. And that the plaintiff may have all other proper relief in the premises and judgment for the costs and disbursements of this action."

There was due service of notice of this action, and Gilbert and Buxton made answer, but the other defendants made default. At the June term, 1905, the case came on for hearing, and the court found that the plaintiff was the owner in fee of the undivided one half of the lands in question; that on July 2, 1902, Clara J. Gibbs was the owner of the other undivided half of said lands, and on that date with her husband she executed and delivered to Gilbert and Buxton the conveyance to them and they took the interest she had in the timber; that said lands were vacant and unoccupied; found the facts as to Reuben Whiteman's original ownership, the making of the will and his death; found that by the remarriage of said Rebecca E. Whiteman the title vested in Alonzo J. Whiteman and Clara J. Gibbs in equal shares an undivided half in each; found the facts as to the Stowell judgment, its assignment, execution thereon, and sale thereunder and the delivery of the certificate and the assignment thereof to the plaintiff Perkins; that the executors' deed was fraudulent; and found as conclusions of law that judgment be entered adjudging that said plaintiff is the owner of an undivided half of the lands described in the finding of facts free of any claim on the part of any of the defendants and that said defendants Frederick L. Gilbert and Edward T. Buxton have such interest in the other undivided half of said lands as by virtue of the execution and delivery of the instrument to them of July 2, 1902, free of any claim of plaintiff. Subsequently, on July 31, 1905, the court adjudged and decreed that George F. Perkins is the owner in fee of the lands in question, entitled to the possession thereof subject to the rights of Gilbert and Buxton as found, and that the other defendants and all persons claiming through them have

no estate, interest, lien, or claim in or upon said premises or any part thereof. July 26, 1906, George F. Perkins sold and conveyed to Alger, Smith & Co., a corporation of Detroit, Mich., an undivided half of the timber on these lands. August 22, 1906, Clara J. Gibbs was by the county court of Marathon county, Wis., adjudged insane, and committed to the Northern Wisconsin Hospital for the Insane. On the 27th day of November, 1906, the same court appointed her husband, Albert L. Gibbs, guardian of her person and estate, and on June 19, 1907, said Albert L. Gibbs was appointed guardian of the estate of Clara J. Gibbs in the state of Minnesota by the probate court of St. Louis county in that state. On or about March 2, 1908, Clara J. Gibbs, by her guardian ad litem, filed an alternative application, first to set aside the judgment in favor of George F. Perkins upon the ground of want of jurisdiction and, second, upon failure to sustain that motion to reopen said case upon the affidavits filed and permit her to answer. October 17, 1908, these applications were denied, and she appealed, and the case was affirmed by the Supreme Court of Minnesota. *Perkins v. Gibbs et al.*, 108 Minn. 151, 121 N. W. 605.

On the 14th day of December, 1908, a bill was filed in the United States Circuit Court for the District of Minnesota by Clara J. Gibbs, by Albert L. Gibbs, her guardian, against Alger, Smith & Co., George F. Perkins, Frederick L. Gilbert, and Edward T. Buxton in which she prayed: First. That the pretended claims of title of said defendants Alger, Smith & Co. and George F. Perkins, and each of them, in or to said undivided one-half interest in and to the timber conveyed by said complainant to the defendants Gilbert and Buxton by deed be declared to be null and void, and that it be declared and adjudged that her said deed to said Gilbert and Buxton conveyed good title thereto and to the whole thereof as against any claims of said defendants Perkins and Alger, Smith & Co., subject always to her lien for the said \$8,000. Second. That she be adjudged and decreed to have a valid and subsisting first lien as for purchase money upon the premises so conveyed by her to the said defendants Frederick L. Gilbert and Edward T. Buxton for the said sum of \$8,000. Third. That said defendants Frederick L. Gilbert and Edward T. Buxton be by the decree of this court required to pay to her said sum of \$8,000 in satisfaction and discharge of said lien by a day certain to be fixed and appointed by the court, and that in default thereof her said lien be foreclosed and a sale of said premises be decreed to satisfy the amount so due to her. Fourth. That said defendants Alger, Smith & Co. and George F. Perkins be forever barred and enjoined from claiming or asserting any claim, right, title, or interest in or to the timber so conveyed by her or any part thereof. To this petition Alger, Smith & Co. and Gilbert and Buxton made answers. In answer Alger, Smith & Co. set up the Minnesota statute for actions to determine adverse claims, alleged that the action of *Perkins v. Gibbs* was brought thereunder, and that Gilbert and Buxton, by appearing in said action and answering thereto, submitted themselves to the jurisdiction of said court, and by their answer agreed that said court adjudged and determine all the rights of the parties to



said action, and the court adjudged and decreed that the defendant Perkins is the owner of an undivided half of the land as described in that action, and in this free of any claim on the part of any of the defendants to said action, and alleged that the issue involved in said action was a question of the ownership of an undivided interest in the real estate by George F. Perkins and the question of the adverse claims of all parties named as defendants in said action, and that said court, having full and complete jurisdiction of said action and the parties thereto, gave judgment therein, adjudging that George F. Perkins was the owner in fee simple of the undivided half in said lands free and clear of any claim of any of the defendants therein; that all of the defendants in said action are bound and concluded by said judgment, and are barred thereby from making any claim to said undivided half of said lands, the timber thereon, or any interest therein. The plaintiff made replication to the answers. The evidence was taken before a special examiner, and upon his report the court dismissed the bill and the complainant appeals.

The case has been ably argued upon numerous points, but, as the Court regards a single one as conclusive of this case, it only will be referred to.

Long before the bringing of a suit by Perkins the laws of Minnesota (section 5817, Statutes of Minnesota of 1894) read as follows:

"An action may be brought by any person in possession, by himself or by his tenant, of real property against any person who claims an estate or interest therein, or lien upon the same, adverse to him, for the purpose of determining such adverse claim, estate, lien or interest; and any person having or claiming title to vacant or unoccupied real estate may bring an action against any person claiming an estate or interest therein adverse to him, for the purpose of determining such adverse claim and the rights of the parties respectively."

It is the contention that the action was to remove a cloud, and was not an action to determine adverse claims under the statute cited, and that, while the decree upon its face went beyond this, the court had no jurisdiction in so far as the relief granted exceeded that of removing the cloud of the executors' deed, and as she had title under the deed from Alonzo J. Whiteman and wife and Rebecca E. Whiteman, and perhaps under the subsequent deed from Alonzo J. Whiteman, her title thus acquired extinguished the title of Alonzo J. Whiteman, and so Perkins took nothing under the execution sale, and, having no decree canceling these deeds, her title remained complete until divested as it was by a subsequent execution sale and the latter did not divest her vendor's lien. It is probable both sides to this controversy misunderstood the effect of the Reuben Whiteman will.

This court held that, under the will, the children took a vested estate in the residuary estate subject to a determinable life estate in their mother. *Perkins v. Gibbs*, 153 Fed. 952, 83 C. C. A. 68. The will in the fifth subdivision, after providing for the determinable life estate in Rebecca E. Whiteman and remainder in his children, contained this provision:

"This clause fifth is subject to the powers hereinafter mentioned."



Immediately following this is a provision conferring upon his executors power in their discretion to sell, convey, mortgage, and deed any and all of the real or personal property mentioned or included in the fifth clause, except the homestead, and provided, in case the real estate should be so sold and converted into money, the proceeds of it should be held and invested and disposed of as the real estate was directed to be disposed of. It seems highly probable that all parties thought these provisions precluded any vesting of the title in the heirs during the existence of the executorship. Mr. Perkins in his original complaint alleged that these lands vested in Alonzo J. Whiteman and Clara J. Gibbs upon the remarriage of their mother to Lindsay, and did not in any way refer to the deed from Alonzo J. Whiteman and wife and Rebecca E. Whiteman, as individuals, although the same was of record in Cook county, Minn., some years before he commenced his suit, but assumed the whole title of Clara J. Gibbs was derived under the original fraudulent deed from the executors. The plaintiff apparently had some fear of such construction because immediately after the remarriage of her mother Alonzo J. Whiteman again deeded her this property and the deed was recorded. Whether this accounts for the bringing of the George F. Perkins suit in the form it was it is not essential to determine. It is sufficiently conceded that, if the action by George F. Perkins was an action under section 5817 to determine adverse claims, then complainant cannot recover in this action.

Reliance is placed upon *Walton v. Perkins*, 28 Minn. 413, 10 N. W. 424, and *Knudson v. Curley*, 30 Minn. 433, 15 N. W. 873. The court in both these cases said the complaints were clearly drawn as bills in equity to procure the cancellation of specific clouds, and the fact that they alleged facts which would have entitled the plaintiffs to maintain action under the statute in question could not avail them. Those were neither of them collateral attacks on judgments rendered, but were both appeals in the original actions. Concerning them the Supreme Court of that state said in *Bovey-De Laittre Co. v. Dow et al.*, 68 Minn. 273, 71 N. W. 2:

"It is settled by the previous decisions of this court that a complaint which is clearly one to remove a specified cloud upon title to real estate cannot, if it fails to state facts sufficient to sustain an action for such specific purpose, be sustained, although it alleges facts sufficient to constitute an action, under the statute, to determine adverse claims to real estate. *Walton v. Perkins*, 28 Minn. 413, 10 N. W. 424; *Knudson v. Curley*, 30 Minn. 433, 15 N. W. 873. The rule established by these decisions must be limited to cases where it clearly appears from the complaint that the only cause of action intended to be relied upon was one for the removal of a specified cloud; for the rule seems to encroach upon the fundamental principles of our Code, abolishing all forms of action, and giving relief upon the facts pleaded and proven, without reference to forms. It does not appear from the complaint in this case that the cause of action intended to be relied upon is one for the removal of a specified cloud. On the contrary, the only cause of action alleged is one to determine adverse claims to real estate. The complaint alleges that the plaintiff is the owner in fee of the land therein described, which is vacant and unoccupied, and to which the defendants claim some title adverse to the plaintiff and its title, which claim of defendants is void in fact, and concludes with a prayer for relief appropriate in an action under the statute to deter-

mine adverse claims to real estate. But it also unnecessarily attempted to anticipate and allege what the plaintiff understood the defendants' adverse claim was."

This is a question of how far the district court of Minnesota had power to determine the extent of its own jurisdiction. The complaint alleged every fact necessary to maintain an action to determine adverse claims. The court of necessity held it was such an action, and it entered a decree under the statute. The Supreme Court of Minnesota starts its opinion with the announcement that:

"This action was brought in the district court of the county of Cook to determine adverse claims to the lands described in the complaint."

The district court of Minnesota is a court of superior general jurisdiction. This is not a question of the jurisdiction to grant a general decree quieting title for it is conceded the court had that jurisdiction if a proper petition had been filed, nor is it a question of the jurisdiction of the parties for that is conceded. It is simply contended that the relief granted was broader than the petition authorized as construed by the Supreme Court of Minnesota.

In *Gillitt v. Truax*, 27 Minn. 528, 8 N. W. 767, it was said:

"The objections to the judgment are that the complaint on which it was rendered does not justify so large a judgment. This, if true, was only error, not affecting the jurisdiction, and does not affect the judgment in a collateral action. \* \* \*"

If the petition in *Perkins v. Gibbs* should be examined by one unfamiliar with the Minnesota cases cited, and who knew only of the statute for suits to determine adverse claims, that the laws of Minnesota abolished all forms of action and provided for giving relief upon the facts pleaded and proven without reference to forms, by what process of reasoning could he reach the conclusion that the court did not have jurisdiction to grant the very relief prayed? If the court on examining this petition found allegations and a prayer for relief strictly authorized by the statute to determine adverse claims and due service, it had jurisdiction of both the subject-matter and the persons, and, if it proceeded to grant such relief, it was at most erroneous. Under such circumstances, the decision was a finality. *American Express Co. v. Mullins*, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. Ed. 525, 15 Ann. Cas. 536; *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039; *United States v. California Land Co.*, 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476; *Van Fleet on Collateral Attack*, §§ 750 and 755.

The decree in the former case is conclusive, and the plaintiff cannot recover in this action.

Affirmed.

## CONNELLEY v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit. December 2, 1912.)

No. 1,682.

**1. MASTER AND SERVANT (§ 206\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.**

An employé assumes the obvious and unavoidable risks of the employment, and the employer violates no legal duty in failing to protect an employé from the dangers of such employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 550; Dec. Dig. § 206.\*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

**2. MASTER AND SERVANT (§ 213\*)—ASSUMPTION OF RISK.**

A trackwalker employed to walk over and watch tracks and repair small defects, while there is a constant passing of trains, assumes the risk of injury by being struck by trains properly operated, and he must adopt for his self-protection reasonable safeguards.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 559-564; Dec. Dig. § 213.\*]

**3. MASTER AND SERVANT (§ 137\*)—INJURY TO SERVANT—NEGLIGENCE.**

A railroad company employing trackwalkers to constantly walk over and watch the tracks and repair small defects required them to go in pairs to aid them in protecting themselves from dangers arising from the constant operation of trains. It also placed a brakeman on switching trains. Two trackwalkers, experienced men, stopped to make repairs while enveloped in steam escaping from a standing engine. The brakeman was on watch at the time, and had the emergency brake ready, but the steam made it impossible for him to see the men, and they could not see the approaching train. *Held*, that the company was not guilty of any breach of duty, and was not liable for the death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.\*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Action by Ellen Connelley against the Pennsylvania Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed, with instructions.

John Hampton Barnes, of Philadelphia, Pa., for plaintiff in error.  
Guilliaem Aertsens, Jr., and Francis Rawle, both of Philadelphia, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case the plaintiff, Mrs. Ellen Connelley, administratrix of Thomas Connelley, brought suit against the Pennsylvania Railroad Company, charging it with negligence in operating one of its trains, by reason of which negligence her husband, Thomas Connelley, was killed. On trial she recovered a verdict, whereupon the railroad moved for judgment notwithstanding such verdict on the ground, amongst others, that the proof showed no neg-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ligence on the part of the defendant. The trial court denied such motion, and entered judgment in plaintiff's favor. Thereupon the railroad sued out this writ, alleging the proofs failed to show its negligence, and that binding instructions in its favor should therefore have been given.

The statement of claim avers deceased was employed as a track-walker on the tracks of the main line of the defendant in the city of Philadelphia between Broad street and West Philadelphia Stations, and that "while the said Thomas Connelley was so employed, and in the course of his said employment, he was on the 4th day of November, 1910, run down and killed by a train belonging to and operated by the defendant company by reason of the negligence of the defendant company's employes in operating the same, and by reason of the negligence of the defendant company's employes in failing to give the said Thomas Connelley while so employed due and proper warning of the approach of said train." The proofs showed that there are eight or nine tracks between these two stations, that there are numerous cross-overs and frogs, and the system widens into 16 tracks running into Broad Street Station. Over these tracks there is the constant passage of several hundred trains incident to such a station. The employment of the deceased was to continuously walk over and watch these tracks, and repair any small job, such as tightening bolts, etc. The trackwalkers go in pairs, so that they can better lookout for each other's safety. At the time of the accident Connelley and Rowan, his companion, who were both experienced men, were walking their beat together. It was a dull, damp, and misty morning. When near Twenty-Second street, they came opposite an engine which was standing still and blowing smoke and steam towards the track on which these two men were. This steam so enveloped them as to hide them from view. Here the men stopped, and Connelley began tightening a bolt. About a minute or two before the accident, Rowan called Connelley's attention to the steam enveloping them, and said they had better move to one side. Rowan's account is:

"I says, 'There is a lot of steam here.' I says, 'We had better move to one side.' That was about a minute or two before this happened, and the last words he spoke. He said he had the bolt nearly tightened now. Just about a minute or so, I judge it was over a minute after that, this here draft came along. Of course, we could not see it very handy. Of course, there was steam blowing there, and I did not see it until about five or six feet away. So I hollered as soon as ever I seen it coming, you know, and I says to myself, if I jump, the wheels may happen to catch me, so I stood right in the middle of the track with my back to it, and let the train hit me. I went right down, and one of the big cars and half a car went right over me."

Connelley was struck just after Rowan went down, but, instead of falling in the middle of the track as Rowan did, he fell on the rail, was run over, and killed. The train that struck him was composed of empty passenger cars, and was being backed into the Broad Street Station. On the end of the train which struck decedent a brakeman was stationed to give warning to any one he saw by shouting or whistling. His testimony was that he was on watch, and had control of the air brake, but, owing to the cloud of steam enveloping Connelley and



Rowan, he did not see them until the car was hitting them, that he instantly applied the air, but, on account of the wet rails, the train slid. The testimony of the track foreman was:

"You cannot warn the men of every train coming. They are supposed to watch for themselves. They have a steady job of trackwalkers, walking these tracks, and they walk the tracks all over in the morning and continue, and if they see anything wrong, of course, it is their duty to repair it—that is, small jobs, tightening bolts, etc.—and one of these men is supposed to watch for the other while the other is working. That is the instructions they get."

The case was submitted to the jury under instructions:

"The first thing, therefore, for you to determine is whether or not there was negligence in the operation of the train that killed Mr. Connelley. If there was no negligence in the operation, then there can be no recovery in this case."

The above facts were all proved by the plaintiff, and are undisputed. We are clear they disclose no negligence on the part of the railroad in operating its train, and that the decedent's death, instead of being caused by any negligence or want of care on the part of the railroad, was caused by the risks incident to the employment he followed.

[1] It is an obvious fact that many occupations, as for example a powder mill operator, a structural iron worker, a diver, a blaster, a trackwalker, necessarily subject those who follow them to great dangers. When, therefore, a man contracts for such employment, he knows and takes on himself the risks and dangers incident to such dangerous work. His assumption of those obvious and unavoidable risks is in the very nature of things part of his employment. It follows, therefore, that the employer violates no legal duty to the employé in failing to protect him from dangers which cannot be escaped by any one doing such work. *Narramore v. Cleveland, C., C. & St. L. Ry. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68.

[2] It is obvious that even where a railroad operates its trains, and moves its switch drafts in a proper and careful manner, trackwalkers and repairmen are necessarily subjected to great risks. Their very occupation is one of constant peril. Indeed, it follows from the nature of such employment that the duty of self-preservation has to rest on them, for no adequate protection, other than self-protection, can be afforded them. And such has been the reasonable holding of the law. Thus in *Norfolk & W. Ry. Co. v. Gesswine*, 144 Fed. 56, 75 C. C. A. 214, it was said:

"This man was one of a number of men who were employed as sectionmen on the railroad. They were engaged in repairing the track, taking out rails, putting in new ones, taking out cross-ties and putting in new ones, and hewing them into proper form and shape, and were working on the railroad track, while the trains were being operated in the usual way; manifestly, a place of danger. A railroad does not suspend the operations of its trains until the track can be put in order, and the proposition to these sectionmen was, 'We will run the trains and operate the road as heretofore, as we ordinarily do, and between trains you must do this work and look out for yourselves to avoid being injured by the trains,' and the sectionmen accept the employment upon these terms, and if an accident occurs, and they are hurt while the trains are being managed and operated in the usual and ordinary way, they



can have no just ground of complaint against the railroad. It is not the fault of the railway company."

So, also, in *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, where an experienced trackman was injured by a moving train in a switching yard, it was said:

"Under such circumstances, what negligence can be attributed to the parties in control of the train, or the management of the yard? They could not have moved the train at any slower rate of speed. They were not bound to assume that any employé familiar with the manner of doing business would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming and switch engines moving forward and backward would have simply tended to confusion. \* \* \* It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employés who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendant."

Indeed, in thus making self-protection the substantial safeguard of trackwalkers and sectionmen, the law is reasonable and just, for no other dependable safeguard can be afforded their perilous work in the practical operation of railroads. As said in *Keefe v. Railway Co.*, 92 Iowa, 182, 60 N. W. 503, 54 Am. St. Rep. 542, "These rules are founded upon the necessities of the business of operating railways," and in *Rosney v. Erie R. Co.*, 135 Fed. 311, 68 C. C. A. 155:

"An elaborate system of signals by ringing bells, sounding whistles, swinging lanterns and waving flags, designed to cover the erratic movements of switching engines and extra freight trains, would quite likely have tended to complicate and confuse the situation."

This rule has the uniform support of courts in all sections of the country. *Morris v. Boston & M. R. R.*, 184 Mass. 368, 68 N. E. 680; *Bancroft v. Boston & M. R. R.*, 67 N. H. 466, 30 Atl. 409; *Railroad Co. v. Hester*, 64 Tex. 401; *Carlson v. Cincinnati, S. & M. R. Co.*, 120 Mich. 481, 79 N. W. 688; *Pennsylvania R. R. Co. v. Wachter*, 60 Md. 395.

[3] In view of these decisions, it is clear, therefore, that, so long as the defendant railroad used its terminal tracks by running its trains properly thereon and in the usual way, the duty of guarding himself against such trains rested on Connelley, and a study of this testimony leads to the sad conclusion that the death of this unfortunate man was due to his own momentary disregard of the peril of his situation. To aid these trackwalkers in taking care of themselves, the railroad required them to go in pairs, and, indeed, Connelley's companion called his attention to the enveloping steam, and advised their moving aside. Obviously self-preservation, the steam enveloped position he was in, together with the knowledge that trains were constantly moving, should have led the decedent to heed the warning instead of making chance and not care the insurer of his safety. The failure of decedent to heed this timely warning and step aside undoubtedly cost him his life. The railroad had taken the additional step of placing a brakeman on the switching train. He was on watch and had the emergency

brake ready, but the steam which enveloped Rowan and Connelley until they were struck made it just as impossible for the brakeman to see them as it was for them to see the approaching train.

Finding, as we do, no lack of care or omission of duty on the part of the railroad, we are constrained to reverse this case and remand it to the court below with instructions to enter judgment for the defendant.

This conclusion renders it unnecessary to pass on the other questions raised in the briefs.

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### THE ANNA W.

(Circuit Court of Appeals, Second Circuit. December 9, 1912.)

Nos. 87, 88.

**1. COLLISION (§ 95\*)—TUG AND TOW WITH SCHOONER—NEGLIGENCE OF TUG—EXCESSIVE HAWSERS.**

A schooner passing up the main ship channel into lower New York Bay at night before the wind against an ebb tide at a speed not more than  $1\frac{1}{2}$  knots came into collision with the tow of a meeting tug on a hawser 1,200 feet long, in violation of navigation regulations under Act May 28, 1908, limiting hawsers to 75 fathoms and as much shorter as the weather or sea will permit. The tug and schooner passed port to port not more than 50 feet apart, though there was plenty sea room to the west. The schooner held her course until just prior to collision with the tow. *Held*, that the tug was at fault in failing to keep further to the west of the channel in view of her duty as the burdened vessel to keep out of the way, and also by reason of the length of the hawser which by the set of the tide would cause the tow to sag to the eastward of the tug's course.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.\*]

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

**2. COLLISION (§ 77\*)—FAULT—FAILURE TO KEEP LOOKOUT.**

Where a schooner came into collision with the tow of a passing tug, the schooner would be held at fault in failing to keep a lookout unless she could affirmatively show that if there had been a lookout, and he had done his duty in seeing and reporting other vessels, and the schooner had navigated in conformity with the information thus obtained, the collision would nevertheless have happened.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 140-149; Dec. Dig. § 77.\*]

**3. COLLISION (§ 44\*)—NAVIGATION—SAILING VESSELS.**

Where a sailing vessel, required by rule to keep her course, sees both lights of an approaching steam vessel which is in a position to pass either to starboard or port, the privileged vessel is bound to hold her course until it is certain which side the burdened vessel will elect to pass on, and then act accordingly.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 48-50; Dec. Dig. § 44.\*]

**4. COLLISION (§ 61\*)—TUG AND TOW MEETING SCHOONER—NAVIGATION.**

A tug and tow and schooner were approaching each other head on at night, at a point where it was entirely practicable for the tug and tow to pass either to starboard or port. Both lights of the tug were visible until she reached a point 300 to 400 feet from the schooner, when the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

green light was shut out. There was no blast of the tug's whistle or anything else to indicate her intentions. *Held* that, as soon as the tug's green light was shut out, the schooner's lookout would have been sufficiently advised that the tug intended to pass to port, so close that collision with the tow was inevitable unless the schooner took prompt action, and, not having done so, the schooner was at fault in failing to have a lookout which contributed to the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 78; Dec. Dig. § 61.\*]

#### 5. COLLISION (§ 154\*)—APPEAL.

Where, on appeal from a decree finding that a collision between a schooner and a tow was a result of the negligence of the tug, appellant undertook to show not only that the schooner was at fault, but also that the tug was free from fault, while appellee sustained only so much of the decision below as found that the tug was at fault, and did not defeat the contention that the schooner was also at fault, neither side would be awarded costs on appeal.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 308; Dec. Dig. § 154.\*]

Appeals from the District Court of the United States for the Eastern District of New York; Thomas I. Chatfield, Judge.

Suits in admiralty by Jared Griffing, as owner of the schooner Daylight, and by the President and Directors of the Insurance Company of North America, against the steam tug Anna W. Decrees for libel (181 Fed. 604), and the claimant, the National Dredging Company of Wilmington, Delaware, appeals. Modified and affirmed.

This cause comes here upon appeals by the claimant from decrees of the District Court, Southern District of New York, holding the Anna W. solely in fault for a collision between her tow, the scow P. B., No. 1, and the schooner Daylight. The first suit was brought to recover for the total loss of the schooner and the personal effects of her master and mate. The second suit was to recover for the loss of a cargo of coal laden on the schooner.

The collision happened between 4 and 5 a. m. January 17, 1910, in the lower bay of New York near the middle of the main ship channel to the northward and eastward of the Quickstep Buoy. The tug, with her loaded tow on a hawser of about 600 fathoms was bound down the channel. The schooner was bound up with a following wind, some witnesses say she was winged, others that her sails were all to starboard, but that her forward sails were not drawing, the mainsail not guyed, but swinging back and forth. The wind was light, 9 knots at Sandy Hook, and the tide ebb, so her progress up the bay was about 1½ knots an hour. The speed of tug and tow was about 5½ knots with the tide. The tug and schooner passed each other port to port, but the port bow of the scow struck near the bluff of the schooner's port bow.

The opinion of the District Judge is found in (D. C.) 181 Fed. 604.

Carpenter & Park, of New York City, for appellant.

L. D. Armstrong, of New York City, for appellee Griffing.

Lawrence Kneeland, of New York City, for appellee President and Directors of Insurance Co. of North America.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). [1] It must be taken as a fact in the case that from the time they sighted each other the schooner held her course until she hardported as the tug reached her bow. Her witnesses say she did, the probabilities are

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that a privileged vessel would do so, and there is not a scrap of evidence to the contrary.

The pilot of the tug brought her down on a course close to the schooner. He says he cleared her by 100 feet; other witnesses make the distance 25 feet. Whether we split the difference and call it 50 feet, which it probably was, since on this dark night he could see the ripple under the bow of the schooner going as slowly as she was, or whether we leave the distance at 100 feet, the event shows that he brought his tug so close that collision between the schooner and the tow was inevitable unless the schooner changed her course to the eastward. The pilot says his tow was straight behind him. If he is right in his estimate of 100 feet clearance of the schooner, he must be wrong as to the tow following exactly. When confronted with this proposition, he can account for the collision only by suggesting that "the schooner *must* have luffed" (to westward). He does not pretend that he saw her luff, and his own witness, Vickery, whose eyes were on her, says she did not luff, but "swung off" (to eastward). Probably the tow was somewhat to the eastward of the tug—the set of the tide testified to by other witnesses than the schooner's would indicate that. We do not think she was much to the eastward, but if she were only 50 feet to eastward, a very slight sheer with a 1,200-foot hawser, and the tug passed as the schooner's witnesses say she did 25 feet from the latter, collision would follow unless the schooner got further to eastward.

Manifestly, as was the case in the *Gladys*, the tug, a burdened vessel, had brought about a situation where the privileged vessel could escape collision only by herself changing course, contrary to the rule. There is no sufficient excuse shown for the tug's producing such a situation. To the westward was the *Du Bois*; but her course was 125 feet off, and the *Anna W.* was going faster than the *Du Bois*. To the eastward of the center of the channel (where the schooner was navigating) was clear water, no vessels at all, and abundant room to pass the schooner to the eastward without intruding on Ambrose Channel where vessels like the tug herein had no right to be.

It seems to us that the *Anna W.* was clearly in fault for this.

Moreover, this collision happened in January, 1910. The board constituted by the Act of May 28, 1908, had promulgated in December of that year the following regulation covering the inland waters where the *Anna W.* was navigating:

"(2) Hawasers are limited in length to 75 fathoms from the stern of one vessel to the bow of the following vessel; and should in all cases be as much shorter as the weather or sea will permit."

With a hawser 200 fathoms in length the tug was violating this regulation, which the statute provides "shall have the force of law," and it is not shown that this violation did not contribute to bring about the collision.

We therefore concur with the District Court in the conclusion that the tug was in fault.

[2] As to the fault on the part of the schooner, she had no lookout and must be held in fault therefor, unless she can show affirmatively



that, if there had been a lookout, and he had done his duty in seeing and reporting other vessels, and the schooner had navigated in conformity with the information thus obtained, the collision would nevertheless have happened. The master of the schooner says they saw the tug's lights two miles off; the mate makes the distance one mile. Even if it were a little less than that, there would be ample time for all proper maneuvers. Although the tow's lights were good and properly placed, they probably were not as bright as the tug's and might not have been seen till a little later. But concede they were visible at the same time. The schooner would then be advised that the tow was either following directly behind the tug (as the tug's pilot says), or was following somewhat to eastward of the tug's course (as the evidence convinces us she really was).

What then should the schooner have done? The evidence shows conclusively that they were approaching substantially on opposite courses; the schooner N. by E., the tug S. by W.  $\frac{1}{2}$  W. The schooner's witnesses say that from the beginning they saw both lights. There is nothing in the proof to indicate that they did not. They also say that the red light seemed somewhat the dimmer, which they thought was because it was partly screened, an indication that the tug was probably bearing to the east. But even if we reject this statement of theirs, as to the red light we have a situation, which arises often and which we have many times considered.

[3] A sailing vessel, required by rule to keep her course, sees both lights of an approaching steam vessel which is in a position to pass her either to starboard or to port. We have repeatedly held that the privileged vessel should hold her course till it is certain which side a burdened vessel (which may lawfully pass on either side) will elect to pass on. If for instance the privileged vessel should too soon *assume* that the passing would be port to port and change her course to starboard, and the burdened vessel should at the same time elect to pass to starboard and change her helm accordingly and collision follow, the privileged vessel would be clearly in fault for disobeying the rule, because had she followed the rule, as the steamer had the right to believe she would, the later would have avoided her and no collision resulted. The privileged vessel must hold on till she is reasonably certain what the other is going to do. In *The Gladys*, 144 Fed. 653, 75 C. C. A. 455, cited on the brief, the tug and tow (two-thirds of a mile long) was heading N. E., the sailing vessel N. N. W. We pointed out that, by reason of the length of the tow, it might seem improbable that the tug could have gone under the stern of the tow, and impossible that the long tow could cross ahead without collision if the schooner kept on. In the opinion the crucial moment is indicated as the "moment when the tug crossed the schooner's course, because then it was impossible for the tug to go under the schooner's stern." The schooner in that case was held in fault, because (in the opinion of the majority) she did not take immediate action when the tug crossed her course, but kept her own course until about 500 feet of the hawser between the tug and first tow had also crossed. "If, the moment she saw the tug cross

her course, she had gone off to starboard, she would certainly have escaped."

[4] In the case at bar, the master of the schooner is surely wrong in fixing the distance between the two vessels at 600 feet when he saw the green light of the tug shut in. The tug was not changing her course, and on their relative courses and in their relative positions they would be closer together when the screen would begin to cut out the green light. The wheelman says it was 300 to 400 feet when the green light shut in. Until that point was reached and in the position the vessels were in, it was entirely practicable for the tug to direct her course to starboard or to port and pass the schooner on either side. Until that time the schooner could not tell which course the tug would take, no blast of the tug's whistle had given any indication as to the latter's intentions, and there was nothing else to indicate them. Down to that time apparently the schooner was not in fault for keeping her course.

As soon, however, as the tug's green light was shut out, the schooner was sufficiently advised that the tug was about to pass on her port side, manifestly so close that, with the tow in the position which a lookout would have seen, collision was inevitable unless the schooner took some action. It was *then* the duty of the master to act promptly. Did he do so?

He certainly delayed some appreciable period of time, for he did not order the helm hard aport until just as the tug came abreast of his bow.

The two vessels, approaching each other at the rate of 7 knots an hour, had covered 300 or 400 feet while the master of the schooner was deciding what to do. The delay was short—a fraction of a minute—but even that delay may have made impossible an escape which otherwise might have been secured. Had the schooner committed no other fault, we might be astute to find excuse for a delay so brief. But, on the contrary, she was confessedly guilty of a very grave fault, navigating without a lookout, and in consequence of failure to keep a lookout, uninformed as to the location of the tow. The burden is on her to show that such fault did not contribute to the collision, and in view of her master's failure to act promptly, when he did learn of the danger that impended, we are not satisfied that she has sustained that burden.

We conclude that both vessels were in fault. Since the schooner was a total loss, this conclusion calls for no different disposition of the second suit—by the insurance company to recover for loss of cargo. That decree is therefore affirmed with costs of this court to libellant.

[5] In the other suit, neither side has fully prevailed. The appellant undertook not only to show that the schooner was in fault, but also to show that the tug was free from fault. The appellee has sustained only so much of the decision below as found the tug in fault. He has not defeated the contention that the schooner was also in fault. Neither side, therefore, is entitled to costs of the appeal.

The cause is remitted to the District Court, with instructions to modify the decree to conform to the views expressed in this opinion.

MOTION PICTURE PATENTS CO. v. STEINER et al.  
SAME v. YANKEE FILM CO.

(Circuit Court of Appeals, Second Circuit. December 9, 1912. On Motion to Modify, December 19, 1912.)

Nos. 42, 43.

1. COSTS (§ 164\*)—EXTRA ALLOWANCE—STATUTES—CONSTRUCTION.

Rev. St. § 982 (U. S. Comp. St. 1901, p. 706), provides that if any attorney, proctor, or other person, admitted to conduct causes in any court of the United States or in any territory, appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required by order of the court to satisfy any excess of costs so increased. *Held*, that such section only permits the court to order that an attorney who has unnecessarily increased the costs shall personally pay the excess of the costs over the amount which was properly incurred in case he unreasonably multiplies the proceedings in any case, and confers no authority on a federal court to grant an extra allowance by way of "excess costs and expenses" against the defeated party, because the successful party had been put to considerable annoyance and expense by reason of the prolonged examination of witnesses by his adversary's counsel.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 620-636; Dec. Dig. § 164.\*]

2. APPEAL AND ERROR (§ 119\*)—ORDERS APPEALABLE—EXTRA ALLOWANCE OF COSTS.

So much of a decree dismissing a bill as granted an extra allowance of costs was subject to review on appeal, where it was claimed that there was no law authorizing such an award.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 823-839; Dec. Dig. § 119.\*]

Appeals from the District Court of the United States for the Southern District of New York; C. M. Hough, Judge.

Suits by the Motion Picture Patents Company against William Steiner and others and against the Yankee Film Company. From so much of a final decree dismissing the bills in each case as awarded an additional allowance of \$150 costs in each case (192 Fed. 134), complainant appeals. Reformed and affirmed.

The appeals in the above-entitled actions are taken for the sole purpose of reviewing final decrees dismissing the bills with costs and an additional sum of \$150 in each case. The decrees contain the following: "Ordered, adjudged and decreed, that the bill of complaint herein be and the same hereby is dismissed with costs to defendant to be taxed, and in addition thereto there is hereby allowed to defendant the sum of one hundred and fifty dollars as excess costs and expenses, and that the defendant have judgment and execution therefor."

The assignments of error challenge the propriety of the decrees in one particular only. It is contended that the court erred in allowing the defendants \$150 in each case "as excess costs and expenses," there being no statutory authority for such an allowance.

J. Edgar Bull, Warren H. Small, and Waters Lee Helms, all of New York City, for appellant.

Seward Davis and William H. Kenyon, both of New York City, for appellees.

Before COXE, WARD, and NOYES, Circuit Judges.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

COXE, Circuit Judge. [1] These appeals present the single question whether, under section 982 of the Revised Statutes (U. S. Comp. St. 1901, p. 706), the court has power on final decree to award an additional allowance to the prevailing party who has been put to "considerable annoyance and expense" by reason of the prolonged examination of witnesses by his adversary's counsel. The only allegation upon which the award is based is found in the affidavit of defendant's counsel and is to the effect that defendant was put "to considerable expense in attending and cross-examining the witnesses and preparing for same."

Assuming complainant's examination to be vexatious and unnecessary, is there any statutory authority for taxing such an allowance against the defeated party? Section 982 is as follows:

"If any attorney, proctor, or other person admitted to conduct causes in any court of the United States, or of any territory, appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased."

The language used is so plain that there can be little doubt as to the proper construction of the section.

First.—It applies only to the attorney, proctor or other persons admitted to practice in the federal courts. It does not apply to the client, no matter how reprehensible his conduct may be. It was designed to punish the pettifogger, or at least, to make him pay the expenses occasioned by his misconduct.

Second.—It can be invoked only when such attorney, proctor, or other person admitted to practice in the federal courts, multiplies the proceedings in the cause so as to increase costs unreasonably and vexatiously. His conduct may be so contumacious as to justify proceedings for contempt; but unless he has increased the costs and done so unreasonably and vexatiously, he cannot be punished under this section.

Third.—The court cannot direct the offending attorney to pay all the costs, but only the excess of costs, which excess was occasioned by his unreasonable and vexatious conduct.

In short, the section permits the court to order that an attorney who has unnecessarily increased the costs shall pay personally the excess of such costs over the amount which was properly incurred. If, for instance, a witness is examined and the record clearly shows that his testimony, in so far as it relates to the issue in controversy, should have been completed in an hour and that by the unreasonable conduct of the attorney it is drawn out for days, the court may, under section 982, compel the offending attorney to pay the excess occasioned by this unnecessary prolongation of the examination. The evident purpose of the section is to punish the lawyer who vexatiously increases costs, by making him, and not his client, liable for the increase occasioned by his improper conduct. It recognizes that such costs should not have been incurred and places their payment on the person who is responsible for them.

There is nothing in the present record to show that the complain-



ant's attorney unnecessarily multiplied proceedings or added improperly to the costs. The amount of the costs is not stated, nor is the amount of the alleged increase occasioned by the misconduct of the complainant's attorney. There is a statement in the affidavit of Mr. Davis that a notice was given to the complainant that objection was taken by the defendant to all further proceedings upon the ground that the bill was vitally defective and that:

"Notwithstanding this notice, complainant proceeded with the testimony putting the defendant to considerable expense in attending and cross-examining the witness, and preparing for same."

The character and amount of this expense is not definitely stated. Whether any part thereof can properly be considered as costs is not known. If it can be so considered, the defendants will recover it under the final decree of January 9, 1912, which dismisses the bill "with costs to defendants." Such sum should not be recovered twice. If, on the other hand, the defendant's expenses are not taxable as costs, it is obvious that the complainant's conduct did not increase costs to the extent of these expenses.

The statute in question is not like those of many of the states permitting the court to make an extra allowance in difficult and extraordinary cases. It authorizes no additional allowance; it deals only with actual costs and provides that if they have been increased by the misconduct of an attorney, he shall pay the excess.

We are unable to find in section 982 authority for allowing an arbitrary sum (\$300, \$150 in each case) to be inserted in the judgment and paid by the complainant to the defendants.

The question here is not what the law should be, but what it is. Unquestionably the laws of New York are much more liberal in the matter of costs and allowances than those of the United States, where the costs are hardly more than nominal. In isolated cases the inability of the court to make an adequate allowance may produce hardship. But, on the other hand, the federal system has advantages which are obvious to all who have practiced in the courts of the United States.

The complainant does not lay much emphasis upon the proposition that in any event the "excess costs" must be charged against the attorney whose misconduct has produced them. It is quite possible that no member of the bar wishes such a precedent established. Nevertheless, it is plain to us that the object of the statute is to punish an officer of the court who vexatiously increases costs.

[2] We are inclined to think that the order is appealable for the reason that the complainant's contention is not that the court abused its discretion or made an excessive award of costs, but that there is no law permitting such an award. In *re Michigan Central Ry. Co.*, 124 Fed. 727, 59 C. C. A. 643.

The decree should be reformed as prayed for, with costs to the complainant.

#### On Motion to Modify.

This is a motion to modify a decision of this court granting costs to the complainant, on the ground that the complainant having failed

to file a disclaimer of an invalid claim prior to the commencement of this suit, is not entitled to costs. We think the sections of the Revised Statutes relating to disclaimers have no application to the present facts. The defendants, and not the complainant, succeeded in the court below. The bills were dismissed with \$300 "excess costs." The complainant insisted that the court had no power to make this allowance and the only way that it could assert this contention was by appeal. If the defendants had not insisted upon the \$300 allowance there would have been no costs in this court. In order to secure its rights, the complainant was compelled to appeal, the only question being the power of the court to award "excess costs." The complainant is claiming nothing under its patent, as to that the bill has been finally dismissed. The complainant's contention is that it is entitled to the costs made necessary in reversing an erroneous award which the defendants insisted upon collecting. That it is entitled to its costs and disbursements incurred in securing its rights in this regard seems to us very clear.

We see no reason to modify our direction that "the decree should be reformed as prayed for, with costs to the complainant." Of course, the costs referred to are the costs of this court.

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In re IRONCLAD MFG. CO.

(Circuit Court of Appeals, Second Circuit. December 9, 1912.)

Nos. 81, 91, 102.

**1. BANKRUPTCY (§ 238\*)—EXAMINATION OF WITNESSES—POWER OF COURT—  
"ORDER TO PRODUCE BOOKS."**

Where, in bankruptcy proceedings against a corporation, certain creditors contend that another corporation is in fact and substance the bankrupt under a different name, the bankruptcy court has jurisdiction to order such other corporation to "produce its books" before the special master on the hearing of orders to show cause why the receivership should not be extended over the property of such company; such an order not being a determination that the books belong to the bankrupt, but being in the nature of a subpoena duces tecum and contemplating merely their delivery for examination at the hearing.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 406; Dec. Dig. § 238.\*]

**2. BANKRUPTCY (§ 238\*)—PROCEEDINGS—CONTEMPT—EVIDENCE.**

Where an order is made in bankruptcy proceedings requiring another corporation to produce its books and papers before a special master, the presumption is that the corporation is in possession and control of its own books, and, to avoid proceedings against it for contempt in failing to produce the books in obedience to the order, the corporation must clearly show that it does not have, and cannot obtain, possession of them.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 406; Dec. Dig. § 238.\*]

**3. BANKRUPTCY (§ 238\*)—PROCEEDINGS—CONTEMPT—EVIDENCE.**

In contempt proceedings against an officer of a corporation for failure to produce its books in compliance with an order of the court in bankruptcy proceedings against another corporation, evidence held insufficient

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to show that she had possession of the books and insufficient to authorize her punishment for contempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 406; Dec. Dig. § 238.\*]

Petitions to Revise Orders of the District Court of the United States for the Eastern District of New York, in Bankruptcy; Julius M. Mayer, Judge.

In the matter of the bankruptcy of the Ironclad Manufacturing Company. Petitions by Elizabeth C. Seaman and the American Steel Barrel Company to revise orders of the District Court. First and second orders affirmed, and third order reversed.

See, also, 197 Fed. 280.

This cause comes here upon petitions to revise three orders of the District Court, Eastern District of New York. The first of these orders, made and entered May 14, 1912, required the Barrel Company and Mrs. Seaman as an officer thereof, and also Mrs. Seaman individually, to produce before and deliver to the special master certain books and papers. Mrs. Seaman only filed petition to review this order. The second order filed June 14, 1912, found the Barrel Company to be in contempt of court for disobeying the first order and fined it \$2,500. That company and Mrs. Seaman each filed a petition to revise said order. The third order filed July 3, 1912, found Mrs. Seaman to be in contempt of court for disobedience of the first order, fined her \$3,000, and committed her to the custody of the marshal for 20 days and for an additional 20 days in case of default in payment of the fine. She filed petition to revise this order.

Olcott, Gruber, Bonyng & McManus, of New York City (D. W. Kahn and Irving L. Ernst, both of New York City, of counsel), for petitioners.

E. T. Rice, of New York City, for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Petition for involuntary bankruptcy was filed against the Ironclad Company on May 23, 1911. It has since been adjudicated a bankrupt. Receiver was appointed May 23, 1911, and was succeeded by trustee January 9, 1912. It being contended by certain of the creditors that the Steel Barrel Company was in fact and substance the Ironclad Company under another name and that all its property was the property of the Ironclad Company, orders to show cause why the receivership should not be extended over the property of the Barrel Company were made. These orders (dated June 13, and June 16, 1911) are not before us, but apparently they contained provisions enjoining these petitioners from removing or permitting to be removed or transferring or disposing of any of the books or property of the Barrel Company. Upon the hearing of these orders to show cause the District Judge expressed a doubt as to whether he had jurisdiction to decide summarily whether the claim of ownership made by the Barrel Company was bona fide or not and for that reason denied the motions. Upon his decision being brought here for review we held that the receiver and creditors were entitled to have the bankruptcy court make a preliminary investigation sum-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

marily to decide whether or not such claim of adverse ownership was merely colorable. 191 Fed. 831, 112 C. C. A. 345.

Upon the remand the District Court undertook such investigation. It was manifest that the books and records of the Barrel Company might be expected to contain important evidence bearing upon the question in controversy. Therefore after some preliminary investigation as to the whereabouts of the books, and after hearing both of these petitioners, the court made the order of May 14, 1912. It required the Barrel Company and Mrs. Seaman as an officer thereof and also Mrs. Seaman individually to "produce before and deliver to the special master on or before May 15, 1912, the ledgers, journals, cashbooks, vouchers, and passbooks of the Steel Barrel Company from the period beginning at the time of its incorporation in February, 1905, up to September 1st, 1910." Apparently the books and papers not covered by this specific designation had already been produced.

[1] The petitioners contend that the court was without jurisdiction to make such an order, apparently construing it as a determination that the books of the Barrel Company were the property of the trustee of the Ironclad. This is a misconception of the order. It did not direct that the books should be turned over to the trustee. It merely required them to be produced before and delivered to the special master, who, by designation of the District Court, was sitting as a court to take testimony upon that very issue. It was merely the equivalent of a subpoena duces tecum; the delivery to the special master contemplates merely a delivery for examination at the hearing. When books and records are produced in obedience to an ordinary subpoena duces tecum, the court may, and in a proper case sometimes does, impound them, when the ends of justice so require; but such impounding in no way affects the title. In view of the broad grant of power to make orders and issue process conferred by section 2, cl. 15, of the Bankrupt Act, and of section 21a of said act (Act July 1, 1898, c. 541, 30 Stat. 546, 552 [U. S. Comp. St. 1901, pp. 3420, 3430]), we are clearly of the opinion that the order was one which the District Court had the power to make, and in view of what the present record discloses the case was one to call for the prompt exercise of such power. Whatever suggestions might be made by the owner of the books, as to interference with the conduct of his daily business, or as to some particular entries which he might contend should not be exposed to some business rival, could be addressed to the discretion of the court after the books were produced and no doubt would receive proper consideration.

The order of May 14th, 1912, is affirmed.

[2] As to the order finding the Barrel Company in contempt for failing to produce the books and papers called for, we start with the presumption that a corporation is in the possession and control of its own books. It cannot be allowed to rebut that presumption by the mere bald statement of some officer that he does not know where they are; it must clearly show that it does not have, and cannot obtain, possession of them. Any other rule would permit corpo-



rations to ignore court orders with practical impunity. The testimony submitted by petitioner wholly fails to rebut the presumption. If it be claimed that the books have passed out of the possession of the corporation, there should be the fullest disclosure of the latest date when the books were in its possession and of the circumstances under which they were removed therefrom. If they have passed into the possession of some one who has no right to them, and presumably no one but the corporation has the right to them, there should be full disclosure as to what steps have been taken to recover possession. If some faithless officer has secreted them, the courts are open to the corporation to effect their return. If they have been destroyed and cannot, therefore, be produced, time, place, and circumstances of such destruction should be shown as fully as possible, so that the court may be able to determine whether the corporation was itself innocent, or whether such destruction was an operation in which officers, directors, and stockholders all took part or to which they assented.

The order of June 14, 1912, is therefore affirmed. Such affirmation, however, would operate as *res adjudicata* touching only the order already disobeyed. If the District Court, in a further effort to obtain necessary evidence, should again order the corporation to produce these books, it would be free to show if it could, any facts which would excuse it from such production. Possibly, if all concerned, officers, directors, and stockholders, realized that, unless they could rebut the presumption of possession by very clear proof, a fine very much heavier than the one imposed for the first offense would presumably be imposed, there might be a much fuller and franker statement of facts than there has yet been made.

[3] As to the order finding Mrs. Seaman individually in contempt for not producing books which do not belong to her, we have no presumption of possession. Possession must be shown by proof, and it seems to us that the proof to be found in this record does not satisfactorily establish the proposition that at the time the order to produce was served upon her the books were in her custody and control. Her own evidence is very unsatisfactory and seems to indicate that no reliance can be placed on any statement she may make; but, if her testimony be struck out as untrustworthy, there is no other evidence sufficiently convincing to warrant her imprisonment for contempt. In her own testimony we do not find any statement which can be taken as an admission that the books were in her personal possession. The District Judge relied principally upon a joint answer of the Barrel Company and of Mrs. Seaman to the orders to show cause of June, 1911, in which answer there is an averment that the Barrel Company was in possession, enjoyment, and control of certain real estate, buildings, machinery, tools, and assets of every description, including "books of account, records, and documents." This averment is apparently directed to an issue of ownership, and moreover it admits only possession by the Barrel Company, not by Mrs. Seaman individually. It also includes all books and documents, old and new, and might have been made in just such phraseology if these particular books and records, now sought for, had already been destroyed. To

warrant imprisonment for failure to obey the order of May 14, 1912, a clear case of disobedience of that particular order must be made out, and we do not think the proof is sufficient. It is quite apparent from this record that throughout this bankruptcy proceeding Mrs. Seaman has been repeatedly contumacious; when under examination flippant, defiant, impertinent, evasive, and self-contradictory. It may be that on some occasions her conduct has been such as to call for punishment as well as admonition; but it is not for these things that the order of July 3d found her in contempt.

We are not convinced that sufficient has been shown to warrant the finding of this last-named order, and, for that reason, reverse it.

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CHICAGO & S. H. S. S. CO. v. LYNCH.

(Circuit Court of Appeals, Seventh Circuit. October 8, 1912.)

No. 1,889.

**1. SHIPPING (§ 166\*)—CARRIAGE OF PASSENGERS—INJURY TO SICK PASSENGER—LIABILITY OF CARRIER—QUESTION FOR JURY.**

Plaintiff, a young woman, while an excursion passenger on defendant's steamer on Lake Michigan, during a high wind which caused the vessel to roll heavily, became very sick, as did many other passengers. She was seated in a chair against the cabin wall, with other occupied chairs on either side and in front, when the cabin watchman directed her to move, so he could enter a stateroom with another passenger. She was entirely helpless, and the watchman, with knowledge of her condition, moved her chair to the center of the cabin, where the floor was slippery, and, owing to her helpless condition, she was thrown to the floor by the rolling of the vessel and severely injured. *Held*, that the question of the liability of defendant for the action of its employé in moving plaintiff from a place of comparative safety, without her consent or volition, to a place which proved less safe, was one for the jury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 538-552; Dec. Dig. § 166.\*]

**2. SHIPPING (§ 166\*)—ACTION FOR INJURY TO SICK PASSENGER—EVIDENCE.**

In such action, evidence of the slippery condition of the cabin floor was competent.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 538-552; Dec. Dig. § 166.\*]

**3. DAMAGES (§ 132\*)—PERSONAL INJURY—EXCESSIVE DAMAGES—PERMANENT INJURY TO FOOT.**

An award of \$11,000 damages to a previously healthy woman, 35 years old, for a permanent injury to her foot, which practically crippled her for life, from which she constantly suffered pain, and which was likely to become worse, *held* not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Action at law by Birdie Lynch against the Chicago & South Haven Steamship Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff and her mother on July 22, 1909, purchased excursion tickets at Chicago for a round trip to South Haven and return. They paid \$1 each for two tickets, and this entitled them to passage on the steamer, but did not include either meals, staterooms, or berths. The steamer South Haven is a steel passenger steamer 248 feet long, 43 feet beam, and was allowed to carry 2,850 excursion passengers, and under an inspection by the local United States inspectors was required to carry a crew of 68 officers and men all told, but on this voyage had a crew of 97 all told. Nothing unusual occurred on the trip from Chicago to South Haven, and at 5 o'clock the steamer left the port of South Haven bound to Chicago on the return trip. She had on board then 651 passengers, less than one-quarter of the number she was allowed to carry.

The wind was blowing from 40 to 45 miles an hour from the northward and westward, and not long after leaving South Haven the steamer began to roll in the heavy sea and the passengers began to get seasick. It is estimated that three-quarters of the passengers were women and children, and the remainder men. It is usual for three-quarters of the women and children and about half of all the men to be seasick in a sea such as this was. Consequently a great number of passengers were seasick. For about an hour plaintiff with some friends sat on the after cabin deck. A northerly wind sprang up, and the air grew chilly, and the sea become rough.

Plaintiff arose and proceeded to the cabin. She began to feel ill from seasickness, and stopped for a while at the entrance. Mr. Lionheart, a witness, noticing that she was ill, looked about the cabin for a chair, and found one that was vacant. He seated plaintiff in this chair, and then procured a wooden deck chair for plaintiff's mother, who sat down, facing her daughter, with her hand on her daughter's knee. Plaintiff then was sitting in a comfortable wicker arm chair, with its back against the wall of the cabin. On either side of her were passengers occupying chairs which were close to hers, and her mother sat facing her in front. Plaintiff was extremely sick, and was weak and limp and incapable of any exertion, and from time to time she vomited. She was in a safe position, well protected, and free from danger. She had been thus situated for about an hour and a half, when the cabin watchman made his appearance, seeking entrance to a stateroom behind plaintiff's chair. He said to plaintiff: "You must move from here. I've got some folks in this stateroom; got to put these folks in this stateroom." Plaintiff attempted to get up, and fell back helpless. She was too weak to move. The watchman saw her in this sick and helpless condition, and took hold of her chair and pulled her away from her position to a point about six feet away, near the center of the cabin, and left her there, without support or protection, on a floor slippery from vomit, and without any one to give her aid. She was utterly unable to care for herself.

Before she was moved from the wall her chair remained stationary. After being moved out she noticed that it slipped twice, felt it move, some three or four inches. She was limp, seasick, vomiting, in a very weak and sick condition. "I felt my chair move, and I came in contact with something, I don't know what, and for a while I didn't remember anything \* \* \* I found myself on the floor with a terrible pain in my foot, and a chair over me." She was picked up and properly cared for. The right foot was injured in some way by her fall. After being taken home she had competent medical attendance extending from July 22 to September 14, 1909. There was much swelling and discoloration. An examination two years later, shortly before the trial, disclosed a fracture of the small bone of the right leg at the line of the ankle joint, the upper bone of the joint was dislocated and thrown entirely forward, and the bones of the instep were ankylosed, solid, a bony ankylosis; the joints of the instep being all destroyed and amalgamated into one mass of bone, immobile. The four tendons which lift the foot are separated from the front muscle of the leg. The tendons in the front part of the ankle are either torn off or torn loose from the muscle, so that there is no power to lift the foot. The injury is a permanent one, with a tendency to grow worse.

The boat was seaworthy, and properly equipped, manned, and navigated. The chair was not defective in any way. The case was tried by jury, and a verdict of \$11,000 returned, upon which judgment was entered, from which

this writ of error was taken. Defendant moved the court at the close of all the evidence to direct a verdict for it, which was denied. Error is also assigned for the refusal of the court to charge that plaintiff took the risk of the rolling and pitching of the steamer, and of her own and the seasickness of other passengers in consequence thereof, and in charging that the condition of the floor of the cabin in any manner contributed to or caused the injury; also that the amount of the verdict is excessive.

Charles E. Kramer, of Chicago, Ill., for plaintiff in error.

Axel Chytraus and Emery S. Walker, both of Chicago, Ill., for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above). The main question is whether plaintiff was injured by the rolling of the steamer and her own seasickness, over which defendant had no control, or by the negligence of the cabin watchman in moving her from a place of safety into an unsafe position. Counsel for defendant urges that one place was as safe as the other, that no other person fell, that no reasonable person would anticipate an injury from the placing of plaintiff in a comfortable and proper chair near the center of the stateroom, even in her condition of sickness, and that the highest degree of care consistent with the practical operation of the vessel was exercised. On the other hand, plaintiff's position is that it was a question of fact, properly submitted to the jury, whether it was not negligence for the watchman to take her, for the convenience of another passenger, from a position where her chair was against the cabin wall, flanked on both sides by other occupied chairs, and protected in front by her mother's chair, and place her in a comparatively unprotected place upon a slippery floor, especially in view of her extreme helplessness; that if she had not been moved at all no liability could have resulted, but if defendant assumed to change her position it was its duty to put her in a place equally safe. Upon this point the court charged as follows:

"If the plaintiff became sick on defendant's boat, and the defendant's employes knew of her sickness, it was their duty to treat her with such care and consideration as were reasonably necessary to protect her from injury. And if the plaintiff, by reason of such sickness, was weak and helpless, and was seated in a chair in a position wherein she was safe and was protected from injury, and if one of defendant's employes, knowing her condition, moved her from such safe position by pulling or moving the chair in which she was sitting, in such manner and in such different position that the plaintiff was unsafe and unprotected, while sick and helpless and unable to care for herself, and was so left by the defendant's employe, and if, by reason thereof, no negligence of the plaintiff contributing, the plaintiff fell and was injured, the defendant is liable to the plaintiff for damages for the injuries thus sustained, provided you further believe from the evidence that in so doing the act of defendant's employe was not the exercise of the highest degree of care by the defendant for the plaintiff's safety, consistent with the practical operation of defendant's boat."

[1] 1. The jury were justified in finding, under this instruction, that defendant voluntarily assumed the responsibility of taking some degree of care of plaintiff when she was moved from the wall. In



this way defendant's attention was specially called to her, her condition of helplessness, and all the surrounding circumstances, and it thus became its duty, as she was unable to care for herself, to take reasonable means to insure her safety. Whether leaving her in the changed position would be likely to cause injury, or the watchman could reasonably have foreseen the probability of injury, were questions for the jury, depending on the extent to which the boat was lurching or rolling, plaintiff's degree of helplessness, the condition of the floor, and other attending circumstances. All these conditions, not capable of being fully reproduced from the printed record, made the case peculiarly one for the jury. In this case we need go no further than to hold that if a sick or helpless passenger is, for the convenience of another passenger, taken from a place of comparative safety without his consent or volition, and put in another place found as a matter of fact to be less safe, liability for a resulting injury is a question for a jury. The degree of responsibility of carriers for sick passengers is discussed in *Croom v. Chicago, etc., Co.*, 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557, *A., T. & S. F. R. Co. v. Weber*, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543, *Mathew v. Wabash R. Co.*, 115 Mo. App. 468, 78 S. W. 272, 81 S. W. 646, *Haug v. Great N. R. Co.*, 8 N. D. 23, 77 N. W. 97, 42 L. R. A. 664, 73 Am. St. Rep. 727, *Conolly v. Crescent City R. Co.*, 41 La. Ann. 57, 5 South. 259, 6 South. 526, 3 L. R. A. 133, 17 Am. St. Rep. 389, and *L. S. & M. S. R. Co. v. Salzman*, 52 Ohio St. 558, 40 N. E. 891, 31 L. R. A. 261.

[2] 2. Error is assigned for not excluding evidence of the slippery condition of the cabin floor. As we have seen, this was one of the attending circumstances to be considered by the jury in determining whether there was any negligence. It was as pertinent, though perhaps not as influential, as the lurching of the vessel or the physical condition of the plaintiff.

3. It is urged that the court erred in not charging the jury that plaintiff took the risk of the rolling and pitching of the boat and of her own seasickness and that of other passengers. The court did so charge. The jury were repeatedly told that the plaintiff could not recover unless defendant was negligent, that the burden of proof was on the plaintiff, that the mere happening of the accident did not make defendant liable, and expressly that the carrier was not liable for injuries from seasickness or rolling of the boat, apart from negligence.

[3] 4. It is claimed that the damages, found by the jury to be \$11,000, are excessive. This is a permanent injury to a previously healthy woman, 35 years old. She is practically crippled for life, suffering from a deformity which will be a constant grave annoyance and interfere with her happiness and means of livelihood as long as she would be able to earn her way. She will always suffer some pain, likely to affect her health, and she will probably gradually get worse. Under these circumstances we cannot say that the damages were excessive.

It is proper to say that the evidence as to the extent of the injury was in sharp conflict. Physicians called by defendant testified that

the fractures shown by plaintiff's evidence did not exist, and that she will ultimately recover. We have stated the case as the jury found it to be, assuming that the facts found by them implied by a general verdict are the facts established by the record.

The judgment is affirmed.

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**McKEE v. HENRY.**

(Circuit Court of Appeals, Eighth Circuit. November 11, 1912.)

No. 3,718.

**INDIANS (§ 13\*)—LANDS—DESCENT—STATUTORY PROVISIONS.**

Under an allotment in November, 1902, to a Creek Indian, who died in November, 1899, and was duly enrolled, a deed to his heirs passes title, under Act Cong. June 30, 1902, c. 1323, § 6, 32 Stat. 501, providing for the descent and distribution of the property of Creek Indians according to Mansf. Dig. Ark. §§ 2522-2545, to the allottee's brother, and not, under Act March 1, 1901, c. 676, § 28, 31 Stat. 869, providing for descent and distribution according to the laws of the Creek Nation, to his father; no title having vested in severalty till the allotment was made, after the passage of the act of 1902.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. § 13.\*]

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Bill in equity by Hugh Henry, guardian of Coy Warden, against W. L. McKee. From a decree for complainant, defendant appeals. Affirmed.

Preston C. West, of Muskogee, Okl. (Lex V. Deckard, of Okmulgee, Okl., on the brief), for appellant.

George S. Ramsey, of Muskogee, Okl. (William M. Matthews and C. L. Thomas, both of Muskogee, Okl., on the brief), for appellee.

Before SANBORN, HOOK, and SMITH, Circuit Judges.

SMITH, Circuit Judge. Clarence N. Warden was not a member of the Creek or Muskogee tribe of Indians, and has never been received or enrolled as such, but he lawfully married a woman of part Creek Indian blood. She was recognized as a member of the Creek tribe, and bore to Warden two sons, Coy Warden and Hugh Warden, and then died leaving as her sole issue said sons. Hugh Warden was born in January, 1899, and died November 28, 1899.

Under the fourteenth article of the treaty of March 24, 1832 (7 Stat. 366), the third article of the treaty of February 14, 1833 (7 Stat. 417), by the letters patent issued to the Creek Nation of the 11th day of August, 1852, and the third article of the treaty of August 7, 1856 (11 Stat. 699), the lands of the Creek Nation situated in Indian Territory were held by them as a tribe in fee simple so long as they should exist as a nation and continue to occupy the lands. By Act March 1, 1901, c. 676, 31 Stat. 861, confirming the agreement between the Dawes

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Commission, on behalf of the United States, and the Creek tribe of Indians, as by said act amended, provision was made for the allotment of said lands in severalty. By section 28 of said act it was provided:

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

Hugh Warden having lived from January, 1899, to November, 1899, his name was properly put upon the rolls. On June 30, 1902 (32 Stat. 500, c. 1323), Congress with certain modifications confirmed a supplemental agreement on the same subject with the Creek Indians which contained the following:

"8. The provisions of the act of Congress approved March 1, 1901 ([Act March 1, 1901, c. 676] 31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: Provided, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And provided further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."

Subsequently and on November 12, 1902, there was allotted to said Hugh Warden the 160 acres of land here in controversy. July 1, 1904, the Principal Chief of the Creeks executed a deed of this land, which was approved by the Secretary of the Interior, to the heirs of Hugh Warden. June 3, 1908, Clarence N. Warden conveyed the land to W. L. McKee, and this deed was recorded. Hugh Henry is the guardian of Coy Warden, and brought this suit, alleging he was in possession of the premises in question, and asking a decree canceling the deed from Clarence N. Warden to W. L. McKee and quieting his title. The case was submitted upon an agreed statement of facts, a decree was entered as prayed, and Mr. McKee appeals.

The sole question in this case is as to who took the title to the lands under the conveyance to the heirs of Hugh Warden—his father, Clarence N. Warden, or his brother, Coy Warden. There is little or no dispute that under the laws of descent and distribution of the Creek Nation the father of Hugh Warden was his heir, and, on the other hand, under chapter 49 of Mansfield's Digest of the Statutes of Arkansas and the provision "that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation," Coy Warden was the sole of Hugh Warden, and the question is: Was the act of June 30, 1902, made after the enrollment, but before any allotment had been made to Hugh Warden, applicable to this tract; and, if so, was it valid?

This case has been argued with great care; but, in the view taken of it, it will be only necessary to consider a small number of the points presented. It must be remembered that this land was in only partially organized territory of the United States at the time in question, and the Constitution provides:

"The Congress shall have power to \* \* \* make all needful rules and regulations respecting the territory \* \* \* belonging to the United States." Section 3, article 4, of United States Constitution.

That is to say, Congress had full power to make laws of descent in Indian Territory, independently of the Indians or other people residing there; but the Muskogee or Creek tribe of Indians were under the special guardianship of Congress, and it had plenary authority over them. *Lone Wolf v. Hitchcock*, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299.

It is not meant that Congress could defeat the Indian title which was held under patent from the United States, much less that a title once allotted could be disturbed. *Choate v. Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941. But it had full and ample authority to fix the laws of descent, with or without the consent of the Indians, both under its guardianship of the Indians and their property, and under its power to make all needful rules and regulations respecting the territory belonging to the United States. It had this right to make laws by agreement with the Indians, but it beclouds the issue if it be assumed that such agreement was necessary when it was not. These lands belonged to the Indians as a tribe so long as the tribe existed and they occupied the land, with reversion to the United States; but no part of these lands belonged to any specific Indian. The Muskogee or Creek tribe was in the nature of a dependent nation; and as our national public buildings belong to the nation, the citizen, while he has an interest in them, has no share in the title to them, so these lands, so far as the Indian title was concerned, belonged to the tribe as a community, and no separate Indian had any title whatever, severally or as a tenant in common. No law or agreement to divide the lands in severalty had any effect to create such a title until the lands were actually allotted. All these laws contemplated that the tribe, through its members, would receive substantially the whole reservation in lands or money. If the right to lands was vested after enrollment and before allotment, then why was the interest of the Indians not actually vested in the remaining lands and money? Yet it was expressly held in *Gritts v. Fisher*, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928, that the interest in the remaining lands and money was not vested, and that new participants could be added by Congress.

The enrolling primarily established the right of citizenship, and only incidentally conferred the right to allotment, and until allotment was made no inheritable right vested in the individual Indian.

"The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms." *Stephens v. Cherokee Nation*, 174 U. S. 445, 488, 19 Sup. Ct. 722, 738 (43 L. Ed. 1041).



The title, so far as here pertinent, of the Creeks, was identical with the title of the Cherokees to their lands, and in *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307, 23 Sup. Ct. 115, 120 (47 L. Ed. 183), it is said:

"Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. *The Cherokee Trust Funds*, 117 U. S. 288, 308 [6 Sup. Ct. 718, 29 L. Ed. 880]. The manner in which this land is held is described in *Cherokee Nation v. Journeyake*, 155 U. S. 196, 207 [15 Sup. Ct. 55, 60 (39 L. Ed. 120)], where this court, referring to the treaties and the patent mentioned in the bill of complaint herein, said: 'Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them.' "

As already suggested, if enrollment conferred a vested interest in any lands, why did it not confer a vested interest in any money or other property belonging to the tribe? Yet it has been held that the power of Congress to admit new persons to the rolls, thereby depleting the amount which would go to those previously on the rolls, is political in its character, and not within the control of the courts. *Muskra v. United States*, 219 U. S. 346, 31 Sup. Ct. 250, 55 L. Ed. 246.

In *Woodbury v. United States*, 170 Fed. 302, 95 C. C. A. 498, this court characterized the right of an Indian long after his enrollment, but before allotment, as "a mere float—giving him no right to any specific property."

When the allotment was made for the first time the rights of any individual vested, and the title became vested in the one at that time fixed by the law, and it makes no difference what previous laws may have provided.

In the conclusion we have reached we find that we are in harmony with the Supreme Court of Oklahoma. *Brady v. Sizemore*, 124 Pac. 615; *Shellenbarger v. Fewel*, 124 Pac. 617.

While our conclusion has been reached upon the authority of the Supreme Court of the United States, of this court, and what seems to us sound reason, it is gratifying to find that there is uniformity in the decisions of the state courts and this court.

At any time after enrollment, and before allotment, Congress could have repealed all legislation providing for allotment, and have restored the old system of tribal control; and, if this is true, manifestly no inheritable interest vested in any one until allotment.

The decree of the Circuit Court is affirmed.

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CLARK v. TILLINGHAST.

(Circuit Court of Appeals, Seventh Circuit. October 8, 1912.)

No. 1,878.

**BILLS AND NOTES (§ 97\*)—PARTIAL FAILURE OF CONSIDERATION—SET-OFF.**

A national bank owning an equity in certain real estate, a corporation was organized to take over the same, which executed bonds to the amount

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of \$85,000 and delivered the same to the bank to represent such equity. The Comptroller of the Currency required that the investment be reduced by a sale of \$40,000 of the bonds, whereupon the bank's cashier sold \$6,000 par value to defendant for \$5,000, taking his note, secured by the bonds, as collateral therefor. This was objected to as a makeshift by the bank examiner, who then insisted that the transaction be rescinded, that the bonds be restored to the assets of the bank, and that the directors guarantee payment of \$20,000 of the sum represented by them. This was carried out, and defendant's note withdrawn from the bank's assets by the cashier and placed in his personal desk, but was never surrendered to defendant, and on failure of the bank it passed into the hands of plaintiff, its receiver, who brought suit thereon, after having sold the equity in the real estate represented by the bonds held by the bank, without notice to defendant, and without recognizing his interest therein. *Held* that, since it was not within the power of the Comptroller, his receiver, the directors, or all of them, to have deprived the bank of any advantage it had fairly obtained by a sale of the bonds, especially as it affected their own liability, the rescission was invalid, and that the most that defendant was entitled to in an action at law was a set-off of an amount equal to the value of his interest in the equity, on the theory of partial failure of consideration for the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-181, 185-192, 196-198, 200, 202-205, 208-212, 1372-1376; Dec. Dig. § 97.\*]

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

Action by P. Tillinghast, as receiver of the First National Bank of Ironwood, Mich., against Charles R. Clark. Judgment for plaintiff, and defendant brings error. Affirmed.

Defendant in error, hereinafter termed plaintiff, filed his complaint against plaintiff in error, termed herein defendant, in said court on October 15, 1909, to recover, as such receiver, upon a certain note of defendant, dated October 31, 1908, for the sum of \$5,000 and interest. From the record, it appears that the transactions were as follows, viz.:

Some time prior to June, 1908, said bank was the owner of an equity in certain Chicago real estate, upon which there was a prior incumbrance of \$95,000; that this equity was valued at about \$80,000, and stood in the names of Jahn and Larsen, respectively president and cashier of said bank; that in June, 1908, Jahn and Larsen organized a corporation under the laws of Michigan, known as the Commercial Investment Company, and caused all the stock, except two qualifying shares, to be issued to themselves; that said corporation thereupon executed bonds to the amount of \$85,000, and delivered the same to the bank; that, while no declaration of trust was ever extended, all parties understood that the bonds represented the said equity, and the several transactions were so dealt with by all concerned that while the bank was holding said \$85,000 bonds as a part of its assets, the same being held in lieu of said equity, the Comptroller requested that the investment be reduced by the sale of \$40,000 of said bonds, whereupon Larsen, cashier, asked defendant, who was then a director of said bank, among others, to purchase \$6,000 par value of said stock for the sum of \$5,000; that Clark thereupon made such purchase, gave his note therefor to the bank, and put up the stock as collateral thereto; that thereafter the bank examiner objected to said arrangement, characterized it as a mere makeshift and demanded that the notes be returned to the makers, that the bonds be placed back among the assets, that the directors guarantee the payment of \$20,000 of the sum represented by said bonds, and that Jahn and Larsen deposit certain personal securities to secure such agreement; that the directors then agreed to cancel the former arrangement, return the notes given on the sale of the bonds, return the bonds to the bank, and make said guaranty; that such action was taken that the note of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant was withdrawn from the bank assets and placed by the said Larsen, cashier, in his personal desk, and defendant notified thereof. This all took place about June 13, 1909. It further appears that on June 21, 1909, the examiner, under instructions from the Comptroller, took possession of the bank and its assets, including the bonds in question, and caused said equity to be conveyed to him, and in some manner became possessed of defendant's said note. The defendant charges that he forced open said desk and took the note. This the receiver denies.

The receiver was appointed on June 25, 1909, and took over said assets; that in August, 1909, defendant advised the receiver of the facts regarding the release of his note and demanded the return of the same to him, which demand the receiver denied; that thereafter, without notice to defendant, the receiver proceeded to collect the rent from said equity, turned it over to the Comptroller, and sold said equity for about \$26,000 net, including rentals, and turned the whole proceeds over to the Comptroller. All this was done without in any way taking defendant's rights into consideration. It further appears that, prior to the said sale of said equity, this suit was instituted. On the hearing, the trial court held that the note in suit was not accommodation paper, but was among the assets of the bank; that in view of the fact that the bonds constituted only an indirect lien on the equity, the value of which was uncertain, the attempted rescission of the transaction wherein the note was given was not fair to the bank; that by reason of Jahn's and Larsen's knowledge of the insolvency of the bank, and the manifest interest of defendant, those three persons were not qualified to act in voting such a rescission; that plaintiff, in selling the equity, destroyed the value of the bonds; that defendant, having taken the bonds and given his \$5,000 note therefor, being the note in suit, was entitled to his pro rata share of the proceeds of the equity, and the income thereof, which the court fixed at the sum of \$1,968; and that such sum might be set up in a proceeding at law as for a partial failure of consideration. The court thereupon entered judgment for \$5,000 and accrued interest, less said sum of \$1,968 and accrued interest, viz., the sum of \$3,535.39, as of July 20, 1911, from which judgment this writ of error is taken.

The court filed a finding of facts substantially as above set out, except that he found that the examiner discovered—(1) the note in the open desk of the cashier unsurrendered to defendant, and took possession of it lawfully; (2) that the attempted rescission took place on a Sunday; (3) that at the time the receiver knew the said equity was the only property back of said bonds, and also knew defendant's relation to said bonds; (4) that defendant was chargeable with knowledge of the fact that the bank was insolvent at the time rescission of the sale of the bonds was agreed on.

The errors assigned are: That the court erred in finding that the receiver came properly by the note and was the owner of it; that the court erred in holding that Jahn and Larsen knew, and that the other directors were chargeable with knowledge, that the bank was insolvent, and in holding that defendant was disqualified to vote for rescission; that the court erred in holding that defendant's \$6,000 bonds were worth less than his note, in fixing defendant's interest in said equity at \$1,968, and in holding that the proposed release of defendant was unfair to the bank; and that the court erred in excluding certain evidence bearing upon the rescission, and in failing to pass upon all the material issues raised.

Edward M. Smart, of Milwaukee, Wis., and H. L. Butler, of Madison, Wis., for plaintiff in error.

T. W. Spence and Irving A. Fish, both of Milwaukee, Wis., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). It does not appear that the Comptroller directed the \$20,000 guaranty to be given in lieu of, or as a substitute for, the notes taken on sale of the \$40,000 bonds, nor does it appear that the \$20,000 guaranteed was

realized on. Manifestly, it would not have been fair or legal to require defendant to take back his note, surrender his bonds, and join the other directors in guaranteeing the payment of \$20,000, and at the same time withhold surrender of his note. It appears that the other purchasers of stock received their notes when they surrendered their stock—at least such is the inference from the record—and that defendant could have had his, at any time after the rescission and prior to the advent of the examiner, by applying for it. It must be remembered, however, that it was not within the power of the Comptroller, or his receiver, or the directors, or all of them, to have deprived the bank of any advantage it had fairly obtained by the sale of the \$40,000 of bonds, especially as it affected their own liability. Thompson on Corporations (2d Ed.) 1225 et seq., 6199 et seq., and cases cited; *Drury v. Cross*, 7 Wall. 302, 19 L. Ed. 40; *Hays v. Citizens' Bank*, 51 Kan. 535, 33 Pac. 318; *Taylor v. Mitchell*, 80 Minn. 492, 83 N. W. 418; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 647, 26 N. W. 184; *Asheville Lbr. Co. v. Hyde* (C. C.) 172 Fed. 730, and cases there cited.

The advantage belonged to the creditors, for whom they were to that extent trustees. Just why the examiner should deem the bonds a weak asset, and at the same time take the directors' guaranty of \$20,000 in preference to the individual obligations of the directors to the amount of \$40,000, is not made plain by the record. There is a seeming inequality of justice in pursuing this defendant, just because he alone was tardy in taking up his note. That question, however, is not presented by the record, and need not be further considered.

It is clear from the record, however, that the examiner, the Comptroller, and the receiver were advised of the facts: (1) That the bonds represented the equity in the Chicago block, and should be dealt with as though they constituted the equity; (2) that defendant was the owner of \$6,000 thereof, subject to the lien of his \$5,000 note held by the bank; (3) that the equity was of an uncertain value, and of such a nature as not to be quickly realized on without sacrifice; and (4) that defendant's interest, entitled him to notice of and participation in any proceedings involving the annihilation of his \$6,000 bond investment. The Circuit Court took this view of the matter, and attempted to remedy plaintiff's disregard of defendant's rights in that respect by crediting the latter with his pro rata share of the proceeds of the sale of the equity, on the theory of part failure of consideration. Whether he succeeded in making a fair adjustment must remain a mere matter of conjecture, so far as appears in the record. Defendant was equitably entitled to have his \$6,000 of bonds, or  $\frac{6}{10}$  of the equity, dealt with separately, or at least to an ascertainment that a sale of the whole equity would result in an advantage to him. Instead of making any attempt to protect defendant's interests, the receiver sold the collateral as though it were an independent asset, taking the benefits of the attempted rescission and disavowing the rescission.

The Circuit Court held that there was in this case a partial failure of consideration, and upon that theory allowed defendant his pro



rata share of the equity as above stated. With this holding, under the facts of the case, we do not dissent, although there may be some question whether defendant may in such a proceeding set up want or failure of consideration. The examiner required the sale of the bonds for the purpose of enabling the bank to pass an examination. In such a case it has been said that the consideration for the note was, among other things, the deposits made upon the credit obtained or favor granted by reason of the extension, if any deposits were made. *Skordal v. Stanton*, 89 Minn. 511, 95 N. W. 449; *Atwater v. Smith*, 73 Minn. 507, 76 N. W. 253; *Pauly v. O'Brien* (C. C.) 69 Fed. 460; *New England Fire Ins. Co. v. Haynes*, 71 Vt. 306, 45 Atl. 221, 76 Am. St. Rep. 771 (1899); *State Bank v. Kirk*, 216 Pa. 452, 65 Atl. 932; *Best v. Thiel*, 79 N. Y. 15; *Tillinghast v. Carr* (C. C.) 82 Fed. 298; *Murphy v. Gumaer*, 18 Colo. App. 183, 70 Pac. 800; *Merchants' Bank v. Rudolf*, 5 Neb. 527; *Proctor v. Baldwin*, 82 Ind. 370; *Bigelow on Estoppel* (5th Ed.) 611; *Morris on Banks and Banking*, § 137.

We are not impressed with the injection of the fact that the rescission was agreed upon on a Sunday. If this defense should avail, it is a fact that action and consequent ratification was had on a secular day. In our view of the case, that question is not material. While we are of the opinion that the action of the receiver in handling and selling the stock was irregular, and for all that appears unfair to defendant, we are not disposed to hold that defendant has not received all the consideration he is entitled to in a proceeding at law.

The judgment of the Circuit Court is affirmed.

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**TILLINGHAST v. CLARK.**

(Circuit Court of Appeals, Seventh Circuit. October 8, 1912.)

No. 1,877.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

Action at law by P. Tillinghast, as receiver of the First National Bank of Ironwood, Mich., against Charles R. Clark. Plaintiff brings error. Affirmed.

T. W. Spence and Irving A. Fish, both of Milwaukee, Wis., for plaintiff in error.

Edward M. Smart, of Milwaukee, Wis., and H. L. Butler, of Madison, Wis., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge. This writ of error is sued out to reverse so much of the judgment of the lower court as allows to the defendant in error herein a credit upon the cause of action brought before this court in No. 1,878 (201 Fed. 77), wherein the parties hereto are reversed, based upon partial failure of consideration for the promissory note there involved.

For the reasons set out in the opinion filed in said former cause, this cause is also affirmed.

## In re TENGWALL CO.

## FALLOWS v. CONTINENTAL &amp; COMMERCIAL TRUST &amp; SAVINGS BANK.

(Circuit Court of Appeals, Seventh Circuit. October 8, 1912.)

No. 1,811.

## 1. EXECUTION (§ 96\*)—AUTHORITY OF OFFICER TO MAKE LEVY—DELIVERY FOR "SERVICE."

While delivery of an execution to a sheriff, to be effective, must not be a limited delivery, a delivery for "service" is an unlimited delivery, and makes it the duty of the officer to obey the commands of the writ, and do all acts necessary to realize the money called for thereby.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 173; Dec. Dig. § 96.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6432, 6433.]

## 2. CHATTEL MORTGAGES (§ 196\*)—VALIDITY OF LIEN—FAILURE TO FILE EXTENSION AFFIDAVIT.

Under Hurd's Rev. St. Ill. 1900, c. 95, § 4, providing that, by filing an affidavit with the recorder within 30 days prior to the maturity of the debt secured by a chattel mortgage, the lien of the mortgage shall be extended not to exceed one year from the date of such filing, on the expiration of the year the lien ceases to be valid as against creditors of the mortgagor, and cannot be revived by the subsequent filing of a new affidavit so as to give it priority over liens thereafter acquired by such creditors.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 429, 438-441; Dec. Dig. § 196.\*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; George A. Carpenter, Judge.

In the matter of the Tengwall Company, bankrupt. From an order sustaining objections to his claim as a secured debt, Edward H. Fallows, trustee, appeals. Affirmed.

From the report of the referee it appears that on June 4, 1910, Barnhart Bros. & Spindler, among others, filed their petition praying that the Tengwall Company be declared a bankrupt; that on June 17, 1910, said company was adjudicated a bankrupt; that on August 9, 1910, said trust company was duly chosen and qualified as trustee; that on the same day appellant filed his claim as a secured creditor, basing the same upon a mortgage; that certain creditors having obtained judgments and executions, and placed the same in the hands of the sheriff for service within the four months period, the trustee filed its petition asking for an order preserving the liens of such creditors for the benefit of said bankrupt estate and for the subrogation of the trustee in bankruptcy to the rights of the judgment creditors; that on August 22, 1910, appellant filed his answer to said petition; that on the same day said answer was found to be insufficient by the referee, and the trustee in bankruptcy was subrogated to the rights of the execution creditors as prayed, to which order appellant saved an exception; that thereafter the trustee in bankruptcy filed objections to appellant's alleged secured claim; that said claim was based upon 200 bonds for \$100 each—\$20,000—bearing 5 per cent. interest, and maturing October 1, 1920, and secured by mortgage dated October 7, 1905, conveying to appellant as trustee the franchises, licenses, and articles of personal property, goods, chattels, viz., all the franchises, licenses, rights, and privileges of running and operating its plant, also all the fixtures, implements, goods, wares, and merchandise, and all other articles of personal

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

property now belonging to and in the possession of said company. The Tengwall Company was given leave to alter any of the machinery, fixtures, or other equipment, and substitute new, which, when substituted, should forthwith become subject to the lien of the mortgage. It further appears that on or about November 9, 1905, the Tengwall plant was partially destroyed by fire, for which fire insurance was collected, and, with appellant's consent, employed

in replacing the said machinery, fixtures, stock in trade, etc., which was burned; that with the exception of said stock in trade said plant remained in the possession of the Tengwall Company practically unchanged from the time of replacement until taken possession of by the trustee in bankruptcy, except as to certain repairs and two printing presses subsequently added; that the property was sold clear of liens, including that of appellant, and the same were relegated to the proceeds; that the sale aggregated \$24,134.03, of which sum, the proceeds of the stock in trade amounted to \$5,000, the good will, \$1,800, the patents, \$600, and the balance was realized on the equipment, etc. The referee further finds that the bankrupt had always recognized the validity of said mortgage and paid the interest on said bonds; that appellant filed his motion to set aside the order of August 22, 1910, which was denied; that the trustee in bankruptcy filed objections to appellant's claim, as aforesaid, alleging as ground therefor that on October 5, 1908, just before the expiration of the three years, during which the chattel mortgage was a valid lien, appellant filed an affidavit in the recorder's office in compliance with the statutes of Illinois for the extension of the mortgage debt. It is assumed that it was the intention to extend the lien of the mortgage, since the debt was not due.

It further appears that on October 6, 1909, another and similar affidavit was filed to secure a second extension. It was the contention of the trustee in bankruptcy that the Illinois statute makes no provision for a second extension, and that, in any event, the affidavit was not filed in time; that it should have been filed within the year ending October 5, 1909, and the referee so held. He also held that the chattel mortgage had ceased to be a lien as against third persons after October 5, 1909; that the liens of the creditors' judgments were valid and inured as such to the trustee for the benefit of the creditors, as against the chattel mortgage.

Thereafter appellant filed his petition for a review, which the referee granted. The grounds relied on in the petition are: (1) That appellant's answer to the petition for subrogation was sufficient, and constituted a good defense thereto; (2) that the action of the referee in that respect was an abuse of discretion, and contrary to law; (3) that the referee erred in holding that appellant's second affidavit for an extension was not filed in time, and (4) in holding that appellant's lien was not superior to that of the execution creditors.

On the hearing of said petition for review, the district court denied the same, and approved the referee's report. Exceptions to the order of the district court were filed and overruled, and this appeal resulted. The errors assigned are:

(1) The court erred in sustaining the order of the referee preserving said execution liens and subrogating the trustee as aforesaid.

(2) The court erred in not holding that the referee had abused the discretion lodged in him by statute.

(3) The court erred in affirming the order of the referee sustaining the trustee's objection to the validity of appellant's lien.

(4) The court erred in not setting aside the order for subrogation. Further facts appear in the opinion.

Edwin H. Cassels, Edward J. Brundage, and Francis Adams, Jr., all of Chicago, Ill., for appellant.

Herman Frank and Percy B. Davis, both of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). This is a controversy to determine which of two liens is entitled to priority against the property of a bankrupt. Appellant, as trustee, represents the holders of 200 bonds for \$100 each, bearing interest at the rate of 5 per cent., dated October 7, 1905, and maturing October 1, 1920, secured by a chattel mortgage on all the plant of the bankrupt, including the stock in trade. It will be noted that the indebtedness runs for a period of practically 15 years, while under the laws of Illinois a chattel mortgage is valid for only three years. In their efforts to keep said bonds secured, the parties resorted to the provisions of section 4 of chapter 95, Hurd's Revised Statutes of Illinois, wherein it is provided that by filing in the recorder's office and with the justice of the peace who took the acknowledgment an affidavit within 30 days of the maturity of the debt, setting forth the mortgagee's interest in the mortgaged property, and the amount remaining unpaid thereon, and the time when the same will become due by extension or otherwise, "the lien of the mortgage shall be continued and extended for and during the term of one year from the filing of such affidavit, or until the maturity of the indebtedness or extension thereof secured by said mortgage, provided such time shall not exceed one year from the date of filing such affidavit." This affidavit was filed on October 5, 1908. Thereafter, and on October 6, 1909, a second and similar affidavit was filed. On the strength of these renewals, appellant contends that his mortgage constituted a valid lien at the date of the institution of bankruptcy proceedings.

Appellee represents, inter alia, the rights of the bankrupt's creditors acquired under and by virtue of several executions issued upon judgments obtained by certain creditors and placed by them in the hands of the sheriff for service, to the claims of whom appellee has been subrogated under the provisions of section 67c of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]). It appears that on June 3, 1910, six judgments, aggregating more than \$25,000, were entered by confession in the superior court of Cook county on judgment notes that day executed by the bankrupt. Upon these executions were at once taken out and placed in the hands of the sheriff, according to the petition. The referee finds they were so placed for service. They never were served, as the bankruptcy proceedings were instituted on June 4, the next day.

It is appellant's contention that these executions never became a lien, that they were secured through connivance of the parties, were never placed in the sheriff's hands for service, but to be held by him. While the transaction bears some evidence of an intent to take advantage of the delay of appellant in securing an extension of his lien, there is no claim that the sums represented by the judgment notes were not just claims, and we are not at liberty to disregard the finding of the referee that the executions were placed in the sheriff's hands for service.

[1] Appellant distinguishes between executions placed in the sheriff's hands for service and those placed there to be executed. Undoubtedly, the delivery to the sheriff must not be a limited delivery. Hurd's Revised Statutes of Illinois (1909) p. 1364; *Gilmore v. Davis*, 84 Ill.



487; *Western Union Cold Storage Co. v. Rose*, 60 Ill. App. 452; 2 *Freeman on Executions* (3d Ed.) § 206, p. 1030.

In the present case, however, there is an utter lack of evidence preserved in the record to show any attempt on the part of the judgment creditors to limit the duty of the sheriff. The Illinois statute seems to contemplate two duties on the part of the sheriff in regard to executions placed in his hands: (1) Serving of notice of execution; (2) levying. *Hurd's Revised Statutes of 1909*. In *Cook v. Scott*, 1 Gilman (Ill.) 333, *Davis v. Chicago Dock Co.*, 129 Ill. 180, 21 N. E. 830, *Bingham v. Maxcy*, 15 Ill. 290, *Boggess v. Pennell*, 46 Ill. App. 150, and *Hamilton v. Quimby*, 46 Ill. 90, it is held that it is the duty of the sheriff to serve notice thereof and make a demand upon the debtor before making a levy. Appellant cites these in support of his contention that service does not include levy. We think, however, that in the present case the two are identical. In *Peck v. City National Bank*, 51 Mich. 353, 16 N. W. 681, 47 Am. Rep. 577, it is said:

"Service of an execution includes every act and proceeding necessary to be taken by the sheriff to make the money and includes the sale of the property when necessary."

The word has been defined to mean "execution of process." 35 Cyc. 1432. This construction seems to us reasonable in the case before us. It would be placing a strained meaning upon the transaction to hold that, when a party places an execution in the hands of a process officer, the latter is not charged with the duty, without further instructions, to proceed to make the money called for by the writ, which itself commands him to do so. In the absence of directions not to levy, it is the duty of the officer to obey the directions and commands of the writ. Nor is the duty waived by refusal of plaintiff to give directions. *Koren v. Roemheld*, 6 Ill. App. 275; *Sweetser v. Matson*, 153 Ill. 568, 39 N. E. 1086, 27 L. R. A. 374, 46 Am. St. Rep. 911; 17 Cyc. 1058.

[2] We therefore hold the liens of the executions here involved to be valid as against the bankrupt as of June 3, 1910. The last attempt at an extension of appellant's lien was on October 6, 1909, so that there is no question of liens attaching during the period intervening the first and second renewals. If it was within the power of the appellant to reinstate the mortgage lien after it had expired by again filing the affidavit required by the statute in order to secure the first extension, then its lien was valid as against the executions. The matter is therefore narrowed down to the question whether appellant acquired a lien valid against subsequent execution liens by taking action a day after the prescribed period for such action. It is a well-settled rule of law that the statute in regard to chattel mortgages is in derogation of the common law, and should be strictly followed. *Porter v. Dement*, 35 Ill. 478. This has been applied to extensions. *Griffen v. Henry*, 99 Ill. App. 284. There can be no doubt but that the statute requires the extension in any case to be effected during the life of the mortgage. The language is unmistakably clear. No reason is perceived why this requirement should not be vital. It has been so held. In *re New York Economical Printing Co., Bankrupt*, 6 Am.

Bankr. Rep. 617, 110 Fed. 514, 49 C. C. A. 133 (2d Cir. Ct. of Appeals); Jones on Chattel Mortgages (5th Ed.) p. 287. The latter states:

"A chattel mortgage which has ceased to be valid by a failure to file it as required by law cannot be revived by any act of the parties so as to give it priority over other liens."

It is further supported by *Seaman v. Eager*, 16 Ohio St. 209; *Nitchie v. Townsend*, 4 N. Y. Super. Ct. 299.

As between the mortgagor and mortgagee, no recording is necessary. As we construe the mortgage act, appellant had nothing more than an unrecorded chattel mortgage. As regards third persons, he had no lien or priority. As between his mortgage and the lien of the executions here under consideration, his rights were secondary.

The decree of the District Court is affirmed.

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In re FRAZIN et al.

In re MORRIS.

(Circuit Court of Appeals, Second Circuit. December 9, 1912.)

No. 86.

**1. BANKRUPTCY (§ 161\*)—PREFERENCES—DETERMINATION.**

Where a note of bankrupts payable at a bank was presented to the bank on the date of its maturity for payment, and was duly certified, and subsequently paid by the bank, the time of certification is to be taken as the time of payment in determining whether the payment was preferential.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.\*]

**2. BANKRUPTCY (§ 340\*)—PREFERENCES—BURDEN OF PROOF.**

On a petition of a trustee in bankruptcy to expunge the claim of a creditor on the ground that it had received a preference, the burden is on the trustee to prove that the preferential payment was made after the creditor received information of the insolvency of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.\*]

**3. BANKRUPTCY (§ 340\*)—PREFERENCES—SUFFICIENCY OF EVIDENCE.**

On a petition by a trustee in bankruptcy to expunge a creditor's claim on the ground that he had received a preference, evidence held insufficient to show that the creditor received the preferential payment after receiving information of the bankrupt's insolvency.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.\*]

Petition to Revise Order of the District Court of the United States for the Southern District of New York; Charles M. Hough, Judge.

Petition by Robert C. Morris, as trustee in bankruptcy, to revise an order denying a petition to expunge the claim of Weichert & Gardiner, a corporation, against Louis Frazin and another, bankrupts. Order affirmed.

See, also, 183 Fed. 28, 105 C. C. A. 320, 33 L. R. A. (N. S.) 745.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This cause comes here on petition to revise an order of the District Court, Southern District of New York, denying a petition of the trustee to expunge the claim of the corporation Weichert & Gardiner, a creditor of the bankrupts, for \$28,493.63. The objection of the trustee to the claim is based upon the contention that within four months preceding the filing of the petition a preferential payment was made by the bankrupts to Weichert & Gardiner, and that its claim should be expunged, unless the amount of such payment be returned to the estate.

G. B. Plante, of New York City, N. Y., for petitioner.

J. T. Smith, of New York City, N. Y., for respondents.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). [1] Weichert & Gardiner, hereinafter called the corporation, had been dealing with the bankrupts for some time; the bankrupts were indebted to it on February 1, 1909, on open account, in the amount of \$28,493.63. In October, 1908, the bankrupts had given the corporation a note for \$5,075.82, payable on February 1, 1909, at the Second National Bank. This note had been discounted by the corporation with the Nassau Trust Company. At some time on Monday, February 1, 1909, the day of the maturity of said note, it was presented to the bank by the trust company, and was thereupon duly certified and subsequently paid by the bank. The referee and the District Court held correctly that for the purposes of deciding whether or not this was a preferential payment the time of certification is to be taken as the time of payment.

[2] About the middle of the day on February 1st Weichert, president of the corporation, had various conversations with one of the bankrupts and others, including Simonson, an officer of the bank, as to the financial condition of the firm. The testimony puts the time of these conversations as extending from noon to about 2 o'clock. It is contended that the information given to the corporation in the course of these interviews was such that it must be held to have had reasonable cause to believe that the firm was insolvent. This is disputed, but we need not discuss that question. We may assume that, if it were shown that the note was certified after the corporation received the information which it did receive, a preferential payment would be established. The important question in the case is whether the note was certified before or after the corporation was informed of financial trouble, and the burden of proving that it was certified after 12 o'clock noon, which is the hour when the interviews began, rests on the petitioner.

[3] The paying teller and a clerk in his department who recorded the certification in the book were called, and both testified that it was impossible to tell whether the certification was in the morning or in the afternoon. Neither of them had any recollection of the particular transaction. One of them said that his "idea would be" from looking at the item, which was in black ink and written by the other, that it was in the afternoon, because generally in the morning he made such entries himself and made them in red ink. The other bank witness

said that "he should judge it was in the morning," because the entry was so near the top of the page.

Petitioner undertook to supplement this by showing other circumstances. The firm's balance with the bank at the opening of business was \$2,142.37. The only deposit made that day was \$10,000, cash received from the various branch stores of the firm, being returns from their sales of the day before. It was usual to deposit such receipts from the branch stores in the morning, but on this day the deposit was held back till after the interview with the bank had taken place, and the firm understood they were to get some extension for payment of a note, due that day, which the bank held. The teller testified that he never overcertified, and that with only \$2,142 to the credit of the firm he would not have certified their check or note for \$5,075. It is contended that this shows that the certification must have been made after the deposit; that is, after the interviews.

We do not find the testimony persuasive to that conclusion for these reasons. When Weichert was first informed by Frazin as to the situation, he telephoned to his own office to know the condition of the firm's account with the corporation. Learning of the \$5,075 note, he gave instructions to have a check of the corporation for that amount drawn and sent to the Nassau Trust Company with which the note had been discounted, so that, if payment of the note were refused at the Second National, the indorser's check would be with the Trust Company to take it up. When Weichert went to the interview with Simonson at the latter's downtown office he told him of this note, and asked if it had been paid. Thereupon Simonson stepped to the telephone, and, when he returned, he said, "Your note was paid." This was between 1 and 2 p. m. The cashier of the corporation, Ralston, testified that he took its check to the Nassau Trust Company about 10 minutes to 3, in order to take up the note, but upon inquiry there he was informed that the note had been paid, whereupon he took the check back with him and canceled it. These witnesses evidently used the word "paid" as the equivalent of "certified." Finally the man who actually made the \$10,000 deposit with the Second National Bank testified positively that he did not deposit it until about 4 p. m. If this testimony be credible, and we see no reason to doubt it, the certification was made irrespective of the deposit, and there is nothing to show that it was made after 12 o'clock.

Petitioner contends that this testimony should be outweighed by the presumption that the certifying officers of national banks always perform their duty. We attach no weight to the suggestion that, to affirm, we must hold the teller who certified to be a "criminal." Whether overcertification be a criminal act, a proposition which we are not to be understood as assenting to, certainly such affirmance is consonant with an entire absence of criminal intent on the part of the teller who certified. He depends and necessarily must depend on the reports of others. His assistant goes to the bookkeeper and asks him the amount of the customer's balance, and accepts his statement of such balance. It is quite conceivable that, like all other human machines, even a bank bookkeeper may make a mistake, may look at



figures in his book, and state that a balance is \$12,421, instead of \$1,242.10. It may not be likely, but it is certainly not impossible, and, if its possibility be accepted, the presumption that a bank teller could not overcertify on a particular note, because it would be criminal to do so, is not such an overwhelming one as to wipe out affirmative testimony to the effect that in a single instance he did so.

The order is affirmed.

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CITY OF CHICAGO v. MICHIGAN, I. & I. LINE.

(Circuit Court of Appeals, Seventh Circuit. October 8, 1912.)

No. 1,875.

NAVIGABLE WATERS (§ 20\*)—BRIDGES—INJURY TO VESSEL FROM OPERATION OF DRAW.

Evidence *held* to support a finding that an injury to a vessel by being struck by the draw of a bridge, which was swung past the center as she was passing through, was due solely to the gross negligence of the bridgetenders employed by the city, and that the city was liable for the entire damage, even though the master of the vessel, in the excitement caused by the reckless mismanagement of the bridge, may not have taken the wisest action.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73-99; Dec. Dig. § 20.\*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; George A. Carpenter, Judge.

Suit in admiralty by the Michigan, Indiana & Illinois Line, owner of the steamer Marion, against the City of Chicago. Decree for libellant, and respondent appeals. Affirmed.

Appellee, sole owner of the steamer Marion, filed its libel against appellant on December 16, 1910, to recover damages suffered by it, by reason of a collision of the said steamer with the Lake Street bridge, Chicago, Ill., on March 31, 1910. At 5 o'clock in the morning of that day the steamer, laden with a cargo of salt and bound up the Chicago river, was struck twice by the Lake Street bridge, which first swung into her stern, with the result hereinafter set out, and then, rebounding (or forcibly propelled by the bridgetender, the evidence does not clearly disclose which), swung into the steamer on her starboard side forward, carrying away the pilot house, texas, lamp screens, destroying the signals, and wrecking whatever she carried forward in line with the bridge, and disabling the steering gear.

It is conceded that the steamer blew her whistle while at the usual distance from the bridge—somewhere from 400 to 600 feet away. At that time her captain, Nelson, was in command, on top of the pilot house; the mate, Thorson, was on the deck, forward of the pilot house; Peterson, the lookout, was aft on the starboard side; and the wheelman, De Sormier, was at his post. The steamer was proceeding at the rate of three miles an hour with the current. Nothing appears in the record with regard to the position of the bridge signals. The captain testifies that after the whistle was blown he heard the bridge bell ring. The day was clear, except for the usual smoky condition at the river at 5 o'clock a. m. The bridge was closed when the signal was blown. As the vessel advanced, the east end of the bridge was swung to the south. The vessel passed into the east draw. It appears from a preponderance of the testimony that the end of the bridge which had spanned the west

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

draw, after a momentary rest at the north center protection, swung by it, and started to carry away the shrouds on the aft spar on the starboard side, the smoke guys, ventilator on boiler house, engine room skylights, dining room skylight, water tanks, boat davits, lifeboat, and canvas on cabin roof. The rear-end collision shoved the steamer onto the pile at the street. Then the engine was stopped and the steamer backed, to disentangle the bridge and steamer. After being released, the bridge began to swing back past the center protection, toward the west, and kept on swinging. In the meantime, the steamer had been sent ahead slowly. The bridge end, which was at first the east end, was then swung so far to the eastward from its center protection position that it struck the forward part of the steamer, as above stated. The spanked and cuffed steamer was practically dismantled.

The damages claimed in the libel amount to \$5,000.

For the city, one witness, Officer Foley, was introduced, who testified that the bridge at no time rested over the center protection, but kept on swinging. The city also introduced sections 992, 993, and 994 of the ordinances regulating bridgetenders and vessels in such case, which read as follows, viz.:

"992. Vessel Signals.—The commissioner of public works is hereby required to provide and maintain at the several bridges over the Chicago river and its branches and the Calumet river, in the best and most practicable manner, vessel signals as required by this article.

"993. Signals Prescribed.—Each signal shall be a ball of suitable material of red color for use in the day time, and shall be not less than twenty-four inches in diameter. The signal for the night time shall be a red lantern of such size and so placed and arranged, when elevated, as to be easily seen up and down the river and the street.

"994. Duty of Vessels—Penalty.—It shall be unlawful for the owner, officer or other person in charge of any vessel in transit upon the Chicago river and its branches, or the Calumet river or any part thereof, to attempt to navigate any such vessel past any of the bridges over said river or branches while said signals are elevated, or while the said bridges or any of them may be opening or closing."

It also set up paragraph 8 of section 1015 of the city ordinances reading: "Vessels exceeding two hundred tons navigating the Chicago Harbor shall not proceed at a speed greater than four miles per hour."

The court found for the libellant. On reference had, the commissioner fixed the damages at the sum of \$3,400.11, which finding was approved by the court, from which decree appellants have taken this appeal.

The errors assigned are: That the court erred in holding that the city was negligent and solely at fault, and not the vessel; that the court erred in not holding that the vessel's injury was caused by the violation of the city ordinance; that the court erred in not holding that the vessel was negligently navigated; that the court erred in not dismissing the libel or dividing the damages.

William H. Sexton, Corp. Counsel, of Chicago, Ill. (Charles M. Haft, Asst. Corp. Counsel, A. J. Hopkins, and D. J. Peffers, all of Chicago, Ill., of counsel), for appellant.

Charles E. Kremer, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The city undertakes no defense of its servant, the bridgetender, nor of the manner in which the bridge was manipulated, but sets up the vessel's failure to comply with the city ordinance as to speed, signals, and entering a draw, above set forth. We are unable to discover from the record any culpable negligence on the part of the vessel. She was well within the ordinance speed limit. The defendant's evidence and reasoning fail to demonstrate that she entered the draw before the bridge

was centered on the center protection, or while the bridge was opening. On the other hand, the city's negligence was gross.

Defendant's contention that, in the absence of proof upon the subject, the court will assume that the danger signal was set, is without merit. The very fact that the bridge was opened in response to the Marion's whistle rebuts any presumption, were any raised, that there existed any such condition as called for the lifting of the closed or any other stop signal. This record calls for no consideration whatever of the defense that the danger signals were not obeyed. That in the excitement and alarm caused by the reckless mismanagement of the bridge, the officer should have done or failed to do the wisest thing, in no way relieves the city from the result of the carelessness of its servants. *The E. A. Packer* (C. C.) 49 Fed. 92; *The Blue Jacket*, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469. A party may not precipitate an alarming situation, calling for extraordinary skill and prudence, and hope to escape liability for the injury done by questioning the conduct of the imperiled parties under the sudden strain of the movement. An ordinarily prudent man is one who meets efficiently the ordinary duties of his position. The acts of the officers of the Marion in no way fell short of their obligation to their owners and to the city. The liability of the city under the facts of the case is clear.

The decree of the District Court is affirmed.

# UNITED STATES FIDELITY & GUARANTY CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 9, 1912.)

No. 93.

## 1. INTERNAL REVENUE (§ 23\*)—DISTILLER'S BOND—TAXES.

Where a distiller's bond was conditioned that he would in all respects faithfully comply with all the provisions of law and regulations in relation to the duties and business of distilling brandy, etc., it covered a liability for taxes assessed on spirits distilled.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 62-67; Dec. Dig. § 23.\*]

## 2. INTERNAL REVENUE (§ 23\*)—BOND OF DISTILLER—TAX ASSESSMENT—PRIMA FACIE EVIDENCE.

An internal revenue tax, assessed by the Commissioner of Internal Revenue on liquors distilled, was prima facie evidence of the amount due against both the distiller and his surety.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 62-67; Dec. Dig. § 23.\*]

In Error to the District Court of the United States for the District of Connecticut; James P. Platt, Judge.

Action by the United States against the United States Fidelity & Guaranty Company. Judgment for the United States, and defendant brings error. Affirmed.

Writ of error to review a judgment in an action brought by the United States against the plaintiff in error, hereinafter called the defendant, as

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

surety upon two distiller's bonds, the relevant portions of which read as follows:

"Now, therefore, if Esadore Gladstone shall in all respects faithfully comply with all the provisions of law and regulations in relation to the duties and business of distillers of brandy from apples, peaches, grapes, pears, pineapples, oranges, apricots, berries, prunes, figs, or cherries, exclusively and shall pay all penalties incurred or fines imposed on \* \* \* for a violation of any of the said provisions, then this obligation shall be void; otherwise, it shall remain in full force."

The complaint alleged that the defendant executed the bonds as surety for one Gladstone; that said Gladstone engaged in the business of distilling brandy, and that he failed to comply with the provisions of law governing said business in that he did not pay the taxes upon certain brandy produced by him during the periods covered by the bonds.

Upon the trial the government offered in evidence in support of the allegations of its complaint the assessment made by the Commissioner of Internal Revenue based upon an estimate of the amount of brandy distilled by Gladstone.

The government had a verdict and judgment and the defendant has brought this writ of error.

R. T. Hough, of Washington, D. C., and Joseph L. Barbour, of Hartford, Conn., for plaintiff in error.

John T. Robinson, of Hartford, Conn., Sp. Asst. U. S. Atty.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). [1] The first question is whether the payment of taxes was covered by the bonds.

The bonds did not mention taxes expressly but were conditioned upon the faithful compliance by the distiller with all the provisions of law relating to the duties of distillers. One of such provisions required the distiller to pay the taxes upon the spirits which he distilled. Consequently it is impossible to see why compliance with that provision was not a condition of the bonds. And such is the interpretation of the authorities. *United States v. National Surety Co.*, 122 Fed. 904, 59 C. C. A. 130; *United States v. Richardson* (D. C.) 127 Fed. 893; *United States v. National Surety Co.*, 157 Fed. 174, 84 C. C. A. 622; *United States v. Sisk*, 176 Fed. 885, 100 C. C. A. 355; *United States v. Bicket*, 24 Fed. Cas. No. 14,590. See, also, *United States v. Rindskopf*, 105 U. S. 418, 26 L. Ed. 1131.

The bonds in the cases cited were in form substantially like those here and we find no such difference in the subjects to which they related as to call for any differentiation in interpretation. Nor do we find anything in the history of the particular statutes involved in this case which requires any other construction of these bonds than the plain one which we have given them.

[2] The second question is whether the trial court erred in its action with respect to the Commissioner's tax assessment.

The rule seems established that an assessment is *prima facie* evidence of the amount of tax due, and we see nothing in reason or authority why this rule does not exist both in respect of the distiller and of his surety. Indeed we think this the holding of the very case



upon which the defendant relies. *United States v. Rindskopf*, 105 U. S. 418, 26 L. Ed. 1131. In that case the Supreme Court said:

"The assessment of the Commissioner of Internal Revenue was only *prima facie* evidence of the amount due as taxes upon the spirits distilled between the dates mentioned. It established a *prima facie* case of liability against the distiller, and nothing more. If not impeached, it was sufficient to justify a recovery; but every material fact upon which his liability was asserted was open to contestation. He and his sureties were at liberty to show that no spirits, or a less quantity than that stated by the commissioner, were distilled within the period mentioned, and thus entirely, or in part, overthrow the assessment. They were also at liberty to show a payment of the tax assessed, in whole or in part, and thus discharge or reduce the distiller's liability. To the extent, however, in which the assessment was not impaired, it was evidence of the amount due."

The court said that the assessment established "nothing more" than a *prima facie* case. It did not say—as the defendant suggests—that it established such a case against the distiller only. On the contrary, it expressly stated that a case made out by the assessment was one which the distiller "and his sureties" were at liberty to contest.

The instructions given to the jury took away from the assessment the presumption in its favor to which it was entitled and in effect left them to determine upon all the evidence presented whether the Commissioner's estimate was correct. This was not entirely proper but the error was not one of which the defendant can complain.

We find no prejudicial error in the charge or refusal to charge concerning a distiller's duty in accounting for material or concerning the statute of limitation.

The judgment of the District Court is affirmed.

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#### In re DOWNING.

(Circuit Court of Appeals, Second Circuit. December 9, 1912.)

No. 39.

#### 1. BANKRUPTCY (§ 142\*)—RIGHTS OF TRUSTEE—PROPERTY FRAUDULENTLY CONVEYED.

A bankrupt's trustee is vested with all the rights, remedies, and powers of a judgment creditor of the bankrupt having an execution returned unsatisfied, and, if a transfer be in fraud of creditors, he may set it aside, have the property sold, and apply the proceeds to the payment of debts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 222; Dec. Dig. § 142.\*]

#### 2. BANKRUPTCY (§ 257\*)—RIGHTS OF TRUSTEE—PROPERTY FRAUDULENTLY CONVEYED—TRANSFERABLE INTEREST.

A bankrupt's trustee has a transferable interest in real estate owned by the bankrupt and transferred by him in fraud of creditors, though made more than four months prior to the bankruptcy proceedings, and may sell such interest, together with the right to sue to set aside the fraudulent transaction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 356, 357; Dec. Dig. § 257.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. BANKRUPTCY (§ 259\*)—PROPERTY FRAUDULENTLY CONVEYED—RIGHT TO SUE—ASSIGNMENT.**

Where a trustee in bankruptcy was unable to prosecute a suit to set aside an alleged fraudulent transfer of real property by the bankrupt to his wife, because the trustee had no funds and creditors refused to contribute, he was properly authorized to sell his interest in the property, and to assign his right to sue for the benefit of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 356-358; Dec. Dig. § 259.\*]

Lacombe, Circuit Judge, dissenting.

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of New York; George W. Ray, Judge.

In the matter of bankruptcy proceedings of Augustus S. Downing. Petition to review an order (192 Fed. 683) authorizing the trustee to sell his interest in certain real estate, together with his right to set aside a fraudulent conveyance of such property by the bankrupt to his wife in alleged fraud of creditors. Affirmed.

Charles B. Sullivan, of Albany, N. Y. (Danforth E. Ainsworth, of Albany, N. Y., of counsel), for petitioner.

W. H. Maider, of Gloversville, for respondent.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The order appealed from permits the trustee to sell his interest in certain real estate, together with his right to set aside as fraudulent a conveyance of such property by the bankrupt to his wife, in alleged fraud of creditors. The trustee is unable to prosecute a suit for this purpose for he has no funds. The creditors have been asked to contribute, but have declined to do so. The trustee cannot wind up the estate and procure his own discharge with this interest and right of action undisposed of. It is of some value, for he has already received an offer of \$301 therefor. In such circumstances, what is to be done? Is there any alternative but to sell whatever interest and right he possesses?

The order of the District Court does not pass upon the validity of the transfer of the real estate; there is nothing in the order itself or in the opinion of the court deciding that the transfer was fraudulent; that question must be decided when the proper action is brought to set it aside.

[1] All that the court decided is that the trustee is vested with all the rights, remedies and powers of a judgment creditor of the bankrupt with the execution returned unsatisfied and, if a transfer be in fraud of creditors, he may set it aside, have the specific real property sold and apply the proceeds to the payment of debts proved against the bankrupt.

[2] The trustee has a transferable interest in real estate owned by the bankrupt and transferred by him in fraud of his creditors, even though made more than four months prior to the proceedings in bankruptcy and may sell this interest, together with the right vested

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in him by statute to maintain an action to set aside such fraudulent transfer.

[3] The sale is to be made without warranty or representation of any kind and the purchaser takes simply the trustee's interest in the real property and his right to bring an action. The right may be valuable and it may be worthless; whoever buys does so with a full understanding of the character of the claim, he cannot be misled into thinking that the District Court or this court has in any way recognized the validity of the claim by directing that it be sold.

The order is affirmed.

LACOMBE, Circuit Judge (dissenting). I am unable to concur with the majority, as in my opinion the trustee has nothing which he can transfer. The right which the amendment gave him to institute a suit, as a judgment creditor could, to set aside a conveyance as fraudulent, was given to him for the purpose of securing a ratable division of all the bankrupt's estate among all his creditors. If he transfers this right to a single creditor, who in the event of success will secure for himself the property covered by the alleged fraudulent conveyance, the very object of the amendment, as it seems to me, is defeated. Usually the sale will be illusory. There is no real market for such a thing. Some particular creditor having inside information will often avail of it to secure a preference. It seems to me contrary to public policy to allow the trustee to transfer a right, given to him for the benefit of all, to some one who, possessed of secret information may be willing to buy it.

In another way such practice may work injustice. Often the transferee of a fraudulent conveyance has a bona fide claim against the bankrupt. If the trustee sets aside the conveyance, the transferee may prove his bona fide claim against the estate and get whatever dividend he may be entitled to. In the event, however, of such a sale as this, the estate would usually be wound up and distributed before the action to set aside conveyance came to trial. In that event the transferee may lose, not only the property conveyed to pay the debt due him, but also the debt itself.

For these reasons I dissent.

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UNITED STATES v. FINCH et al.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1912.)

No. 1,867.

COURTS (§ 426\*)—DISTRICT COURT—JURISDICTION—UNLAWFUL ASSESSMENTS—RECOVERY.

Rev. St. §§ 3220, 3226, 3227, 3228 (U. S. Comp. St. 1901, pp. 2086-2089), authorizing the recovery of internal revenue taxes wrongfully imposed, does not prescribe a remedy inconsistent with the general provisions of Tucker Act March 3, 1887, c. 359, § 1, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752), prescribing the jurisdiction of the Court of Claims, and declaring (section 2) that the District and Circuit Courts shall have concurrent juris-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

diction for amounts named, and hence a federal District Court had jurisdiction of an action to recover money paid to the United States under an erroneous assessment imposed as an internal revenue tax and penalty.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1131; Dec. Dig. § 426.\*]

In Error to the District Court of the United States for the Western District of Wisconsin; A. L. Sanborn, Judge.

Action by Benjamin Finch and another, doing business as Finch Brothers, against the United States of America. Judgment for plaintiffs, and defendant brings error. Affirmed.

George H. Gordon, of La Crosse, Wis., for the United States.

C. H. Crownhart, of Superior, Wis., for defendants in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge. The judgment of the District Court awards recovery against the United States for an amount the defendants in error were compelled to pay under an alleged erroneous assessment imposed by the Department of Internal Revenue, as an internal tax and penalty. It rests on findings of fact which support the averments of the petition that the defendants in error were not engaged in the business for which the assessment was imposed, namely, that of "wholesale dealer in oleomargarine"; and the only assignment of error which calls for discussion is one challenging the jurisdiction of the District Court to entertain the cause.

The suit was instituted and proceeded to judgment as authorized under the provisions of the Act of March 3, 1887, c. 359, 24 Stat. 505, known as the Tucker Act (1 U. S. Comp. St. 1901, p. 752; 2 Fed. Stat. Ann. 80). This statute expressly provides (section 1) that the Court of Claims shall have jurisdiction to hear and determine claims against the United States, founded upon the Constitution, laws of Congress, or "regulations of an Executive Department," and (section 2) that District and Circuit Courts shall have concurrent jurisdiction therein for amounts named. Certain classes of claims are excepted therefrom, not applicable in terms to the case at bar; and the claim in suit is plainly enforceable thereunder, unless the statute under which it arises provides other inconsistent remedy.

The contention is that such inconsistency appears in the provisions of the several sections of the Internal Revenue statute, in reference to recovery for unlawful assessments made and collected, namely, sections 3220, 3226, 3227, and 3228, R. S. (U. S. Comp. St. 1901, pp. 2086-2089); and that an exclusive remedy is thereby intended for recovery against the collector. The sections cited expressly authorize the Commissioner (section 3220), on appeal to him, to remit or refund taxes and penalties erroneously assessed or collected, and provide (section 3226) that "no suit shall be maintained in any court for recovery" thereof, until appeal shall be made to the Commissioner and his decision "has been had therein." Such appeal and adverse decision are averred and found as conditions precedent to the present suit. We are advised of no further provision thereof for recovery,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



whether by suit against the collector (as contended) or otherwise. For the proposition that an exclusive remedy against the collector was intended, counsel relies upon remarks appearing in the course of the opinion, in *United States v. Savings Bank*, 104 U. S. 728, 734 (26 L. Ed. 908), that "an action lies against the collector" when the Commissioner rejects a claim under section 3226. But we do not understand that such inquiry was involved in the case, nor that the decision rested thereon in any measure; moreover, the remark was made long prior to the above-mentioned Tucker Act, although subsequent to the original act (section 1059, R. S. [U. S. Comp. St. 1901, p. 734]), conferring rights of action upon claims in the Court of Claims.

The question here presented, however, does not require solution of the inquiry whether recovery may be authorized against the collector, as the jurisdictional test must be whether the several provisions for recovery of internal taxes prescribe a remedy which is inconsistent with the general provision of the Tucker Act, and may thus operate to exclude other remedies. *Vide Nichols v. United States*, 7 Wall. 122, 130, 19 L. Ed. 125. We believe no such inconsistent provision appears in the sections referred to, and that the rule upheld in *Dooley v. United States*, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074, and authorities cited in the opinion, furnishes ample support for jurisdiction over the claim in suit.

The judgment of the District Court is affirmed.

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**In re NOETHEN.**

(Circuit Court of Appeals, Second Circuit. December 10, 1912.)

No. 71.

**BANKRUPTCY (§ 184\*)—PROPERTY OF BANKRUPT—CHattel MORTGAGE—VALIDITY.**

A chattel mortgage on a bankrupt's fixtures and furniture, stock in trade, wines, liquors, supplies, and stock, and all goods and chattels thereafter purchased or required and placed on the premises, but authorizing the bankrupt to retain possession, sell the stock from day to day in the usual course of trade, without accounting for such sales and paying the proceeds on the mortgage, was void as against the bankrupt's creditors and receiver in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.\*]

Petition to Revise Order of the District Court of the United States for the Southern District of New York; Julius M. Mayer, Judge.

In the matter of bankruptcy proceedings against Joseph Noethen, individually and as surviving partner of the firm of Hyler & Noethen, bankrupt. On petition of August Luchow to revise an order (195 Fed. 573) denying the claim of petitioner as mortgagee of the bankrupt stock and goods. Affirmed.

This cause comes here on petition to revise an order of the District Court, determining the claim of the petitioner to the proceeds of the sale of certain merchandise contained in the place of business of the bankrupt and claimed

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes  
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to be subject to the lien of a chattel mortgage held by petitioner. The bankrupt was engaged in the restaurant, wine, and liquor business. The proceeds as to which this claim is made represent stock in trade (wine, liquors, cigars, etc.) in the premises when the mortgage was made, and similar stock in trade purchased between the time of making the mortgage June 5, 1911, and the time when the receiver in bankruptcy took possession, January 9, 1912. The mortgage covered, in addition to certain fixtures and furniture, "stock in trade, mentioned, the schedule annexed." The schedule mentions "all wines, liquors, cigars, supplies, and stock." The mortgage also covered "all other goods [and] chattels which may hereafter be purchased or acquired and placed in the premises." The District Judge held that the mortgage was void both as to the stock on the premises at the time of delivery of the mortgage and as to the stock after acquired. The opinion will be found in 195 Fed. 573.

G. E. Joseph, of New York City (Nathan Burkan, of New York City, of counsel), for petitioner.

Yankauer & Davidson, of New York City (R. V. Ingersoll, of New York City, of counsel), for respondent.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). It seems hardly necessary to add anything to the opinion of the District Judge. A mortgage such as this, covering supplies which are constantly shifting, some being used up in the business and other similar supplies being bought to take their place, will be sustained, if it is apparent that all money received by the mortgagor from the sale of old stock is used either to buy new stock, which is taken into the premises and brought under the mortgage, or else is applied in reduction of the mortgage debt. From the record, a majority of the court are not satisfied that this was the case. The wines, liquor, and merchandise, both old and new, were at all times used by the bankrupt as such stock in trade ordinarily is, and were bought and sold and dealt in from day to day in the usual course of trade; all the proceeds being retained by the bankrupt, and no part being turned over to the mortgagee. There is nothing to indicate that the mortgagee did not know the bankrupt was selling the stock of wines, cigars, and restaurant supplies. The business was a going restaurant, where such sales are made from day to day. Knowing what the business was, the mortgagee must have known they were selling stock which his mortgage covered. He knew that they made no payment or return or reports to him of such sales. The inference seems irresistible that there was no agreement that the proceeds of sales should be applied on the mortgage. If there were such an agreement, he would certainly have inquired why, during six months, no return was made to him of any sales.

A majority of the court concur in affirming the order.

## NOTASEME HOSIERY CO. v. STRAUS et al.

(Circuit Court of Appeals, Second Circuit. December 9, 1912.)

No. 72.

**1. TRADE-MARKS AND TRADE-NAMES (§ 70\*)—UNFAIR COMPETITION—LABELS.**

Where defendants' labels used on similar goods were engraved by the same company, and appeared to be actually copied, from those previously used by complainant and defendants continued to use the same after notice, they were guilty of unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 155; Dec. Dig. § 70.\*]

**2. TRADE-MARKS AND TRADE-NAMES (§ 75\*)—"UNFAIR COMPETITION"—DECEPTION.**

In a suit for "unfair competition," it is not necessary for plaintiff to show actual deception; but it is sufficient if the proof shows that the actual and probable result of defendants' use of their infringing label will be the deception of the ordinary purchaser, making purchases under ordinary conditions.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 161; Dec. Dig. § 75.\*]

For other definitions, see Words and Phrases, vol. 8, p. 7174.

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper Bros., 30 C. C. A. 376.]

Appeal from the District Court of the United States for the Southern District of New York; John R. Hazel, Judge.

Action by the Notaseme Hosiery Company against Isidore Straus and others to restrain alleged infringement of the trade mark and for unfair competition. From a decree for defendants, complainant appeals. Reversed and remanded.

James H. Griffin, of New York City (E. H. Fairbanks and Robert M. Barr, both of Philadelphia, Pa., of counsel), for appellant.

Wise & Seligsberg, of New York City (E. E. Wise, of New York City, of counsel), for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. As we are of the opinion that the complainant may obtain adequate relief upon its charge of unfair competition, we think it unnecessary to examine the charge of trade-mark infringement. And as the latter phase of the case may be laid out of consideration, we are not required to determine the preliminary question whether the complainant, by its own deception in the use of its alleged trade-mark, was disentitled to ask its protection. Certainly no such deception is shown as would prevent the complainant from suing for unfair competition.

[1] The testimony shows that the complainant's label came into use some six months before that of the defendants. It also shows that the engraving company which prepared the complainant's label designed that of the defendants. The inference is strong that the latter

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was actually copied from the former, and this inference is supported by comparing them. Each label is a rectangular design, having a diagonal black band with white script and triangular red panels. There is nothing to show that the defendants themselves knew at first of any similarity in the labels, but they were notified afterwards and continued the use.

[2] In our opinion the evidence is insufficient to show actual deception. Such proof, however, is not necessary. The question is whether the natural and probable result of the use by the defendants of its label will be the deception of the ordinary purchaser, making his purchases under ordinary conditions—whether there is a degree of similarity calculated to deceive. And we think there is such similarity. It seems clear to us that the general impression made by the defendants' label upon the eye of the casual purchaser would be likely to result in his confounding the defendants' goods with those of the complainant.

We conclude that the complainant is entitled to relief against unfair competition, and consequently the decree appealed from is reversed, with costs, and the cause remanded, with instructions to decree for the complainant.

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#### GIBSON OAT CRUSHER CO. v. CITY FUEL CO.

(Circuit Court of Appeals, Seventh Circuit. November 15, 1912.)

No. 1,918.

#### PATENTS (§ 328\*)—INFRINGEMENT—FEED CRUSHER.

The Gibson patent, No. 923,966, for a feed crusher, in view of the narrow construction required by the prior art, *held* not infringed by the machine of the Bell patent, No. 796,255.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaat, Judge.

Suit in equity by the Gibson Oat Crusher Company against the City Fuel Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 195 Fed. 772.

Charles O. Shervey, of Chicago, Ill., for appellant.

Barthel & Barthel, of Detroit, Mich. (Otto F. Barthel and C. R. Stickney, both of Detroit, Mich., and William L. Hall, of Chicago, Ill., of counsel), for appellee.

Before BAKER and SEAMAN, Circuit Judges.

PER CURIAM. This appeal is from a decree, on final hearing of the appellant's bill alleging infringement of letters patent No. 923,966, which was dismissed by the District Court for want of equity.

No error appearing therein, the decree is affirmed, on the opinion filed by Judge Kohlsaat, as reported in 195 Fed. 772.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



**F. F. SLOCOMB & CO., Inc., v. A. C. LAYMAN MACH. CO.**

(District Court, D. Delaware. December 6, 1912.)

No. 312.

**PATENTS (§ 314\*)—SUIT FOR INFRINGEMENT—EVIDENCE—ORDER OF PROOF—DAMAGES.**

Officers of a corporation defendant, in a suit for contributory infringement of a machine patent by furnishing repair parts to users of such machines, cannot be required to testify to the details and extent of defendant's business, or the various persons to whom it has sold repair parts, etc., in advance of a determination of the questions of validity and infringement of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 550-553; Dec. Dig. § 314.\*]

In Equity. Suit by F. F. Slocomb & Co., Incorporated, against the A. C. Layman Machine Company. On motion to require witness to answer certain questions. Denied.

E. Hayward Fairbanks, of Philadelphia, Pa., for complainant.

Charles Howson and William Steell Jackson, both of Philadelphia, Pa., for defendant.

BRADFORD, District Judge. In this suit F. F. Slocomb & Co., Incorporated, the complainant, charges the A. C. Layman Machine Company, the defendant, with infringement of patent No. 927,609 and reissue patent No. 11,843, relating to leather-staking machines. The matter immediately before the court is a motion on behalf of the complainant for an order to compel Alfred C. Layman, president of the defendant, to produce a copy of a certain application pending at the time of the submission of the motion for letters patent of the United States; and also to answer interrogatory No. 236 addressed to him during the taking of the complainant's prima facie proofs. Since the argument a patent having been granted on the above application the motion so far as it relates to the production of that application has been abandoned, and the only questions now before the court arise on that portion of the above mentioned interrogatory reading as follows:

"Q. 236. In order to get before the Court in a single proceeding certain facts about which I have asked you and which you have declined to answer in view of misdirected efforts of your counsel, I will now enumerate in a single question the various facts as to which I desire information, and if you do not answer the question, I will make an application to Court for an order requiring you to.

"a. Give me the names of all the complainant's customers with whom you or the defendant corporation has meddled with and furnished repair parts prior to December 1st, 1911.

"b. Make a specific reference to the drawings of the two patents in suit and enumerate by a reference numeral on said drawings which of said repair parts you have furnished to complainant's customers or to users of complainant's machine and when and to whom, prior to December 1st, 1911.

"c. Give me the names of such of complainant's customers as you knew had installed in their plant or in use the knee pressure staking machine

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

conforming substantially to the reissue patent, 11,843, only, to whom you furnished repair parts adapted only for use in such machines, prior to Dec. 1, 1911.

"d. Give me the names of the complainant's customers whom you or the defendant visited soliciting their trade in the way of furnishing supplies and repair parts for the complainant's patented machines here in suit, prior to Dec. 1, 1911.

"e. Give me the names of the other parties connected with the defendant corporation to whom you made reference in your answer to my Q. 56."

The information sought under paragraph "e" of the interrogatory, requiring Layman to give the names of the other persons connected with the defendant to whom he had referred in his answer to Q. 56 is wholly immaterial as appears from that question and its answer, which are as follows:

"Q. 56. What was your authority for saying that this suit was indefinitely prolonged? Did either of your counsel tell you to say this?

"(Same objection as last before.)

"A. The fact that practically nothing had been done in this case for about two months and the slow progress that had been made led me to believe that it was being drawn on simply for business reasons and that only; in fact, the whole case which began practically last September has not only led me but others connected with our concern to feel the same way about it and I might say a number of the trade."

The other paragraphs of the interrogatory remaining open for consideration seek information as to the names of the complainant's customers or users of the complainant's machine to whom the witness or the defendant had furnished "repair parts" prior to December 1, 1911; or the names of the complainant's customers whom the witness or the defendant visited "soliciting their trade in the way of furnishing supplies and repair parts for the complainant's patented machines here in suit, prior to Dec. 1, 1911"; or the names of such of the complainant's customers as the witness knew had installed "in their plant or in use the knee pressure staking machine conforming substantially to the reissue patent, 11,843 only, to whom you furnished repair parts adapted only for use in such machines, prior to Dec. 1, 1911." Paragraph "b" requires not only a statement of the names of the complainant's customers or users of the complainant's machines to whom the witness or the defendant had furnished "repair parts" prior to December 1, 1911, but also a specific reference to the drawings of the two patents in suit and an enumeration by reference numerals on such drawings of such "repair parts" so furnished.

There has been no decree establishing the validity and infringement of the patents in suit or either of them, and the complainant is still engaged in making out its prima facie case. It has a right to prove by Layman, if it can, infringement by the defendant, contributory or otherwise, of any of the claims relied on. And it would be unnecessary and unwise at this stage of the suit to undertake a precise statement of the essentials of contributory infringement in this case or to decide whether or under what circumstances the furnishing by the defendant of "repair parts" to the complainant's machines, whether in the hands of the complainant's customers or others using the same, would constitute such infringement. The complainant is enti-

tled to the testimony of Layman for the purpose of proving such infringement, actual or supposed. That the complainant has had the benefit of Layman's testimony largely covering the supposed infringement of the claims relied on appears from the copy of his evidence submitted to the court. But should complainant conceive that the witness has not fully stated the nature and character of all the "repair parts" furnished by the defendant in supposed infringement of the claims relied on, the complainant is at liberty further to examine Layman on this subject making specific reference to the drawings of the patents and the numerals thereon indicating all "repair parts" which the complainant may claim were furnished in such infringement, and also as to the period or periods of time covering such furnishing. But at this stage of the case the complainant is not entitled to draw from the witness the names of its various customers or of the various users of its machines to whom the defendant or the witness acting for it furnished "repair parts" in supposed infringement of the patents in suit. Before this can properly be done it is necessary that the complainant should obtain an interlocutory decree sustaining the claims relied on and finding infringement. In the absence of such a decree the complainant cannot successfully insist upon a disclosure of the details and extent of the defendant's business. *Keller v. Strauss* (C. C.) 88 Fed. 517; *Lovell Mfg. Co. v. Automatic Wringer Co.* (C. C.) 124 Fed. 971. Nor does the fact that the complainant may desire, if deemed expedient by counsel, to join with the defendant "as contributory infringers or joint tort-feasors" such of the complainant's customers or users of its machines as may have been furnished with "repair parts" by the defendant, entitle the complainant at this stage of the suit to a list of the names of such customers or users. Indeed, the joinder as co-defendants of such persons generally would inevitably, I think, result in misjoinder of parties and multifariousness.

For the above reasons the motion under consideration is denied, with costs to the defendant.

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In re LIPPHART.

(District Court, S. D. New York. October 4, 1912.)

**1. BANKRUPTCY (§ 14\*)—JURISDICTION OF PROCEEDINGS—"PLACE OF BUSINESS."**

An employé of a large express company at a salary of \$23 per week as rate clerk and attorney in fact, authorized to indorse all bank paper, such as bills of lading and consular invoices, and to sign custom house clearances, has no "place of business," within Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545, 546 (U. S. Comp. St. 1901, p. 3420), giving the District Court jurisdiction to adjudge persons bankrupt who have had their principal place of business within their respective territorial jurisdiction for the preceding six months, or the greater portion thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 14.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5390-5392.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. BANKRUPTCY (§ 14\*)—JURISDICTION OF PROCEEDINGS—RESIDENCE AND DOMICILE.**

One who went from New York to acquire a residence in New Jersey which would justify him in bringing an action for divorce relinquished both his residence and domicile in New York within Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545, 546 (U. S. Comp. St. 1901, p. 3420), giving the District Courts jurisdiction over persons who have resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 14.\*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

In the matter of Henry H. Lipphart, bankrupt. Heard on motions by the creditor to vacate the order of adjudication and for dismissal of the petition in bankruptcy on the ground of no jurisdiction, and by the bankrupt to amend his voluntary petition. Motion to vacate granted, and motion to amend denied.

Edward Endelman, of New York City, for creditor.

Emanuel M. Kaiser, of New York City, for bankrupt.

MAYER, District Judge. Upon the same state of facts two motions have been made—(1) by the creditor to vacate the order of adjudication herein and for a dismissal of the petition in bankruptcy on the ground of no jurisdiction; and (2) by the bankrupt to amend his voluntary petition by adding the allegation "and has also had his domicile for said period" within the Southern District of New York.

The bankrupt is, and has been for the past 10 years, an employé of a large express company, at a salary of \$23 per week, in the capacity of a rate clerk and as attorney in fact, authorized to indorse all bank paper, such as bills of lading and consular invoices, and to sign custom house clearances for the company. He was born in the city of New York, where he resided for about 30 years until on April 1, 1908, he moved to the state of New Jersey. He contemplated bringing an action for divorce against his wife on the ground of desertion, and his purpose in moving was to secure the residence necessary to the jurisdiction of the courts of New Jersey in such an action. In April, 1911, however, he secured a decree of divorce against his wife in the state of New York; the sole ground of jurisdiction being that the marriage had taken place in the state of New York. From April, 1911, until June 25, 1912, the date of the filing of the voluntary petition, the bankrupt continued to live in New Jersey. He claims that it was his intention to return to New York, but that he was unable so to do on account of the illness of his mother, who lived with him. The jurisdiction of this court was invoked in his petition by the allegation that he had "his principal place of business" for the statutory period at 65 Broadway, New York City.

[1] The first question to be determined is whether a person employed as is and was this bankrupt has a place of business within the meaning of the Bankruptcy Law. Section 2 invests the District Courts

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



with jurisdiction to "adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof. \* \* \*" While there is not any uniform rule of conduct, it may be said that people generally contract their debts where they live, or where they do business. The debts contracted at the place of residence or domicile are usually of a personal character having to do with purchases for personal use or the household, and ordinarily a person living in one place and employed in another does not contract debts in the locality where he is employed.

It seems to me that it was intended, among other things, by the Bankruptcy Law that these proceedings should, as far as practicable, be carried on in the jurisdiction most convenient to all concerned. The debts of a clerk on a small salary would most likely be owing to the tradesmen doing business in the place where he lived. I think that a clerk, or, for that matter, the general run of employés, cannot be said to be in business or to have a place of business. It seems to me that "place of business" mean a place where a man is conducting a business of his own in which he is a principal. I am inclined to think that the statute contemplated "place of business" as applying only to those who have a business of their own, but in this case it is only necessary to decide that a clerk, such as this bankrupt, did not have a place of business anywhere, and therefore he should have filed his petition at the place where he resided or had his domicile. *In re Kinsman*, Fed. Cas. No. 7832; *In re Magie*, Fed. Cas. No. 8951.

In support of the bankrupt's contention, *In re Baily*, Fed. Cas. No. 753 and *In re Belcher*, Fed. Cas. No. 1237, are cited. In the former case, under the statute then in force, it may be said that the bankrupt carried on business. I do not follow the latter case, and am inclined to think that the learned judge confirmed the report of the register upon the theory that a great hardship might be visited upon creditors if not confirmed.

[2] The second question involved is whether the bankrupt has shown that his domicile was in the city of New York so as to entitle him to an amendment of his petition. The statutes and the courts have made some distinctions between residence and domicile, and the subject is interestingly discussed in *Brisenden v. Chamberlain* (C. C.) 53 Fed. 307, and *In re H. D. Berner*, 3 Am. Bankr. Rep. 325; but in the case at bar the bankrupt has lost both his residence and his domicile in the state of New York. When he left the city of New York to acquire a residence in New Jersey which would justify him in bringing an action for divorce, he relinquished both his residence and his domicile in the state of New York. Upon the ground of public policy, as well as upon the facts of this particular case, the bankrupt should not be permitted to invoke the aid of the courts of New Jersey to secure a divorce and at the same time seek the jurisdiction of this court to be relieved of his debts.

The motion to vacate is granted, and the motion to amend is denied.

## Ex parte OROZCO.

(District Court, W. D. Texas. December 14, 1912.)

## 1. NEUTRALITY LAWS (§ 1\*)—OFFENSES—AUTHORITY OF PRESIDENT—STATUTES.

Pen. Code (Act March 4, 1909, c. 321, 35 Stat. 1090 [U. S. Comp. St. Supp. 1911, p. 1592]) § 14, relating to "offenses against neutrality," provides that the President or such other person as he shall have empowered for the purpose may employ the land and naval forces to take possession of and detain vessels, etc., and to prevent the carrying on of any military expedition or enterprise from the territory or jurisdiction of the United States against the territory or dominion of any foreign prince or state, or any colony, district, or people with whom the United States is at peace, does not empower the President, in time of peace, to use the military power to arrest without a warrant and imprison without trial a person merely suspected of being within the United States for the purpose of organizing a military expedition in aid of a revolution in his own country with which the United States is at peace.

[Ed. Note.—For other cases, see Neutrality Laws, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

## 2. NEUTRALITY LAWS (§ 1\*)—ARREST OF ALIENS—CONSTITUTIONAL PROVISIONS.

Since the fifth amendment of the federal Constitution guaranteeing to an individual immunity against being deprived of his liberty without due process of law, and the fourth amendment, declaring that warrants shall not be issued except on probable cause supported by oath or affirmation, and the sixth amendment, guaranteeing to accused a speedy and public trial by a jury of the district where the crime was committed, are applicable to aliens sojourning in the United States, as well as to citizens, the President in time of peace has no right to use the military forces for the arrest of an alien temporarily residing in the United States and to imprison him indefinitely without trial while the officers of the government are endeavoring to secure evidence against the alien for violating the neutrality laws existing between the United States and the country of which the alien is a citizen, in which a revolution is in progress with which the alien has been identified.

[Ed. Note.—For other cases, see Neutrality Laws, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

## 3. HABEAS CORPUS (§ 29\*)—SCOPE OF WRIT—ARREST BY EXECUTIVE ORDER.

Where relator, a Mexican alien, identified with a revolution in that country, came into the United States, and while there was illegally arrested by order of the President, and held by the military authorities without trial while effort was being made to show that he was in the United States to violate the neutrality laws, the order directing his arrest was void, and he was entitled to discharge on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 24; Dec. Dig. § 29.\*]

Petition for writ of habeas corpus, on relation of Pascual Orozco, Sr., to secure his release from custody of the military authorities of the United States pending investigation to determine whether he could be held for violation of the neutrality laws between the United States and Mexico. Writ granted, and relator discharged on entering into a recognizance in the sum of \$2,500, with a surety for his appearance to answer the judgment of the appellate court.

The relator, Pascual Orozco, Sr., has presented to the court a petition praying the issuance of a writ of habeas corpus, and his release from custody. He

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is now confined at Ft. Sam Houston, San Antonio, Tex., and claims that he was arrested without warrant by the military authorities, and that his detention is unlawful. He alleges that he is guilty of no crime against the laws of the United States, and that he is charged with no offense, and that his arrest was but the exercise of arbitrary power by the military authorities. The relator bases the illegality of his restraint, employing the language of the petition, upon the following constitutional grounds: "Your applicant further avers that he is so unlawfully restrained in his liberty, contrary to the Constitution and laws of the United States, and particularly in contravention of article 3, § 1, of the Constitution of the United States, which provides: 'The judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish.' And of article 3, § 2, of the Constitution of the United States, which provides: 'The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and the treaties made, or which shall be made under their authority.' And of article 3, § 2 of the Constitution of the United States, which provides: 'The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crime shall have been committed, but when not committed within any state, the trial shall be at such place or places as the Congress may by law direct.' And article 4 of the amendments to the Constitution of the United States, which provides: 'The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.' And of article 5 of the amendments to the Constitution of the United States, which provides: 'No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of the law; nor shall private property be taken for public use without just compensation.' And of article 6 of the amendments to the Constitution of the United States, which provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.' And of article 8 of the amendments to the Constitution of the United States, which provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'"

The writ duly issued, and in obedience to its command Col. Charles G. Treat, the commanding officer at Ft. Sam Houston, produced the relator, and submitted his return, which fully sets forth the reasons for his detention. From the return thus made it appears that the relator, Pascual Orozco, Sr., is a citizen of Mexico, and enjoys the rank of colonel in the army opposed to the administration of President Madero. He is the father of Gen. Orozco, and has been, with the son, engaged in the revolutionary movement now flagrant in the neighboring republic. For several months subsequent to January 31, 1912, relator was in command of the forces at Juarez, Mexico, a port of entry opposite El Paso, Tex. Upon the abandonment of Juarez, in the month of August following, he proceeded with his men to the village of Ojinaga, where, in September, a conflict occurred between the government and revolutionary forces, in which the former were successful. The relator made his escape, and crossed the Rio Grande to American territory, where he was arrested by United States troops, who were then patrolling the river, and by them delivered to the civil authorities to answer an indictment which had been preferred against him in the federal court at El Paso, charging him and others with



a conspiracy, entered into on March 28, 1912, to export arms and ammunition to the Republic of Mexico. Upon this charge he was duly tried, and on October 19th acquitted and ordered discharged. Subsequently, on November 10th, in pursuance of telegraphic orders issuing from the War Department by direction of the President, he was arrested in El Paso by the military authorities and by them detained in custody for a day or two, when he was removed to San Antonio, and on November 13th delivered to Col. Treat, who now holds him in custody, under instructions from the President.

It further appears that the military authorities have information that the relator intends to return to Mexico with the view of rejoining the revolutionary forces, and that it was his purpose and intention at the time of his arrest at El Paso to aid and assist in setting on foot, within the United States, a military expedition to be carried on against the republic of Mexico. While it is averred in the return of Col. Treat that the authorities have information of certain acts and conduct of the relator evidencing his intention to violate the neutrality laws, it is also alleged that they are "not informed of the commission of such overt acts as would probably at this time" warrant the filing of a complaint and the issuance of a warrant of arrest against him. The respondent further advises the court that the authorities are engaged in obtaining evidence touching the illegal acts of the relator, and he indulges the belief that sufficient evidence will soon be obtained to justify the filing of a criminal complaint against him by the civil authorities. The averments of the return are somewhat vague as to the time when the relator will be delivered to the civil authorities, but it may be inferred that it is the intention of the respondent and of his superior officers to surrender him when sufficient evidence of his guilt has been procured to authorize his prosecution. In this connection the respondent denies that the relator is held upon a charge of violating the military laws of the United States, or that he is held for trial by court-martial. Finally, it is insisted by the respondent that the relator should be remanded to the custody of the military authorities "to await further orders."

Touching the power of the President to cause the arrest and detention of the relator, the return of the respondent employs the following language: "The respondent is commanding officer of the United States Army, United States of America, at Ft. Sam Houston, in Bexar county, Tex., and there holds interned and in detention the person of one Pascual Orozco, Sr., in accordance with and pursuant to orders from the War Department, and instructions of the Secretary of War of the United States of America, directing such detention of said Pascual Orozco, Sr., with the approval and at the direction of the President of the United States of America, Commander in Chief of the Army by virtue of the power vested in the President of the said United States, and Secretary of War, so empowered by the President of the said United States for such purpose, by section 14 of the Criminal Code of the said United States (being same as section 5287 of the Revised Statutes of the United States), to employ the army for the purpose of preventing the carrying on of any military expedition or enterprise from the territory or jurisdiction of the said United States of America against the territory or dominion of any foreign prince or state, or of any colony, district or people with whom the United States are at peace, or the violation of any of the neutrality laws of the said United States." Section 14 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1090 [U. S. Comp. Supp. 1911, p. 1592]), provides: "The District Courts shall take cognizance of all complaints, by whomsoever instituted in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof. In every case in which a vessel is fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel is increased or augmented, or in which any military expedition or enterprise is begun or set on foot, contrary to the provisions and prohibitions of this chapter; and in every case of the capture of a vessel within the jurisdiction or protection of the United States as before defined; and in every case in which any process issuing out of any court of the United States is disobeyed or resisted by any persons having the custody of any vessel of war, cruiser or other armed vessel of any foreign prince, or state, or of any colony, district or people, or of



any subjects or citizens of any foreign prince or state, or of any colony, district or people, it shall be lawful for the President or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such vessel with her prizes, if any, in order to enforce the execution of the prohibitions and penalties of this chapter, and the restoring of such prizes in the cases in which restoration shall be adjudged; and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territory of the United States against the territory or dominion of any foreign prince or state, or of any colony, district or people with whom the United States are at peace." To the return of Col. Treat the relator interposed a demurrer, the grounds of which are founded upon the constitutional provisions hereinbefore set forth.

The cause is therefore submitted to the court upon demurrer to the facts averred in the return, the truth of which the demurrer admits.

Goldstein & Miller, of El Paso, Tex., for relator.

Charles A. Boynton, U. S. Atty., of Waco, Tex., and Charles C. Cresson, Asst. U. S. Atty., of San Antonio, Tex., for the United States.

MAXEY, District Judge (after stating the facts as above). While the duty has devolved upon the writer during a long period of judicial service to decide many grave and important questions, he has not been called upon to determine one of more delicacy than that now submitted for consideration. Broadly speaking, the question involves, on the one hand, personal liberty; on the other the power of the President, in the exercise of his constitutional functions, to restrict that liberty. To the solution of the problem thus presented the court has given anxious thought; and, to enable it to reach a satisfactory conclusion, all available sources of information have been consulted.

To somewhat abbreviate the discussion, it may be noted in limine that the military laws are not here involved, since the relator is not engaged in either the military or naval service of the United States. Nor is it pertinent to inquire into the powers of the chief executive during the reign of martial law—that species of law denominated by jurists of distinction as “not law, in any proper sense, but merely the will of the military commander, to be exercised by him only on his responsibility to his government or superior officer.” Martial law prevails when war is flagrant, and the civil courts are powerless to exercise their accustomed jurisdiction. Such conditions do not now exist. Our country is at peace with all nations, and there is nothing to disturb the civil courts in the orderly discharge of their appropriate duties. And “where peace prevails,” said the Chief Justice in *Ex parte Milligan*, “the laws of peace must prevail.” 4 Wall. 140, 18 L. Ed. 281. Where, then, do we find the law which authorized the President to arrest the relator without warrant, in violation of the fourth amendment of the Constitution, and to deprive him of his liberty without due process of law in contravention of the fifth?

[1] It is said by the respondent that this power of summary arrest and detention is derived from the provisions of section 14 of the Penal Code. This section, forming part of the chapter on the subject of “offenses against neutrality,” so far as it affects the present inquiry, makes it lawful for the “President or such other person as he

shall have empowered for that purpose, to employ the land and naval forces" for two purposes, to wit: (1) For the purpose of taking possession of and detaining vessels, etc.; and (2) for the purpose of preventing the carrying on of any military expedition or enterprise from the territory or jurisdiction of the United States against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace. In analyzing the section, it will be observed that in reference to vessels express power is conferred to seize and detain; but no power is conferred, in terms, authorizing the arrest and imprisonment of persons. The President may employ the army in preventing the carrying on of a military expedition from our own territory against the Republic of Mexico, and his discretion in calling out the military forces for that purpose is not subject to the review and control of the courts. And it may be further said, in the language of the Supreme Court, that:

"Whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the only and exclusive judge of the existence of such facts." *Martin v. Mott*, 12 Wheat. 31, 32, 6 L. Ed. 537; *Luther v. Borden*, 7 How. 45, 12 L. Ed. 581.

This principle is especially true when applied to the acts of the chief magistrate of the nation, and, when he "exercises an authority confided to him by law, the presumption is that it is exercised in pursuance of law." These principles are freely conceded. But in using the army to prevent the carrying on of a military expedition against Mexico may he go further, and arrest, without warrant and imprison without the benefit of a trial, persons who are suspected of organizing such expeditions? It is manifest that no such extraordinary authority is expressly conferred by the statute; and in *Gelston v. Hoyt*, 3 Wheat. 332, 4 L. Ed. 381, a case involving the powers of the President, it was said by Mr. Justice Story that:

"It is certainly against the general theory of our institutions to create great discretionary powers by implication."

Do the facts of the present case justify it? At the time of his arrest the relator was sojourning in the city of El Paso. He had been recently acquitted by a jury on the charge of conspiring to export arms to Mexico in violation of the resolution of the Congress and the proclamation of the President. It was a time of peace. The courts were open, and there were a United States commissioner and deputies of the marshal to issue warrants and serve process. There was absolutely no obstruction to the administration of justice by the civil courts, and there was in El Paso no hostile force threatening to invade Mexico to overthrow the existing government. Why, then, cause his arrest by the military authorities, and transport him 600 miles to San Antonio to be held in custody at Ft. Sam Houston?

It is not pretended that for any act committed the relator is amenable to trial by court-martial. But it is insisted by counsel for the respondent that the President has lawful authority, not only to invoke

the aid of the army to prevent the carrying on of a military expedition against Mexico, but also to arrest and detain any persons engaged in the illegal movement. In this connection the views of Attorney General Harmon may be read with profit. In a communication addressed by him to the Secretary of State, he wrote as follows:

"It is certain, however, that the executive has no right to interfere with or control the action of the judiciary in proceedings against persons charged with being concerned in hostile expeditions against friendly nations. The President may employ the military and naval forces to disperse or prevent the departure from our territory of any such expedition, or of any men, arms, or munitions which are manifestly parts thereof; and, being a co-ordinate authority, he would not be precluded from so doing in a proper case by the action of the judiciary. But it is plain that such means are practicable only when there is open defiance of the authority of the government by an organized body of men. Occasions may be imagined when the summary process of martial law might perhaps be resorted to against the persons composing such a body. But in all such cases as those which have come to the notice of the government these conditions do not exist, and the judicial authority is the only one which can be properly or efficiently invoked. See Mr. Bayard to the Spanish minister. 3 Whart. Dig. Int. Law, p. 625. Our government possesses all the attributes of sovereignty with respect to the present subject, and has for their exercise the appropriate agencies which are recognized among civilized nations; but our Constitution forbids the arbitrary exercise of power when the liberty or property of individual citizens is involved. It cannot, therefore, resort to some measures which are still possible in some countries." 21 Op. Attys. Gen. 273.

That the President has lawful power to employ the army in dispersing or preventing the departure from our territory of a military expedition against Mexico is clear beyond controversy. In the execution of that high duty soldiers employed might encounter forcible resistance. They would in such contingency obviously have the right to use sufficient force to overcome that resistance. In order to disperse or prevent the departure of the expedition, it might, and probably would, become necessary to effect the capture of the persons therein engaged. Thus far the army would be acting within the scope of its lawful powers. But even in the case supposed it is thought that it would become the plain duty of the captors to deliver the persons arrested within a reasonable time—that is, at the earliest convenient opportunity—to the civil authorities, to be dealt with according to the law of the land. Such was the course pursued by the military authorities in reference to the first arrest of the relator after his escape to American territory, following the Ojinaga encounter in September. And having been delivered to the marshal, as the executive officer of the court, he was, in due season, accorded a fair and impartial trial, in obedience to constitutional requirements and according to the forms of law. But his subsequent arrest and imprisonment at El Paso on November 10th, without warrant and merely upon an order directed by the President, stands upon a different footing. The conditions then existing repelled the thought that the intervention of the military was necessary to the administration of justice. The civil courts, with their equipment, were competent to deal with all disturbers of the peace and with all persons offending against the neutrality or other statutes. The military authorities were not there en-

gaged in dispersing or expelling from our territory an armed force, constituting a hostile military expedition, since no such force existed in El Paso. Whence then comes the power for the interference of the military authorities? We have seen that it is not expressly conferred by section 14 of the Penal Code, and it would be contrary to the general theory of our institutions, repeating the language of Mr. Justice Story, to create such discretionary powers by implication.

[2] The power to arrest without warrant and to deprive the individual of his liberty without due process of law has no existence in this country. It has not been committed to any official, however high his station, nor to any department of the government, either executive, legislative, or judicial. Every department must act in obedience to the mandates of the Constitution. No one of them may usurp powers forbidden by that instrument, and none of them may perform acts in violation of its commands. When, therefore, an individual is arrested without warrant, in disregard of the fourth amendment, and imprisoned without due process of law, in violation of the fifth, the arrest and imprisonment are unlawful, and cannot be sustained in a court of justice. The treatment of the relator is embraced within this category. His arrest upon the mere order of the President was in contravention of the fourth amendment of the Constitution, and his continued detention is repugnant not only to the fifth amendment, but also to the sixth, which guarantees to the accused the right to a speedy and public trial by a jury of the district where the crime shall have been committed.

The views expressed by the court are supported by high authority. In a communication addressed by Attorney General Black to the President on the subject of the "Power of the President in executing the Laws," among other things it was said:

"To the chief executive magistrate of the Union is confided the solemn duty of seeing the laws faithfully executed. That he may be able to meet this duty with a power equal to its performance, he nominates his own subordinates, and removes them at his pleasure. For the same reason, the land and naval forces are under his orders as their commander in chief. But his power is to be used only in the manner prescribed by the legislative department. He cannot accomplish a legal purpose by illegal means, or break the laws himself to prevent them from being violated by others." 9 Op. Attys. General, 518, 519.

Mr. Wirt as Attorney General in the year 1818 addressed the President as follows:

"Sir: Mr. Calhoun has called on me at the desire of the Secretary of State (now absent), for the purpose of inquiring whether I would advise a proclamation against Obed Wright, of Georgia, or private instructions to the marshals of the several districts and territories, for the apprehension of the fugitive. On inquiry at the department of state, no precedent is to be found for either course, as you will find from Mr. Brent's answer to some questions put by me, which I inclose. The case to which he alludes by memory is that, he says, of Bradford, who was implicated in the Pennsylvania insurrection. But we know not what degree of evidence General Washington might have had against Bradford to warrant his proclamation, or whether he relied upon the openness and notoriety of the fact of the insurrection, which was very little, if anything, short of bellum flagrans. The result of the inquiry is that there is no certain precedent to guide us as to either course, and I have very strong doubts (in which Mr. Calhoun concurs) whether either of the courses proposed



is warranted by the Constitution. Arrest for trial is a proceeding which belongs to the judicial, not to the executive, branch of the government, and the warrant of arrest is always preceded by evidence—*ex parte* to be sure, but still evidence—to wit, information on oath. Can the President of the United States order an arrest either by proclamation or by instructions to marshals? Would not such proclamation or instructions be, in effect, a warrant to arrest? It is very clear to me that they would; and that either of them would be a violation of the sixth (fourth) article of the amendments of the Constitution of the United States, which provides that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.' It was one of the strong grounds of objection to the celebrated alien law that it gave the President power to arrest, 'a power,' says Judge Tucker, 'which it was presumed did not exist either in the executive of the state or of the federal government.' 4 Tucker's Black., 290. Would not a better course be to have an indictment submitted to the next grand jury for the circuit court of Georgia; and, if found by them to cause authenticated copies of it to be furnished to the several marshals and collectors of the United States, with instructions, if Wright should make his appearance anywhere within the United States, to cause him to be arrested according to law, with special reference, if necessary, to the sixth amendment to the Constitution of the United States and the thirty-third section of the judiciary act, which points out the mode of arrest? There is nothing in this suggestion which denies to the President the power of issuing his proclamation against an offender who has once been regularly arrested and has made his escape; for the regularity of the arrest implies that the probable cause has been furnished on oath or affirmation according to the amendment of the Constitution, and that the warrant of arrest has been duly issued, and has had its effect."

But we are not confined to the opinions of cabinet officers. In 1861 Mr. Chief Justice Taney had under consideration the case of *Ex parte Merryman*. The case may be readily understood from a partial statement as made by the Chief Justice, as follows:

"A copy of the warrant or order under which the prisoner was arrested was demanded by his counsel and refused; and it is not alleged in the return that any specific act, constituting any offense against the laws of the United States, has been charged against him upon oath, but he appears to have been arrested upon general charges of treason and rebellion without proof, and without giving the names of the witnesses, or specifying the acts which, in the judgment of the military officer, constituted these crimes. Having the prisoner thus in custody upon these vague and unsupported accusations, he refuses to obey the writ of habeas corpus, upon the ground that he is duly authorized by the President to suspend it. The case, then, is simply this: A military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland upon vague and indefinite charges without any proof, so far as appears. Under this order, his house is entered in the night, he is seized, as a prisoner, and conveyed to Ft. McHenry, and there kept in close confinement; and when a habeas corpus is served on the commanding officer, requiring him to produce the prisoner before a justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is that he is authorized by the President to suspend the writ of habeas corpus at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ." 17 Fed. Cas. 147, 148.

In the opinion, discussing the powers of the President at page 149 of 17 Fed. Cas., the Chief Justice said:

"So, too, his powers in relation to the civil duties and authority necessarily conferred on him are carefully restricted, as well as those belonging to his

military character. He cannot appoint the ordinary officers of government, nor make a treaty with a foreign nation or Indian tribe, without the advice and consent of the Senate, and cannot appoint even inferior officers, unless he is authorized by an act of Congress to do so. He is not empowered to arrest any one charged with an offense against the United States, and whom he may, from the evidence before him believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the Constitution expressly provides that no person 'shall be deprived of his life, liberty or property without due process of law'—that is, judicial process. Even if the privilege of the writ of habeas corpus were suspended by act of Congress, and a party not subject to the rules and articles of war were afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison, or brought to trial before a military tribunal, for the article in the amendments to the Constitution immediately following the one above referred to (that is, the sixth article) provides that, 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.' The only power, therefore, which the President possesses, where the 'life, liberty or property' of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires 'that he shall take care that the laws shall be faithfully executed.' He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the Constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments."

At page 150 of 17 Fed. Cas. he continued:

"Indeed, the security against imprisonment by executive authority, provided for in the fifth article of the amendments to the Constitution which I have before quoted, is nothing more than a copy of a like provision in the English Constitution, which had been firmly established before the declaration of independence. Blackstone states it in the following words: 'To make imprisonment lawful, it must be either by process of law from the courts of judicature, or by warrant from some legal officer having authority to commit to prison.' 1 Bl. Comm. 137. The people of the United Colonies, who had themselves lived under its protection, while they were British subjects, were well aware of the necessity of this safeguard for their personal liberty. And no one can believe that in framing a government intended to guard still more efficiently the rights and liberties of the citizen against executive encroachment and oppression they would have conferred on the President a power which the history of England had proved to be dangerous and oppressive in the hands of the crown, and which the people of England had compelled it to surrender, after a long and obstinate struggle on the part of the English executive to usurp and retain it."

And at page 152 of 17 Fed. Cas. he indicated the course which should have been pursued by the military, upon the arrest of Merryman, in the following language:

"For, at the time these proceedings were had against John Merryman, the district judge of Maryland, the commissioner appointed under the act of Congress, the district attorney, and the marshal all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time there had never been the slightest resistance or obstruction to the process of any

court or judicial officer of the United States in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offense against the laws of the United States, it was his duty to give information of the fact and the evidence to support it to the district attorney. It would then have become the duty of that officer to bring the matter before the district judge or commissioner, and, if there was sufficient legal evidence to justify his arrest, the judge or commissioner would have issued his warrant to the marshal to arrest him; and upon the hearing of the case would have held him to bail, or committed him for trial, according to the character of the offense, as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military."

Such were the principles enunciated by the Chief Justice in favor of liberty at a time when the clash of arms resounded throughout the land and the fate of the republic was thought to hang in the balance. In an exigency so pressing the venerable jurist would doubtless have been inclined to go to the very verge of his authority in the effort to strengthen the hands of the President, and enlarge his administrative powers. But personal liberty, intrenched in and effectively protected by the safeguards of the Constitution, was a thing too sacred to be disregarded, notwithstanding the peril to the national life.

Thus reasoned also Mr. Justice Lawrence, as the organ of the Supreme Court of Illinois, in the case of *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159-178. This case originated in 1862. It was an action of trespass brought by Johnson to recover damages for an unlawful arrest. It was averred in the pleas of certain of the defendants that Johnson was a member of a disloyal secret society, known as the Knights of the Golden Circle, that he was deeply engaged in aiding the society in their treasonable purposes, and was in fact levying war against the United States. The pleas mentioned contained the following additional averments:

"The defendant Jones was at that time United States marshal for the Northern District of Illinois, and that said defendants Hawkins and Hopkins were his deputies; that as such marshal he was ordered by the President of the United States to arrest said plaintiff, as a measure proper for the suppression of the rebellion, and convey him to Ft. Lafayette; and that he did so arrest him, and convey him to said fort in a comfortable manner, and there delivered him to the custody of the officer in command of said fort, after which time the plaintiff was not in the custody of the defendant."

It will be observed that at the time of Johnson's arrest war was flagrant as it was when Merryman was taken into custody. He was arrested by the United States marshal, upon the order of the President, for treasonable designs against the government, and imprisoned in Ft. Lafayette. If the President was without power to issue an order of arrest at such a time and under such circumstances, let it be asked, Whence comes the power in a season of profound peace? In an opinion which reflects luster upon the author the power was denied the President in Johnson's Case, and it was decided that he had a good cause of action. In discussing the question it was said by the



learned justice at pages 147, 148, of 44 Ill., at pages 163, 164, of 92 Am. Dec.:

"That the President of the United States has the rightful power in time of peace to cause a marshal to arrest a citizen of Illinois without process and without any charge of crime legally preferred, and convey him to a distant state, and there imprison him without judicial writ or warrant in a military fortress, is a proposition which no one would have the hardihood to assert. That such power in a season of peace cannot be safely intrusted to any government by a people claiming to be free is a political truism lying beyond the domain of argument. The right of the citizen to his personal liberty, except when restrained of it upon a charge of crime and for the purpose of judicial investigation, or under the command of the law pronounced through a judicial tribunal, is one of those elementary facts which lie at the foundation of our political structure. The cardinal object of our Constitution, as it is the end of all good government, is to secure the people in their right to life, liberty, and property. The more certainly to attain this end, the framers of our Constitution, not only proclaimed certain great principles in the Bill of Rights, but they distributed governmental powers into three distinct departments, each of which, while acting in its proper sphere, was designed to be independent of the others. To the legislative department it belongs to declare the causes for which the liberty of a citizen may be taken from him; to the judicial department to determine the existence of such causes in any given case; and to the executive to enforce the sentence of the court. If a citizen can be arrested, except upon a charge of violated law, and for the purpose of taking him before some judicial tribunal for investigation, then it is plain that the executive department has usurped the functions of the other two, and the whole theory of our government, so far as it related to the protection of private rights, is overthrown. But on this question we are not left merely to arguments drawn from the general spirit and object of our Constitution. Our forefathers had fresh in their memory the struggles which it had cost in England to secure those two great charters of freedom, the Magna Charta of King John's time, and the Bill of Rights of 1688, and they incorporated into our fundamental law whatever was most valuable in those instruments for the security of life, liberty, and property. They provided in article 4 of the amendments that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.' They further provided, in article 5, that 'no person shall be deprived of life, liberty, or property without due process of law'; and, in article 6, that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.'"

At pages 160, 161, of 44 Ill., at pages 174, 175, of 92 Am. Dec., it was further said:

"It is a fearful power that is claimed for the government by the counsel for the appellee, and one which no free government ought to possess. Even in England, in the latter part of the last century, when secret political societies were formed hostile to the government and in league with the French revolutionists, or supposed to be so, although the country was at war with France, yet, while the high Tory administration of Mr. Pitt arrested, prosecuted, and punished with a pitiless vigor, it acted only through the ordinary agencies of the civil courts, and made no use of the military arm under the pretense that the offending persons were belligerents or public enemies. If this plaintiff, was guilty of the charges made in the plea, he merited arrest and a severe punishment, but he should have been punished in conformity to law. It is to



be remembered that the question before us is one of power simply on the part of the executive, and not of deserving on the part of the plaintiff. If the President could rightfully arrest him by military force, and consign him without process or trial to a fortress in the harbor of New York, he could do the same thing to any other person in the State of Illinois, however innocent of crime. This plaintiff may have been disloyal, and seeking to aid the rebels, but the most loyal citizen might have been arrested and sent away in the same summary manner. As no charge is made, no judicial investigation had, it is left entirely to the caprice of the government to determine what persons shall be seized. The power to thus arrest being once conceded, every man in the state, from the Governor down to the humblest citizen, would hold his liberty at the mercy of the military officer in command."

Apply the closing language of the excerpt to the case at bar, concede the principle contended for by the respondent, and every man in the country would hold his liberty at the mercy of the President, and the military would then become independent of and superior to the civil power. In the famous case of *Ex parte Milligan*, 4 Wall. at pages 128, 129, 18 L. Ed. 281, it was said by Mr. Justice Davis, speaking for the court, that:

"In some parts of the country, during the War of 1812, our officers made arbitrary arrests, and, by military tribunals, tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the courts, were uniformly condemned as illegal."

But it may be objected that the provisions of the Constitution, to which reference has been made, afford no protection to foreigners, and that they apply solely to our own citizens. To this objection the courts have responded in the negative. In *Ex parte Milligan* it was said that:

"The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances." 4 Wall. 120, 121, 18 L. Ed. 281.

The language of the court in *Wong Wing v. United States*, 163 U. S., at page 238, 16 Sup. Ct., at page 981, 41 L. Ed. 140, is equally emphatic:

"And in the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 369 [6 Sup. Ct. 1064, 1070 (30 L. Ed. 220)], it was said: 'The fourteenth amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws.' Applying this reasoning to the fifth and sixth amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law."

In this connection the apt and forceful words of Mr. Justice Field deserve repetition:

"The term 'person,' used in the fifth amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident

alien born is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws. This has been decided so often that the point does not require argument. *Yick Wo v. Hopkins*, 118 U. S. 356, 369 [6 Sup. Ct. 1064, 30 L. Ed. 220]; *Ho Ah Kow v. Nunan*, 5 Sawy. 552 [Fed. Cas. No. 6,546]; *Carlisle v. United States*, 16 Wall, 147 [21 L. Ed. 426]; *In re Lee Tong* [D. C.] 18 Fed. 253; *In re Wong Yung Quy*, 6 Sawy. 237 [47 Fed. 717]; *In re Chow Goo Pool* [C. C.] 25 Fed. 77. The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar—in face of the great constitutional amendment which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. Far nobler was the boast of the great French Cardinal who exercised power in the public affairs of France for years that never in all his time did he deny justice to any one. 'For fifteen years,' such were his words, 'while in these hands dwelt empire, the humblest craftsman, the obscurest vassal, the very leper shrinking from the sun, though loathed by charity, might ask for justice.'" 163 U. S. 242, 243, 16 Sup. Ct. 983, 41 L. Ed. 140.

It is thus seen that the safeguards of the fourth, fifth, and sixth amendments of the Constitution protect citizens and aliens alike; and hence the foreigner, equally with the native born, may invoke their aid to guard against the assaults of arbitrary power.

[3] Without further discussion of the interesting question involved in the controversy, the court contents itself with the statement of the following conclusions: (1) The President was without lawful power to order the arrest and imprisonment of the relator; (2) the order issued by his direction for such arrest was inoperative and void; and (3) the relator, being illegally restrained of his liberty by the military authorities, is entitled to be enlarged.

It is therefore the order of the court that he be discharged from custody upon entering into recognizance in the sum of \$2,500, with surety, as prescribed by rule 34 of the Supreme Court, for appearance to answer the judgment of the appellate court.

The court is mindful of the fact that the decision of this case attributes to the President the unlawful exercise of power. But in view of his eminence as a jurist and his well-known devotion to the laws of the country, and to the principles of constitutional liberty, the writer takes pleasure in disclaiming any intention of imputing to that distinguished official the purpose, or desire, to usurp powers not lawfully confided to the chief magistrate of the Union. That he has earnestly and persistently endeavored to enforce the neutrality statutes and thus to preserve amicable relations with our sister republic is known to all men, and that in ordering the arrest and imprisonment of the relator he was actuated by the high motive to faithfully execute the laws, the writer readily admits. But these considerations should not affect the determination of legal questions. The relator has appealed to the court to set him free, and, if he be illegally restrained of his liberty, that appeal should not be in vain.

**Ex parte DE LA FUENTE.**

(District Court, W. D. Texas. December 14, 1912.)

Petition by David de la Fuente for writ of habeas corpus to obtain his release from imprisonment by the military authorities of the United States for the alleged breach of the neutrality laws. Writ granted, and relator discharged on entering into a recognizance with a surety in the sum of \$2,500.

Lane, Wolters & Storey, of Houston, Tex., for relator.

Charles A. Boynton, U. S. Atty., of Waco, Tex., and Charles C. Cresson, Asst. U. S. Atty., of San Antonio, Tex., for the United States.

**MAXEY**, District Judge. The relator, David de la Fuente, has presented to the court a petition praying the issuance of a writ of habeas corpus and his release from imprisonment. He is now confined at Ft. Sam Houston, San Antonio, Tex. The writ duly issued and Col. Charles G. Treat, commanding officer at Ft. Sam Houston, who has the relator in charge, produced him in court, and has, in obedience to the writ, filed his return.

This case was submitted with that of *Ex parte Orozco*, 201 Fed. 106, just decided. While the facts in the two cases are somewhat different, like principles of law govern both. Upon the authority of the *Orozco* Case, therefore, it is ordered that the relator be discharged from custody upon his entering into recognizance, in the sum of \$2,500, with surety, as prescribed by rule 34 (32 Sup. Ct. xiii) of the Supreme Court, for appearance to answer the judgment of the Appellate Court.

**PORTLAND RY., LIGHT & POWER CO. v. CITY OF PORTLAND et al.**

(District Court, D. Oregon. November 25, 1912.)

No. 5,722.

**1. COURTS (§ 282\*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.**

A federal court has jurisdiction of a suit to enjoin the enforcement of a municipal ordinance alleged to impair the obligation of a prior contract made by the city and which was passed under assumed and asserted legislative authority.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 820-824; Dec. Dec. Dig. § 282.\*]

Jurisdiction of federal courts in cases involving federal questions, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Mining Co.*, 35 C. C. A. 7; *Earnhart v. Switzler*, 105 C. C. A. 262.]

**2. CARRIERS (§ 12\*)—REGULATION OF RATES—POWERS.**

The right to reasonably regulate rates to be charged by a public service corporation, as a street railroad company, is a governmental power continuing in its nature, and, while it may be suspended in a given case by a contract for a definite time not unreasonably long, it can only be done by words of positive grant or language equivalent thereto, and then only by the supreme legislative body of the state unless authority is clearly delegated by such body.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 7-20; Dec. Dig. § 12.\*]

**3. CARRIERS (§ 12\*)—REGULATION OF RATES—POWERS OF CITY.**

Under the provision of the charter of the city of Portland, Or., authorizing the council to grant for a limited time specific franchises in the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

streets, etc., but providing that "at all times the power and right reasonably to regulate in the public interest the exercise of the franchise or right so granted shall remain and be vested in the council and said power and right cannot be divested or granted," the further provision, that every grant of such a franchise which provides for the charging of rates, fares, and charges for services rendered or performed by the grantee shall fix a maximum rate which may be charged during the life of such franchise, does not vest the city with power to contract away its right to regulate the fares which may be charged by a street railroad company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-20; Dec. Dig. § 12.\*]

**4. CONSTITUTIONAL LAW (§ 134\*)—OBLIGATION OF CONTRACTS—CONTRACTS OF MUNICIPALITY—FRANCHISE TO USE STREETS.**

The grant by a municipality of the right to use streets for a reasonable time for street railroad purposes becomes, when accepted by the grantee and the railway is built, a contract which neither the state nor any of its agencies may impair.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 344; Dec. Dig. § 134.\*]

**5. INJUNCTION (§ 112\*)—RESTRAINING ENFORCEMENT OF ORDINANCE—TIME FOR ACTION.**

A federal court has jurisdiction of a suit to enjoin the enforcement of an ordinance which impairs the obligation of a contract without waiting until proceedings are instituted for its enforcement.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 197; Dec. Dig. § 112.\*]

**6. CARRIERS (§§ 2, 12\*)—CONSTITUTIONAL LAW (§ 298\*)—ORDINANCE REGULATING FARES—CONSTITUTIONALITY.**

A city ordinance requiring street railroad companies operating their lines under franchises granted by the city to provide registers in each car on which the conductor shall ring up the fares collected, providing that, "when the number of fares received equals the seating capacity of the car of two feet for each passenger," the conductor shall only be allowed to charge three cents for each passenger admitted, instead of the regular fare of five cents, that any car shall receive passengers to the extent of the standing room therein, and that for its willful violation for the period of one month the council may declare the franchise of the company forfeited and remove its tracks from the streets, without providing for any hearing or judicial determination of its rights, is unconstitutional and void not only as an impairment of the contract made by a company's franchise and depriving it of its property without due process of law, but as uncertain and unreasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5, 7-20; Dec. Dig. §§ 2, 12;\* Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.\*]

**In Equity.** Suit by the Portland Railway, Light & Power Company against the City of Portland, Frank S. Grant, City Attorney, and E. A. Slover, Chief of Police of said City. On motion for preliminary injunction. Motion granted.

F. V. Holman and Franklin T. Griffith, both of Portland, Or., for complainant.

Frank S. Grant, City Atty., and L. E. Latourette, Deputy City Atty., both of Portland, Or., for defendants.

Before WOLVERTON and BEAN, District Judges.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



BEAN, District Judge. This suit is brought to enjoin the defendant city and its officers and agents from enforcing as against the complainant ordinance No. 25683, enacted by its city council August 14, 1912, and which reads as follows:

"An ordinance providing for a reduced fare on street cars where no seats are provided for passengers, and providing for a penalty for the violation thereof.

"The city of Portland does ordain as follows:

"Section 1. That there shall be placed above the entrance of every street car or car operated as a street car within the city of Portland, in large letters, words and figures indicating the seating capacity of the car.

"Sec. 2. The conductor or other person in charge of the car shall ring up in plain sight of the occupants of the car the number of fares received. When the number of fares received equals the seating capacity of the car of two feet for each passenger as indicated on its entrance, then the conductor or person who collects the fares shall only be allowed to charge or receive three cents for each passenger admitted, for a full fare ride, and it shall be unlawful for any street car company to accept or receive any greater sum than three cents for any person admitted to the car in excess of its seating capacity.

"Sec. 3. Any street car may be permitted to receive and it is required to receive passengers to the extent of the standing room of the car. If the number of passengers in the car falls below its seating capacity, any person standing and who may have paid a three-cent fare may take a seat vacated by other passengers without an extra charge.

"Sec. 4. Persons paying only a three-cent fare as above set forth are entitled to all the transfers and other privileges of a regular fare as herein limited.

"Sec. 5. Any person or company operating street cars in the city of Portland is hereby required to issue and keep on sale tickets in pads of 100 or more, printed in such a way that two and a half cents shall be sufficient for a standing room fare. The selling price of such pads of 100 two and a half cent fares shall not exceed \$2.50. Such pads shall be so printed that two of such standing room tickets may be received for a full fare with seat. Said company or persons operating street cars in the city shall immediately upon the taking effect of this ordinance, issue and keep on sale such tickets.

"Sec. 6. Any person, firm or corporation violating any of the provisions of this ordinance, shall upon conviction in the municipal court be punished by a fine of not more than \$500.00 or imprisonment of not more than six months. It shall also be lawful in case the provisions of this ordinance are willfully violated for a period of one month after the passage of this ordinance for the council of said city of Portland to declare the franchise of the company violating the ordinance forfeited, and to remove its tracks from the streets. Said forfeiture herein provided for may be imposed in lieu of the fine and imprisonment herein provided for, at the option of the council."

In December, 1902, the Oregon Water Power Company owned and was operating street railways in the city of Portland, under municipal franchises, and at that time the city passed and the Power Company accepted a new ordinance granting to it a franchise over additional streets, which provided that the grantee and its successors and assigns "may charge and collect from each passenger traveling upon its railways a fare of five cents, and no more, for traveling each continuous trip in any one direction within the limits of the city of Portland over the line of railway constructed by authority of this ordinance, and its other lines of railway within the limits of said city."

On November 24, 1902, the Portland Railway Company was the owner of certain franchises under which it was operating street railways in the city of Portland, and on the day named the city passed,

and the company accepted, an ordinance repealing all former franchises and granting a new one over certain designated streets, and which provided that the grantee or its successors and assigns "may charge and collect from each passenger traveling upon its railways for each trip traveled by such passenger in one general direction upon the railways authorized by section 1 of this ordinance within the limits of the city of Portland a fare of five cents and no more; excepting that for riding in or the use of observation cars, funeral cars, mail cars, express cars, freight cars, party cars, and other special cars said railway company, its successors and assigns, may charge and collect such compensation, rates and fares as it or they may desire."

On January 9, 1903, the City & Suburban Railway Company was the owner of a street railway system and was operating the same under previously granted franchises covering certain designated streets, and on that day an ordinance was adopted repealing former franchises and granting to the company a new one which contained a provision in reference to fares similar to that in the ordinance of November 24, 1902, to the Portland Railway Company.

At the time of the passage of these several ordinances, the city had authority to "provide for and allow the laying down of tracks for street cars and other railways upon such street or streets as the council may designate" (Laws 1898, Special Session, p. 114), but no authority to enter into a contract with the grantee of such franchise fixing the rate of fares to be charged by such grantee, nor did it have specific authority to regulate such charges.

On the 23d of January, 1903, the present charter of the city of Portland was approved by the Governor. It contains a provision that:

"Nothing in this charter contained shall affect the validity of any franchise, right or privilege in actual use or enjoyment heretofore given or granted by any former or the present city of Portland, or by the city of East Portland or by the city of Albina, and the same shall be and continue in force and effect as given or granted by said cities or either of them." Special Laws 1903, p. 52.

After the adoption of the present charter and prior to 1909, the complainant herein became the owner by purchase or otherwise of the several franchises heretofore referred to and the railways being operated thereunder. In order that it might operate its lines as one system, the city council passed, and the complainant accepted, in April of that year, a new ordinance (No. 19176) granting to it additional franchises over streets and parts of streets so as to enable it to connect its tracks, which ordinance provides (section 12):

"The railway company, its successors and assigns, may charge and collect from each passenger traveling upon its railways or street railways for each trip traveled by such passenger in one general direction, wholly within the city of Portland, on the railways or street railways of the railway company, its successors and assigns, including railways and street railways constructed on the streets or parts thereof, authorized by section 1 of this ordinance, a fare of five cents (5¢) and no more, except that for passengers traveling in observation cars the railway company may charge and collect from each passenger a fare not exceeding fifty cents (50¢) per trip. The railway company, its successors and assigns, may charge and collect for the use of funeral cars,

mail cars, express cars, freight cars, party cars and other special cars, a sum not exceeding ten dollars (\$10.00) per hour for each of such cars."

And that:

"This ordinance and the franchise herein contained is granted subject to all the terms, provisions and conditions contained in the charter of the city of Portland and applicable thereto in the same manner and to the same extent as if each and every of said terms, provisions and conditions were expressly set out and incorporated herein." Section 19.

And also:

"The power and right at all times to reasonably regulate in the public interest the exercise of the rights and privileges granted by this franchise shall be and remain vested in the council of the city of Portland." Section 21.

At the time of the granting of such franchise, the following provisions of the city charter were in force:

"Sec. 94. The council may, subject to the limitations and conditions contained in this charter, grant for a limited time specific franchises or rights in or to any of the public property or places mentioned in the preceding sections (streets, alleys, highways, etc.). Every such grant shall specifically set forth and define the nature, extent and duration of the franchise or right thereby granted, and no franchise or right shall pass by implication. At all times the power and right reasonably to regulate in the public interest the exercise of the franchise or right so granted shall remain and be vested in the council, and said power and right cannot be divested or granted."

"Sec. 105. The council of the city of Portland shall have at all times power to regulate by ordinance, street railroads, tramways and other railroads and the use of tracks and cars, etc."

"Sec. 112. Every grant of a franchise which provides for the charging of rates, fares and charges shall contain a provision fixing the maximum rate of fares, rates and charges which the grantee, his, its or their successors or assigns can charge or collect for services rendered or performed by virtue of and during the life of such franchise and the operation of his or its plant or property thereunder; and said grant may also or in addition provide that the council reserve the right to thereafter from time to time, change, alter, regulate and fix fares, rates or charges which the grantee, his, its or their successors or assigns, can charge or collect thereunder during the life of such grant or franchise."

The jurisdiction of this court is invoked solely on the ground that the controversy is one arising under the Constitution of the United States. Diversity of citizenship does not exist between the parties.

The complainant contends: (1) That the ordinance of August 14, 1912, prescribing the fares which it shall charge and collect, is violative of a contract between it and the city, embodied in franchise ordinance No. 19176, by which it is entitled to charge during the life of the franchise a fare of five cents for each passenger carried, and is therefore invalid under section 10, article 1, of the Constitution of the United States, prohibiting the state from passing any law impairing the obligation of a contract. And (2) that the ordinance granting it a franchise to occupy the streets of the city with its railway lines and the acceptance thereof constitutes a vested right for the life of the franchise, of which it cannot be deprived without just compensation, and that the provisions of the ordinance challenged providing a forfeiture of the franchise in case of a violation thereof is an attempt to deprive it of its property without due process of law, in violation of the

fourteenth amendment to the federal Constitution. And (3) that the enforcement of the ordinance will deprive it of its property without due process of law, denies it the equal protection of the law, and compels it to illegally discriminate between passengers, contrary to the federal Constitution.

The jurisdiction of the court is challenged by one of the officers of the city who is made a defendant, on the ground that the complainant contended at the hearing that the city had no power or authority to fix or regulate fares to be charged by public service corporations.

[1] It is settled law that a municipal ordinance not passed under legislative authority cannot be regarded as a law of the state within the meaning of the constitutional prohibition against the state impairing the obligations of a contract. *Seattle El. Co. v. Seattle R. & S. Co.*, 185 Fed. 365-370, 107 C. C. A. 421; *San Francisco v. United R.*, 190 Fed. 507, 111 C. C. A. 339. But no such case is made by the bill. It contains an averment that the ordinance, the enforcement of which is sought to be enjoined, is void as to the complainant, not, however, because the city had no general power or authority to legislate upon the subject, but because it impairs the obligations of a contract between the complainant and the city, and if enforced will deprive the complainant of its property without due process of law and deny it the equal protection of the law. There is no averment that the city was without authority to pass an ordinance of that kind. Furthermore, the city has answered, setting up various provisions of the charter under which it assumed to act in adopting such ordinance, and claiming and insisting that it has ample authority to enact the same. The ordinance was passed and is sought to be enforced under assumed and asserted legislative authority. A federal question is therefore presented by the record, over which the court has jurisdiction and which it is bound to decide. *Hamilton Gaslight Co. v. City*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; *Cleveland v. Cleveland Ry. Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; *Siler v. Louisville & N. R.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; *City R. Co. v. Citizens' R.*, 166 U. S. 557-561, 17 Sup. Ct. 653, 41 L. Ed. 1114; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808.

On the first branch of the case, the questions are: (1) Had the city of Portland at the time of the passage of ordinance No. 19176 legislative authority to contract away for the life of the franchise the governmental right of fixing fares; and (2) has it done so? If the first question is answered in the negative, the other necessarily becomes immaterial, for if the city had no authority to grant the complainant immunity by contract from the right of the state, in the exercise of its governmental powers, to reasonably fix rates for the carriage of passengers over its line, this court should not assume to inquire whether the state has in fact delegated to the city the power to fix rates. *Mills v. Chicago (C. C.)* 127 Fed. 731; *New Orleans v. Waterworks*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943.

[2] A large number of decisions have been cited and commented upon by counsel. They have all been carefully examined. It is need-



less to refer to them in detail, for, as said by Mr. Justice Moody in *Telephone Co. v. Los Angeles*, 211 U. S. 274, 29 Sup. Ct. 52, 53 L. Ed. 176, "no case, unless it is identical in its facts, may serve as a controlling precedent for another." It is enough that the authorities are agreed that the right to reasonably regulate rates to be charged by public service corporations is a governmental power, continuing in its nature, and, while it may be suspended in a given case by a contract for a definite time, not grossly unreasonable in point of time (*Detroit v. St. Ry.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; *Vicksburg v. Waterworks*, 206 U. S. 496, 27 Sup. Ct. 762, 51 L. Ed. 1155; *Los Angeles v. Water Co.*, 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886; *Minneapolis v. St. Ry.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259; *Cleveland v. St. Ry.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; *Walla Walla v. Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341), it can only be done by words of positive grant or language equivalent thereto, and then only by the supreme legislative body of the state, unless the authority to do so is clearly delegated by it to some governmental subdivision.

"The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for the purpose is required. This proposition," says the court, in *Telephone Co. v. Los Angeles*, *supra*, "is sustained by all the decisions of this court."

It is further said in that case:

"For the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power"—citing a large number of cases.

It was consequently held that authority to a municipality to grant a franchise to the highest bidder after public advertisement, stating the character, terms, and conditions of the franchise, "to erect or lay telephone wires \* \* \* upon any public street or highway," and "to regulate telephone service and the use of telephones, \* \* \* to fix and determine the charges for telephones and telephone service and connections," conferred ample authority to exercise the governmental power of regulating charges, but not "authority to enter into a contract to abandon the governmental power itself," notwithstanding a franchise so sold by the city provided that the charge for services should not exceed specified amounts. All the leading decisions bearing on this subject are so thoroughly and carefully reviewed and the distinctions between them pointed out by Mr. Justice Moody in the case just referred to that it is unnecessary to prolong this opinion by reference to them.

[3] The concrete question before us is whether the city of Portland had authority by its charter, at the time ordinance No. 19176 was adopted, to contract with a public service corporation as to the fares such corporation might charge and collect during the life of the franchise, so as to deprive itself or the state from exercising during that time the governmental power of rate regulation. Our attention has been called to no express authority to do so. The position of the

complainant is that such authority is to be found in the general power to grant franchises for the use of the streets, and in section 112 of the charter, declaring that every franchise so granted shall fix the maximum rates to be charged during the lifetime thereof. Neither of these provisions contain any express authority to the city to contract away the important governmental power of regulating rates. Authority given a city to grant franchises for the use of its streets may impliedly confer the power to provide therein, as a condition to the exercise of the grant, the rates which it may be lawful for the grantee to charge and collect (*Boerth v. Detroit City Gas Co.*, 152 Mich. 654, 116 N. W. 628, 18 L. R. A. [N. S.] 1197); but it does not authorize the city to barter or contract away the governmental power of thereafter changing such rates if the altered conditions of the country require (*Water Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679; *Ga. R. & Banking Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377; *Telephone v. Los Angeles*, *supra*).

In the Freeport Case the city council or board had authority to provide for a supply of water "by the construction and regulation of wells, pumps, cisterns, reservoirs or waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years." Under such authority by ordinance the city granted to one Shelton or his assigns the exclusive right and privilege for the period of 30 years to supply the city and its inhabitants with water, providing therein the rates which the company might charge the city and consumers, and declaring that such ordinance should become a binding contract between the city and Shelton upon his filing an acceptance thereof, and thereafter it should not be altered, amended, or changed in any way without the consent of both parties. Shelton filed his acceptance of the terms and conditions of the ordinance. The city subsequently reduced the rates to be charged by the grantee, and its order was sustained by the Supreme Court on the ground that it had no authority to make an irrevocable contract fixing water rates for the life of the franchise, because such a power was not indispensable to the exercise of the other powers granted. The authority of the city in this case was, it seems to us, fully as complete as can be claimed for the authority of the city of Portland. Moreover, it is expressly declared in the section of the charter of the city of Portland authorizing it to grant, for a limited time, franchises or rights to the use of its streets by public service corporations that:

"At all times the power and right reasonably to regulate in the public interest the exercise of the franchise or right so granted shall remain and be vested in the council and said power and right cannot be divested or granted."

And this provision is carried into the complainant's franchise by express words. Here is a positive provision of the charter and franchise that the right to reasonably regulate in the public interest the exercise of the rights granted cannot be and was not granted away. The word "regulate" is a broad term. It is the word used in the Constitution of the United States to define the powers of Congress over

interstate commerce, and it is hardly necessary to cite authorities to show that under such power Congress has the right to regulate the charges or rates for the transportation of freight or passengers by interstate carriers. Section 112 of the charter does not in terms or by necessary implication authorize or empower the city to enter into an irrevocable contract with the grantee of a franchise fixing the rates of fares which may be charged by such grantee. Such a contract is not indispensable or necessary to the exercise of the other powers granted. Moreover, the section must, we think, be read in connection with the other provision in the charter reserving to the city the right and power at all times to reasonably regulate in the public interest the exercise of a franchise granted by it. It is in the nature of a command from the supreme legislative power of the state to the city that it shall, in granting franchises which provide for a charge of fares, insert a provision fixing the maximum charges which the grantee or its assigns may charge or collect for services rendered during the lifetime of the franchise. It is a limitation rather than the grant of a power to contract or barter away the governmental right of regulating fares (*Home Telephone & Telegraph Co. v. Los Angeles* [C. C.] 155 Fed. 554-573), and the fact that no provision was entered in the franchise reserving to the city the right to change the rate cannot affect its power to do so.

We conclude that the city had no authority at the time of the adoption of ordinance No. 19176 to contract away the right of regulating the fares to be charged by the grantee when the public interest required, and therefore the ordinance complained of is not void as impairing the obligations of a contract.

[4] This brings us to the question whether, if enforced, it will deprive the complainant of a vested right. The grant by a municipality of authority or permission to use the streets of the city for a reasonable period of time for street railway purposes, and to lay down tracks thereon and operate cars thereover, becomes, when accepted by the grantee and the railway built, a contract right to use the streets for the purposes stated during the life of the franchise which neither the state nor any of its agencies is at liberty to impair. *City Ry. v. Citizens' R.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; *Vicksburg v. Waterworks*, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253; *Walla Walla v. Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *New Orleans Gas v. La. Lt. Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516.

[5] The franchises of the complainant and their acceptance conferred upon the grantees vested rights during the terms of the franchises which cannot be revoked without the consent of the owner unless upon grounds stated therein, and a municipal ordinance passed under color of legislative authority, which impairs the rights so granted, or which attempts to take the property of the complainant without due process of law, comes within the protection of the federal Constitution, and in such case the federal courts may be applied to for relief without waiting until proceedings are instituted by the city to enforce such ordinance. *Waterworks v. Vicksburg*,

185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808; *Willcox v. Cons. Gas.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034. The city may take measures to regulate the manner in which the complainant may enjoy its franchise, but such regulations must not be arbitrary or capricious, and must be reasonable and not destroy or unlawfully impair the rights granted. It cannot, under the guise of regulation, deprive the company of its franchise; nor can it forfeit such franchise or cancel the same except in the manner provided by law for taking private property for public use unless for some ground of forfeiture stipulated in the franchise itself. It has therefore been held that an ordinance of a city attempting to declare a forfeiture of a franchise as a punishment for a violation of some municipal regulation is a threatened violation of the constitutional rights of the grantee and the impairment of the obligations of a contract which a federal court has jurisdiction to restrain. *Iron Mt. Co. v. Memphis*, 96 Fed. 113, 37 C. C. A. 410.

[8] Now an examination of the ordinance in question discloses that it provides in effect that, upon the refusal of the company to comply therewith for a period of one month, the city council may, in its discretion, as a punishment therefor, revoke the franchise of the complainant and remove its tracks from the street. This it may do without an opportunity to the company to be heard. The ordinance does not provide that upon a legal conviction for a violation thereof the franchise shall be forfeited as a result of such conviction, but that, in lieu of the other penalties provided, the council may, in its discretion, declare the franchise forfeited and virtually destroy and render worthless the property of the complainant, and this without a judicial hearing or any kind of a hearing.

It is argued that the provisions of the ordinance for the forfeiture of the franchise in case of a violation thereof may be void and the remainder of the ordinance valid. It is quite true that the same statute may be in part constitutional and in part unconstitutional where the several provisions are so clearly separable that one may stand and the other be rejected. This rule is sometimes applied to the penalties provided where it is not unreasonable to believe that the lawmaking power would have adopted the statute without the penalty. *Reagan v. Farmers' Loan & Trust*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Berea College v. Ky.*, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81; *Flint v. Stone Tracy Co.*, 220 U. S. 108, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312. But where the several provisions of a statute are "so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other as to warrant a belief that the Legislature intended them as a whole, and that if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the conditions which are thus dependent, conditional, or connected must fall with them." *Warren v. Mayor of Charleston*, 2 Gray (Mass.) 84, quoted approvingly in *Allen v. La.*, 103 U. S. 84, 26 L. Ed. 318. There is no ground for supposing or believing that the city would have passed the ordinance of August 14,



1912, fixing the fares to be charged by the complainant company without the penalties provided therein for its violation. The several penalties are an essential part of the ordinance, and we know of no rule of law which would justify the court in undertaking to separate the penalties and declaring that a part were valid and the others invalid. The several penalties provided and the object to be attained by the ordinance itself are so essentially and inseparably connected that one cannot operate or be effectual without the other. The ordinance would be of no value whatever without the penalties. It is therefore void because it is an attempt to deprive the complainant of a vested right without just compensation or due process of law.

There are other objections to the ordinance which are deserving of notice, and they are that it is unreasonable, arbitrary, impracticable, and impossible of enforcement and is void because, if enforced, it would compel the complainant to discriminate between its passengers. That it is indefinite, uncertain, and open to various constructions is apparent from even a most cursory examination of it. It is not a simple no-seat no-fare ordinance. It does not prohibit the street car company from collecting more than a three-cent fare from passengers for whom it does not furnish seats, nor is it a regulation requiring the company to operate cars sufficient to provide each passenger with a seat. Indeed, it cannot be complied with by furnishing cars. Regardless of the number of cars provided by the company or its operating schedule, it is compelled by the ordinance to receive passengers to the extent of the standing room in a car, and many persons would, no doubt, insist on such right even if a sufficient number of cars were at hand to furnish each with a seat, thus leading to controversies and disputes between the agents of the complainant and the general public, and perhaps breaches of the peace. The ordinance is applicable to individual cars only. It requires the company to accept and receive passengers to the extent of the standing room in a car and to collect a fare of only three cents for each passenger in excess of the defined seating capacity, regardless of the number of cars operated by it or the seating facilities in other cars. The company is required to place above the entrance of every car words and figures indicating its seating capacity, which is defined by the ordinance as "two feet for each passenger," without specifying whether it is cubic feet of contents, square feet of floor space, or lineal feet of seat provided. If it be assumed that the latter was intended, the complainant company would necessarily be compelled in many instances to discriminate between passengers because many cars operated by it have cross-seats with three feet four inches lineal surface, sufficient to accommodate two persons; but it could not charge more than three cents for each passenger in excess of the aggregate lineal feet of seating capacity, estimating two feet for each passenger, although they might be provided with seats and the same accommodations as passengers paying full fare. The language is thus so involved and uncertain as to give rise to honest difference of opinion as to what was actually intended, and yet, if the company or its employes should misinterpret it and refuse for one month to obey

the ordinance as subsequently interpreted by the courts, its franchise could be revoked, its property destroyed, and the large sums of money invested therein by its stockholders and bondholders be entirely lost. It would therefore seem to be void because it subjects the complainant to ruinous penalties if it should exercise its rights to test the validity thereof in the court and should be unsuccessful. *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Cons. Gas v. Mayer* (C. C.) 146 Fed. 150; *Ex parte Wood* (C. C.) 155 Fed. 190.

Again, the ordinance says that the conductor or other person in charge of the car shall ring up in plain sight of the occupants the number of fares received, and, when the number of fares (manifestly so rung up) equals the seating capacity of the car as defined in the ordinance, the conductor or person in charge is prohibited from charging or receiving more than three cents for each passenger admitted for a full fare ride, without any provision as to when the register may be changed or a recount of passengers commenced, or whether this regulation is applicable to a single trip of the car or some other definite run. If we assume that the ordinance contemplates that the register shall be changed at the end of each trip, as is probably the practice of the company, it would follow that, if a car should leave one of its terminals with the defined seating capacity occupied, all persons boarding it thereafter would be required to pay a three-cent fare only, although a sufficient number of passengers may have alighted in the meantime at some transfer point or other place to leave ample and abundant room for such persons to obtain seats immediately upon entering the car, or, if the register of fares received during the trip should exceed the seating capacity of the car, the same result would follow, although as a matter of fact it may have received and discharged passengers at intermediate points so that at no time the passengers on the car would equal its seating capacity. Thus the company would be compelled by law to discriminate between passengers, although the accommodations were the same. Furthermore, the company is required by the ordinance to receive passengers to the extent of the standing room of the car notwithstanding it may provide a sufficient number of cars to afford seats for all. Thus if there are two or more cars en train, and there are more passengers than the defined seating capacity of one, but not enough to exceed the standing room therein, the operators are obliged to receive the excess passengers for a three-cent fare, although the other cars may be entirely empty.

It is said that, because the ordinance makes it unlawful for any street car company to accept or receive any greater sum than three cents for any person admitted to the car in excess of its seating capacity, it only prohibits the company from charging more than three cents to a passenger for whom it does not furnish a seat; but the difficulty is that the ordinance provides a standard for determining when the seating capacity of the car is exceeded, and that is when the fare register so indicates, regardless of the number of persons actually in the car at any one time.

We are not attempting to definitely construe the ordinance, for we conceive that to be practically impossible in view of its language, but to point out some of the glaring defects, and to show how unreasonable it is to make the violation of such a law a ground of forfeiture of a valuable vested right acquired by the company under its franchise, and that it requires the complainant to discriminate between passengers for whom it furnishes like services in violation of that part of the federal Constitution which forbids the taking of private property without due process of law and requires the equal protection of the laws. *Lake Shore & Mich. Sthrn. Ry. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858.

A preliminary injunction will issue.

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O'KEEFE et al. v. STAPLES COAL CO.

(District Court, D. Massachusetts. December 1, 1910.)

No. 261.

**1. ADMIRALTY (§ 50\*)—PROCEDURE—BRINGING IN NEW PARTIES—SUIT FOR INJURY TO VESSEL BY STRIKING BRIDGE.**

A suit to recover for injury to a vessel by collision with a drawbridge is within the admiralty jurisdiction, and is a suit for "damage by collision," within the meaning of admiralty rule 59 (29 Sup. Ct. xlv); and under such rule a county, which was the owner of the bridge, may be brought in by petition of the respondent or claimant, alleging fault or negligence in its construction or operation, and it is immaterial that the libel makes no such allegations.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 414–429; Dec. Dig. § 50.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1258, 1259.]

**2. ADMIRALTY (§ 19\*)—MARITIME TORT—COUNTIES—EFFECT OF STATE STATUTE.**

A county may be held liable in admiralty for a maritime tort, brought about by the negligence of its employes in the operation of a drawbridge, although they were in the performance of a public duty, and under the law of the state the county is exempted from liability in such case; the general maritime law which creates such liability being paramount, and not controlled in an admiralty court by any rule of local law.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 233, 234; Dec. Dig. § 19.\*]

In Admiralty. Suit by John S. O'Keefe and others against the Staples Coal Company. On exceptions of County of Bristol to the libel and to petition filed by respondent under admiralty rule 59. Exceptions overruled.

See, also, 201 Fed. 135, 144.

D. Gardner O'Keefe, of Taunton, Mass., and Fitz Henry Smith, Jr., of Boston, Mass., for libelants.

Richard P. Borden, of Fall River, Mass., for Staples Coal Co.

Frederick S. Hall, of Taunton, Mass., and Albert P. Worthen, of Boston, Mass., for County of Bristol and county commissioners.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DODGE, District Judge. The libelants seek to recover damages for injuries to their schooner Sarah L. Thompson, caused by alleged negligence on the part of the respondent's tug Cohannet in towing the schooner. The negligence complained of is in bringing the schooner into collision with the "new county bridge, which spans the Taunton river at Fall River."

The respondent has filed a petition in the case, which alleges that the owners of the bridge referred to (otherwise called "Brightman Street bridge"), are wholly responsible for the collision and ought to be sued for the resulting damages. Allegations follow of due care on the respondent's part in performing the towage service, and of negligent failure on the part of those in charge of the draw in said bridge to open it promptly in response to the tug's signals, or to give any signal or warning that the draw would not be so opened. It is further alleged that the county of Bristol, acting by its commissioners, was in control of the bridge under certain Massachusetts statutes referred to, and operated the draw through its or their servants, agents, or employés. The petition asks for process under admiralty rule 59 (29 Sup. Ct. xlvi) against the county, against certain persons named, as they were commissioners when the county first assumed control of the bridge, and against certain persons named as they were county commissioners in control thereof at the time of the collision. It asks also that said county and said persons may be made parties to the suit, and may be summoned to appear and answer in accordance with the rule.

A summons, issued according to the prayer of this petition, has been duly served upon the county and upon the persons named as county commissioners. Exceptions have been filed by the county to the libel upon the following grounds:

"1. Because there are no allegations in the libel against or concerning the county.

"2. Because the allegations contained in the libel are not sufficient in law to constitute a cause of action against the county.

"3. Because the libel does not allege or specify what acts or neglects of the county the libelants rely upon as constituting the cause of action."

The county has also filed exceptions, similar to those numbered 2 and 3 above, to the petition of the respondent.

The persons summoned as county commissioners at the time the county assumed control of the bridge are John I. Bryant, Frank M. Chase, and William R. Black. The persons summoned as commissioners at the time of the collision are John I. Bryant, Frank M. Chase, and Richard E. Warner. Exceptions to the libel have been filed on behalf of all of the above upon grounds similar to those set up in the exceptions filed by the county to the libel. Exceptions to the petition have also been filed on behalf of all of said persons upon grounds similar to those numbered 2 and 3 in the exceptions filed by the county to the libel. Upon all the above exceptions there has now been a hearing.

[1] The exception numbered 2 in the exceptions to the libel and 1 in the exceptions to the petition is the only exception which need



be discussed. If either the libel or the petition alleges a sufficient cause of action in admiralty against these respondents, the petition is sufficiently specific as to their acts or neglects which are relied on. The acts and neglects relied on are those of whoever may have been responsible at the time for the proper operation of the draw. That the libel does not charge either the county or the commissioners with the responsibility for the management of the draw or for the collision, and does not name or refer to them, or either of them, and does not, indeed, ascribe the collision to any negligence whatever in the operation of the draw, cannot excuse them from answering it, now that the petition has been filed. In the petition are found allegations, such as rule 59 describes, of fault or negligence on the part of those in charge of the draw, contributing to the collision for which the libel claims damages. In the petition are also found allegations that the county or the commissioners were charged with the duty of properly operating the draw. They have been duly summoned under the rule, and the suit is now required to proceed as if they had been originally made defendants in the libel. They are to answer the libel, as the rule requires, as if it had originally contained the charges now made against them in the petition. By answering the petition, as well as the libel, as they have done (though without waiving their exceptions), it would seem that they have fully complied with the rule. The other libelants, as "the other parties in the suit," have answered the petition, and the pleadings required by the rule are thus complete.

No "fault or negligence in any other vessel," contributing to the collision, is alleged in the petition, and in this respect (though no such objection is raised by the exceptions) the case is not brought within the terms of the rule. But the rule is to apply in all suits for damage by collision, and this is none the less such a suit because the collision was with a drawbridge, and not with another vessel. Suits for damage done to vessels on navigable waters, by permanent structures in or over such waters, are of admiralty jurisdiction. *Atlee v. Union Packet Co.*, 21 Wall. 389, 22 L. Ed. 619. Such suits occur not infrequently in admiralty courts, and it has been usual to call them suits for collision, whether or not, strictly speaking, they ought to be so described. See *Marsden, Collisions at Sea* (5th Ed.) 75, 76; *Spencer, Collisions at Sea*, § 169, p. 310. And the principle upon which the rule is based may be and is applied in other than collision cases by analogy. *Dailey v. New York* (D. C.) 119 Fed. 1005; *The Barnstable*, 181 U. S. 464, 466, 467, 21 Sup. Ct. 684, 45 L. Ed. 954. If the county or the commissioners are chargeable, as alleged, with negligence contributing to the collision, the original respondent has the right to bring them into the case as parties defendant.

[2] Do the allegations of the libel and of the petition, taken together, state a cause of action upon which recovery can be had in this court against the county?

The only reason urged for holding that they do not is that by the law of Massachusetts a municipal corporation or similar body, charged with a public duty imposed by statute, is not liable for the negligence

of its agents or servants engaged in the actual performance of that duty. *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *French v. Boston*, 129 Mass. 592, 37 Am. Rep. 393; and later Massachusetts cases to the same effect are relied on.

But in *Workman v. New York*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, a suit in admiralty against a city for a collision brought about by negligence of its employes in charge of a city fireboat while responding to an alarm of fire, the Supreme Court held that because the city was amenable to the process of the admiralty court, as having "a general capacity to stand in judgment," it was liable like any other defendant for a maritime tort, and not exempted from liability because of the public nature of the service it was performing through its employes in charge of the fireboat. That under the law of the state of New York, within which the collision occurred, the city would have been so exempted from liability, was held to afford no defense in admiralty to a liability imposed by the general maritime law. That law, it was held, is uniform and paramount, it recognizes no exception in favor of a municipal corporation to the general rule of liability, and it is not controlled, in a court administering it, by any rule of local law to the contrary.

This decision is conclusive against the excepting parties on the present question. The county, as is not disputed, is a body amenable to the process of this court and having a general capacity to stand in judgment. The injury to the schooner, if due to negligence in the management of the draw, was a maritime tort cognizable in admiralty, because she was in navigable waters at the time. The responsibility for the maritime tort thus committed was upon the county by the maritime law, if the operation of the draw was at the time controlled by the county. No exemption from liability for such negligence to which it may be entitled under the local law affords it a defense in an admiralty suit before this court.

The same result was reached, some years before the decision in *Workman v. New York*, in this district, on appeal from this court. *City of Boston v. Crowley* (C. C.) 38 Fed. 202 (1889). Decisions to the same effect were made by the District Court in Connecticut in *Greenwood v. Westport*, 60 Fed. 560, and *Van Etten v. Same*, 60 Fed. 579 (1894). The maritime tort complained of in each of these cases was, as here, injury to a vessel on navigable waters, by negligent operation of a drawbridge. In each of them the city or town claimed exemption from liability under a state statute. These decisions are criticised in the dissenting opinion in *Workman v. New York*. See 179 U. S. 589, 590, 21 Sup. Ct. 212, 45 L. Ed. 314. But they are fully in accord with the prevailing opinion in that case.

The draw in a bridge like this, which crosses and therefore obstructs navigable waters, may be regarded in two aspects. It is part of a means of public travel across the river, provided and maintained under state authority. The liability of the public body immediately in control of it to a person injured by negligence in its operation while making this use of it depends upon the law of the state, whether asserted in the state or the federal courts. But it is also part of an obstruction to

navigation, used for the purpose of preventing the bridge from becoming such an obstruction as the national authority, supreme where navigable waters are concerned, forbids. So far as due care in its operation is necessary for this purpose, the liability of the public body in control, for negligent operation, to persons navigating the river and attempting to use the draw as the appointed means of a safe passage from the navigable waters on one side to those on the other, is properly a question of national concern, which must be treated, in a court administering the general maritime law of the United States, as a question depending upon that law alone.

The petitioner, relying expressly on an act of Congress passed March 23, 1906 (34 Stat. 84, c. 1130 [U. S. Comp. St. Supp. 1911, p. 1555]), has alleged a negligent failure to open this draw, upon reasonable signal, for the passage of its tug and the libelants' schooner, resulting in damage to the schooner through collision with the bridge. It has also alleged a negligent failure to warn the vessels referred to that the draw was not to be opened, as they had the right to expect. By way of further specification, it has alleged that the persons employed to open the draw when required were asleep. Personal or individual negligence is not charged against any of the persons summoned as county commissioners, and no such charge could be made against the county. Under such allegations it would seem clear that only under the rule of respondeat superior, if at all, can either the county or the commissioners be held liable. If negligence on the part of the drawtenders is established, and the fact that they were the county's employés at the time, it would appear to be unnecessary to inquire whether they can be regarded also as employés of the commissioners. Employment by the commissioners would make them employés of the county. No reason at present appears for supposing that Mr. Black, not a commissioner at the time, can in any event be held for the negligence alleged. But the present hearing was limited to the validity of the exceptions filed by the county. There may, if required, be a further hearing on the question whether any case maintainable against the commissioners, independently of the county, has been stated.

The exceptions, whether to the libel or petition, are all overruled so far as concerns the county or the commissioners merely as its representatives.

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O'KEEFE et al. v. STAPLES COAL CO.

(District Court, D. Massachusetts. September 6, 1911.)

No. 261.

**1. PLEADING (§ 17\*)—ANSWER—ARGUMENTATIVENESS.**

Statements in answers in a suit in admiralty *held* improper, and subject to exception on the ground that they were argument only.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 38, 41, 195, 350; Dec. Dig. § 17.\*]

**2. ADMIRALTY (§ 61\*)—PLEADING—ANSWER.**

An answer to a petition filed by respondent in an admiralty suit under admiralty rule 59 (29 Sup. Ct. xlv) must either admit or deny all ma-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

terial allegations of the petition, unless it is stated that the answering respondents are ignorant as to the truth of such allegations.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 497-506; Dec. Dig. § 61.\*]

**8. NAVIGABLE WATERS (§ 20\*)—INJURY TO VESSEL BY COLLISION WITH BRIDGE—LIABILITY OF COUNTY.**

A schooner had her masts carried away by striking a drawbridge maintained by the county while being towed through it before daylight, the draw not having been opened, although, as shown by a preponderance of the evidence, the tug sounded reasonable signals with her whistle when approaching. It also fairly appeared that she could not have safely turned or stopped with her tow after approaching nearer than 600 feet, and that on previous occasions the draw had been opened when she was less than such distance away. *Held*, that she was not in fault, but that the injury was due solely to the negligence of the bridge tenders employed by the county in failing to open the bridge in response to the signals, as required by Act March 23, 1906, c. 1130, § 4, 34 Stat. 85 (U. S. Comp. St. Supp. 1911, p. 1556), for which negligence the county was liable.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73-99; Dec. Dig. § 20.\*]

In Admiralty. Suit by John S. O'Keefe and others, owners of the schooner Sarah L. Thompson, against the Staples Coal Company, owner of the tug Cohannet; the County of Bristol, Mass., being impleaded. Decree for libelants against the county.

See, also, 201 Fed. 131, 144.

D. Gardner O'Keefe, of Taunton, Mass., and Fitz Henry Smith, Jr., of Boston, Mass., for libelants.

Richard P. Borden, of Fall River, Mass., for Staples Coal Co.

Frederick S. Hall, of Taunton, Mass., and Albert P. Worthen, of Boston, Mass., for Bristol county and county commissioners.

DODGE, District Judge. In an opinion filed December 1, 1910 (201 Fed. 131), overruling exceptions to the libel filed by the county of Bristol and its commissioners, the nature of this case has been stated and its history reviewed up to that point. Since the exceptions were overruled as above, there have been two amendments to the libel, on January 10 and January 30, 1911, neither requiring special notice here. On April 15, 1911, the Staples Coal Company filed exceptions to the answers which had been filed to its petition, on June 11, 1910, by the county of Bristol and by Messrs. Bryant, Chase, and Warner, county commissioners. The case has also been heard on the merits, without requiring the court first to make an express decision on the sufficiency of the answers, where attacked by the exceptions.

There are 12 exceptions to each answer. The first objects that the third article of each denies the facts and circumstances of the collision to be correctly stated in the petition "as to some particulars," without specifying the particulars. Of course, some specification was necessary. But the answers elsewhere purport to give the respondents' own account of the facts and circumstances, particularly in the articles numbered 8. Although the answers nowhere so state, I think I may take them as meaning to deny the correctness of the statement

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



in the petition, where it disagrees with the statement contained in the answers.

[1] The seventh exception objects to the statements in the fourth article of each answer that, if the tug's helm was in fact ported, she did not respond, and her subsequent course and speed forbade the supposition that her helm had been ported. This seems to me neither admission nor denial, nor new matter set up in defense, but argument only, and improper in an answer. The eighth exception objects to denials, in the same article of each answer, that the tide, at the time, was such as to put the tug in danger of being carried broadside to the bridge, forcibly enough to endanger her or those on board, if her helm had been seasonably ported. This I consider improper for similar reasons.

The twelfth exception objects to denials in the seventh article of each answer that the county accepted and undertook the control of the bridge, or employed and paid those who opened or controlled it, "in such legal effect as to constitute liability," or "personal liability." This seems to me objectionable on similar grounds.

[2] The eight exceptions remaining relate to portions of the fourth and fifth articles of each answer, wherein the respondents neither admit nor deny certain allegations of the petition, and leave the petitioner to make such proof of the same as may be material. It is nowhere stated that the respondents are ignorant as to the truth of the allegations thus treated, and as to some of them the facts raise a presumption that they were not ignorant. Unless really ignorant, they were bound either to admit or deny. I am unable to regard the portions of the answers covered by these eight exceptions as sufficient.

[3] Inasmuch as all the evidence which any party has desired to introduce has now been heard, I shall proceed to deal with the case as if the respondents had denied what they have thus left the petitioners to prove, if material, without alleging their own ignorance as to its truth. The evidence leaves no doubt that on Saturday, December 11, 1909, at a little before 5 o'clock in the morning, the schooner Sarah L. Thompson, owned by the libelant J. Howard O'Keefe and the other libelants whose names are set forth in the amendment to the libel, filed January 30, 1911, was being towed by the tug Cohannet, owned by the Staples Coal Company, from an anchorage in Mt. Hope Bay, near the mouth of the Taunton river, up said river toward Taunton, whither she was bound with a cargo of clay, laden on board her at Perth Amboy, N. J., for delivery at Taunton. On her way toward her destination she had to pass first through the draw of the Slade's Ferry bridge and next through the draw of the Brightman Street bridge, both of which bridges cross said river at Fall River, the latter draw some 1,220 feet above the former. The draw of the Slade's Ferry bridge was duly opened for their passage. They continued toward the draw of the Brightman Street bridge, expecting it also to be opened before they got to it. It was not opened. The tug passed underneath it, losing only her flagstaff by collision with it. The schooner also passed underneath it, but in doing so had her masts and spars broken or carried away and sustained other damage. For the purposes of the ques-

tions raised regarding the responsibility for this disaster, the three opposing parties now before the court may be referred to as the "tug," the "schooner," and the "county." Each denies that the damage to the schooner was due to any negligence attributable to it. The schooner contends that it was due to negligence on the part of the tug, or the county, or both; the tug and the county each contend that it was due to the negligence of the other, but neither charges the schooner with any fault.

The Brightman Street bridge, where the accident happened, since it crossed navigable waters of the United States and was erected under authority granted by Congress, was subject to the provisions of the federal statute enacted March 23, 1906 (34 Stats. 85, c. 1130 [U. S. Comp. St. Supp. 1911, p. 1556]). Section 4 of this statute requires the draw of such a bridge to be "opened promptly, \* \* \* upon reasonable signal, for the passage of boats and other water craft." The evidence sufficiently shows the bridge with its draw to have been at the time under the county's control, and the county to have been undertaking to perform the duties imposed by the statute. Here were two vessels desiring passage through the draw, and the draw was not opened. If it appears that "reasonable signal" for its opening was given, it is for the county to explain the failure to open.

Upon the tug, as part of her undertaking to get the schooner safely up river, the schooner having no duty save that of properly following the tug, lay the duty of signaling for the opening of the draw. Sound signals were the kind of signals required, because it was not yet daylight. The tug claims to have given six signals in all within hearing distance of the draw, each consisting of three long whistle blasts, three such signals before and three after passing through the Slade's Ferry draw, as follows: The first when from one-fourth to one-half a mile below the latter draw; the second when somewhat nearer to it, after which it was opened; the third while passing through it; the fourth immediately after passing through; the fifth when about half way from it to the Brightman Street draw; and the sixth just before the tug went underneath that draw. The tug's master, who was steering her in her pilot house, testifies that he himself sounded all these signals.

The tug's crew consisted of an acting mate (Angell) on her forward deck at the time, the engineer (Braley) in her engine room, which was on her main deck and had windows through which he could see where the tug was, and the fireman (Reed) most of the time in the fire room below deck. The acting mate and engineer confirm the captain's statement as to all six of the signals which he says he sounded. The fireman says that while working below he paid little attention, but noticed that "she blowed two or three different times." Two witnesses called by the tug, apparently without interest in the case, also confirm the captain's statement. One of them (Kirby) was foreman of the Slade's Ferry draw, the other was one of the draw tenders there (Brown), and both were on duty there at the time. Two other witnesses were called by the tug, also apparently disinterested. One of them (Whittaker), a foreman employed by the street railway and at the time about a mile and a half away from the draw, says he heard the tug-

boat's whistle blown so frequently as to make him notice and remember the fact. The other (Thibault) was a trackman employed by the street railway. He happened to be on the westerly end of the Slade's Ferry Bridge, about 300 feet from the draw in that bridge. He saw the tug passing through the draw, and heard her sound the last three signals to which the captain testified, but says nothing about the first three.

The schooner (86 feet long) was being towed astern of the tug (83 feet long), with 100 feet, or a little more, of hawser between them. Her master, with two other men, composed her crew; all three being on deck at the time. The master (O'Keefe) and one of the crew (McManus, cook and deckhand) were witnesses on her behalf. Captain O'Keefe says that the tug sounded the first three signals described by her master, but that he heard no signals sounded after the one given upon clearing the Slade's Ferry draw until the tug got to the Brightman Street draw and was going under it. Then, as he says:

"I could not say what he blowed, or anything about it. I know he was blowing, because when I see he was going into that bridge I was pretty timid."

McManus' testimony was:

"He blew three short blasts for the Slade's Ferry bridge. \* \* \* Going through the draw of the Slade's Ferry bridge, he blew three more short blasts for the Brightman Street bridge."

He says there were no signals blown between the two bridges.

A watchman employed at the People's Coal Company's yard on the east bank of the river, between the two bridges, also a witness apparently without interest, called by the schooner (Smith), stated that he was in the office at the yard, heard a signal of three blasts, left the office, and went down to the dock, some 75 feet away. From the end of the dock he saw the tow going through the Slade's Ferry draw. He watched it until the accident. He heard no other whistle signal, except the one heard by him in the office. This witness appeared to be somewhat hard of hearing.

In charge of the Brightman Street draw at the time, was Sullivan, a drawtender, called as a witness by the schooner, and Menchion, an electrician, called by the county. According to their testimony, Sullivan's duties were to close the gates across the bridge west of the draw when the draw was to be opened, Menchion's to close the gates on the east side and then start the electrical machinery which moved the draw. Their hours of duty were from 11 p. m. to 7 a. m. Both were in the operating house on the north side of the bridge, near the easterly end of the draw, in which house there was a stove. Both were sitting down, Sullivan reading. Door and windows were shut, the weather being cold. Sullivan, looking out of the window, saw smoke or steam below the the bridge, said to Menchion, "There is a tow between the draws," ran out of the house, and shut the gates west of the draw. When he first saw the schooner, she was half way between the draws. After he got the gates closed, he heard the tug sound three strong blasts when she went under the bridge. Menchion also came out of the house, whether before or after Sullivan, saw the tug, went to the

gates east of the draw, and got one of them closed before the tug went under the bridge. The draw had not been moved when the schooner struck. Menchion heard no whistles from the tug, as did Sullivan, when she went under the bridge.

Some time before they thus left the house to close the gates, both men had heard what they then thought might be a tug's whistle. It was a signal of three blasts according to Sullivan, of one blast according to Menchion. They decided that it came from the New York boat, whose wharf is below the Slade's Ferry bridge, did not leave the house, and paid no further attention to the signal. According to Sullivan, this happened 20 or 25 minutes before they were aroused by seeing the tug's smoke or steam. According to Menchion, it was about 15 minutes before the accident. The New York boat's usual signal is three blasts, a signal sometimes repeated, but not always.

I must hold, on this evidence, that the tug has sustained the burden of showing that she gave reasonable signal for the opening of the draw. I should be much inclined to hold that signals given for the opening of the Slade's Ferry draw before entering it were reasonable signals for the opening of a draw only about 1,200 feet further on. It is true that there are two wharves between the bridges, where vessels sometimes stop; but signals for up-river passage, sounded below the Slade's Ferry draw, must be hardly less audible at the Brightman Street draw, and ought, at least, to put those in charge of that draw on the alert to know as soon as possible whether its prompt opening will not also be required. But, in any case, one signal sounded in or while clearing the Slade's Ferry draw would be, in my opinion, a reasonable signal, sufficient to require the prompt opening of the draw above. That such a signal, at least, was given, seems to me clearly proved. The evidence leaves no doubt in my mind that the tug did in fact sound three signals after going into the Slade's Ferry draw. The evidence further satisfies me that inattention and neglect on the part of Sullivan and Menchion was the sole reason why the signals given were disregarded. The county, therefore, whose servants they were, is in any case responsible for the failure to open the draw promptly as the statute requires. It is liable for all the damage to the schooner, if this failure was the sole cause of the accident, and for half of the damage if fault on the tug's part contributed.

The schooner or the county have undertaken in the pleadings to charge the tug with fault in the following respects: That her captain was incompetent, that the tug went too fast between the draws, that she did not slow down before getting to the Brightman Street draw, that she did not turn and swing the schooner clear of the bridge on finding the draw still closed, and that she did not slow down, lie by, or wait for the draw to open before going under the bridge.

The tug's captain had had 26 years' experience at sea, had been a licensed pilot since 1889, and a licensed master of steam vessels since 1890. During his experience since 1890, he had averaged four or five trips each week up and down the Taunton river as master of a tugboat with some other vessel in tow, passing on those trips



through the draws of the bridges across the river. The Brightman Street draw had been one of the draws through which he had to pass since October, 1908, when that bridge was opened, some 14 months before this accident. He was 42 years old, and testified as a witness in the case. Whether or not he made any mistake in connection with this accident, there is no evidence on which I can find him incompetent, generally speaking.

As to his speed between the bridges, the following facts appear: It is necessary, in taking a vessel up the Taunton river, to go up with the tide. The tide at the time was about half flood, running up the river at a rate of about  $1\frac{1}{2}$  miles per hour as estimated by the captain of the schooner, and between 2 and 3 miles as estimated by the captain of the tug. The evidence affords no means more reliable than estimates for ascertaining the true rate. The tug's engine, which, according to her evidence, had previously been running, ever since taking the schooner in tow, under one bell, the signal for half speed, was slowed down somewhat, under order through the speaking tube from the captain to the engineer, when she entered the Slade's Ferry draw. She thereafter kept on, without stopping, under this reduced half speed, until the accident. Without keeping some strain on the towing hawsers, she would not have been in control of her tow for want of steerage way. Some speed through the water was therefore necessary. There was a slight change of course to be made in coming out of one draw and into the other. According to the schooner's captain, the rate of speed from one bridge to the other was about 6 miles an hour; according to the acting mate of the tug, about 4 miles through the water. The tug's engineer and fireman state that her engine was going as slowly as it could without stopping. Statements are in evidence that she was going "pretty lively," or "at a good pace," or "clipping it right along." There is evidence that she was going faster than usual through the bridges, and that she was going slower than usual. Unless she was called upon to anticipate, while going through the Slade's Ferry draw, that the Brightman Street draw would not be open when she got to it, I find no reason to believe her speed greater than was proper, in view of the necessity for keeping steerage way. I do not believe her actual speed exceeded 6 knots, and think it may well have been considerably less. At 6 knots it would take her 2 minutes between the 2 draws, and at 5 knots about  $2\frac{3}{4}$  minutes. The actual lifting of the draw from a state of rest has been found to take 36 seconds, according to the evidence of Merritt, electrician in charge. This does not include closing the gates, which according to Menchion's estimate takes 45 seconds more, making the time required for the whole operation less than a minute and a half. Except in daylight, an observer at the Slade's Ferry draw could not tell whether the gates were being closed or not. Lights on the draw show red until it begins to lift, when they change to green, and this would be the first visible signal that the opening had begun.

With the schooner and the tide behind her, I do not think the tug could safely have slowed down between the draws. As to the

claim that she ought to have turned and swung the schooner clear of the bridge upon finding that the draw did not open, I think the evidence shows that there was available water between the draws sufficient to permit the tug to make such a turn with the schooner so far as the room necessary for the operation was concerned, and that, under favorable circumstances, such a turn might have been made, even if not begun until the tug had got half way to the Brightman Street draw. But, carried along as both vessels were by the tide, I do not think it is shown that such a turn could safely have been made later. Close to the draw, at a distance estimated by him at 125 to 150 feet, because of its continued failure to open, the tug's captain ported his wheel with the idea of attempting to turn; but apprehended danger of increased damage to both vessels caused him to steady the wheel again immediately and go under the draw as the least of two evils.

If such a turn was to be made, steerage way amply sufficient for full control was indispensable, so that the claim that the tug ought to have turned between the draws is inconsistent with the claim that she ought to have slowed down. The total distance from the tug's bow to the schooner's stern cannot have been much less than 300 feet. Allowing for sufficient speed through the water to insure control both of the tug and tow and for the tide, I am unable to believe that less than twice this distance, or about half the distance between the draws, could have afforded sufficient margin for safety.

As to the claim that the tug should have "lain by or waited" until the draw was opened, it is obvious from what has been said that nothing of the kind could safely be done after the schooner had once got away from the pier adjoining the Slade's Ferry draw on its northerly side. To this pier she might have been made fast; but, once away from it, I see nothing that the tug could have done, if obliged to avoid the bridge ahead, but to turn with the schooner and to turn in time.

If, then, the tug was bound to anticipate, before getting the schooner away from the pier referred to, that the Brightman Street draw would not be open for passage when she got to it, she would be in fault for not having stopped, instead of proceeding further. If she was not then bound to anticipate such failure to open the draw, but became bound to anticipate it before she had proceeded more than half way to the next draw, she would be in fault for not turning while it was still safe to turn. But if not bound to anticipate any failure to open until after she was more than half way to the draw, I do not see how she can be held in fault at all. Even if, after the event, it could be said that there was a possibility of turning safely within 600 feet of the draw, a wrong decision on the tug's part between two such alternatives, in an emergency created wholly by fault on the county's part, would not be contributing fault on the part of the tug, according to the rule, familiar in collision cases, regarding error in extremis—a rule the more applicable here in view of the fact that the evidence leaves it at least doubtful whether turning within that distance would be safe or not. *The Elizabeth Jones*, 112 U. S. 514, 526, 5 Sup. Ct. 468, 28 L. Ed. 812; *The City of New York*, 147 U. S. 72, 85, 13 Sup.

Ct. 211, 37 L. Ed. 84; *The Ludvig Holberg*, 157 U. S. 60, 71, 15 Sup. Ct. 477, 39 L. Ed. 620; *The Oregon*, 158 U. S. 186, 204, 15 Sup. Ct. 804, 39 L. Ed. 943; *Boland v. Bridge Co.* (D. C.) 94 Fed. 888.

The evidence fails to satisfy me that the tug had become bound to anticipate failure to open the draw and to take measures accordingly at any time before she had proceeded half way toward it. I must deal with this question upon the assumption that, as I have found, reasonable signal for opening the draw had at that time been given at least twice after the tug had entered the Slade's Ferry draw. Although the lights at the Brightman Street draw showed it to be closed when the tug and schooner passed the Slade's Ferry draw, and continued so to indicate up to the time of the accident, the tug had the right to assume that drawtenders were in charge of it, having nothing to do but watch for such signals and respond promptly to them. In the absence of any signal of warning or caution from them, the longer opening was delayed, the more reason to expect the delay to end. It does not appear that there had been any previous failure to open the draw in time. That the opening had not infrequently been delayed on previous occasions until the tug had got considerably nearer this draw than half the distance between it and the other I am unable to doubt. The men on the tug so testified, and I find no contradiction, except such as comes from the drawtenders whose inattention to signals was the only reason why its opening was being delayed on this occasion. Under such circumstances, the absence of any emergency warning that the draw would not open in time amounted to an invitation to the tug to proceed. *Manistee, etc., Co. v. Chicago* (D. C.) 44 Fed. 87; *Chicago v. Mullen et al.*, 116 Fed. 292, 54 C. C. A. 94; *Clement v. Metropolitan, etc., Co.*, 123 Fed. 271, 59 C. C. A. 289.

The schooner's captain testifies that, while passing through the Slade's Ferry draw, some man, not identified, on that bridge told or sung out to the captain of the tug "that the bridge was closed," and repeated the statement to the schooner as she followed through the draw. McManus, the other witness from the schooner, also on her deck at the time, does not testify to hearing anything of this kind, nor does either of the Slade's Ferry drawtenders on duty confirm the statement, though each says that he called out to the tug or schooner that he saw no stir or sign of life at the draw above. The tug's captain and mate say they heard nothing about the other draw from any one at the Slade's Ferry bridge. I do not think that such calls, if heard, would add anything to the circumstances requiring the tug to anticipate failure to open. No reason appears for supposing any one at the Slade's Ferry draw better informed about what the drawtenders at the other bridge were doing than the people on the tug. All knew that the other draw was still closed, and none of them knew or could have known why at the time. It appears that the electrical machinery which lifted the other draw made a noise when thrown into operation, audible at the Slade's Ferry draw, for a brief interval before the draw actually lifted. Men whose time was spent

at the Slade's Ferry bridge may have learned to regard this noise as an indication when the draw was about to lift; but I am not satisfied that the master of a tug like this, though making frequent trips up and down through these draws, would have been likely, or could be required, to take notice of it or govern himself by it. The tug's captain had been on the Brightman Street draw since it had been in operation, had talked with the drawtenders, had gained some knowledge of its mode of operation, and knew, as did everybody, that no regular signal was used to warn that opening of the draw could not be expected. Nothing, however, that thus appears, seems to me to put upon him any greater duty to anticipate this failure to open the draw. Properly vigilant drawtenders, though there was no regular signal for the purpose, would, as I cannot doubt, have found some way of making the fact known in time to the tug, had they encountered any unexpected difficulty in operating the draw.

In view of the nature of the duty incumbent on the county to have the draw open in time on this occasion, and in view of the nature of the failure to perform it, I am unable to find that contributing fault on the tug's part has been sufficiently proved.

There must be an interlocutory decree for the libelants against the county of Bristol. As against the tug, the libel must be dismissed. The circumstances of the case seem to require, however, that no final decree thus dismissing the libel should be entered until after the amount of damages recoverable from the county has been ascertained, so that the result reached as above can then be carried out by one final decree disposing of the entire case.

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**O'KEEFE et al. v. STAPLES COAL CO.**

(District Court, D. Massachusetts. July 30, 1912.)

No. 261.

**ADMIRALTY (§ 122\*)—COSTS—DECREE AGAINST PARTY BROUGHT IN.**

The owners of a schooner, injured by striking a drawbridge under which she was being towed, brought suit against the owner of the tug, which brought in the county owning and operating the bridge, under admiralty rule 59 (29 Sup. Ct. xlv) and decree was rendered in favor of libelants against the county only. *Held*, that libelants were entitled to tax against the county all their costs, except the clerk's and marshal's fees made on the process issued against respondent, and that respondent was entitled to tax its proctor's fees against libelants and its remaining costs against the county.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 797-827; Dec. Dig. § 122.\*]

In Admiralty. Suit by John S. O'Keefe and others, owners of the schooner Sarah D. Thompson, against the Staples Coal Company, owner of the tug Cohannet; the County of Bristol, Mass., being impleaded. On taxation of costs.

See, also, 201 Fed. 131, 135.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



D. Gardner O'Keefe, of Taunton, Mass., and Fitz Henry Smith, Jr., of Boston, Mass., for libelants.

Richard P. Borden, of Fall River, Mass., for Staples Coal Co.

Frederick S. Hall, of Taunton, Mass., and Albert P. Worthen, of Boston, Mass., for Bristol County and county commissioners.

DODGE, Circuit Judge. My rulings on the questions raised are as follows:

1. On exceptions, whether those by the county of Bristol or the county commissioners, to the libel, or to the Staples Company's petition, or those by the Staples Company to the answers to its petition, filed on behalf of the county or on behalf of the county commissioners, I allow no costs to any party. I see nothing that would in any event be taxable, except the proctor's fee to the party in whose favor the decision went. But the proctor's fee is only taxable on final hearing, and, on the authorities, I do not think any of these hearings on exceptions were final hearings.

2. Libelants' costs: The libelants are to have a decree in their favor for the full amount of their damages against the county. It is true that their libel did not make any claim against the county, but only against the Staples Company, which owned the tug. That company having brought in the county under rule 59 (29 Sup. Ct. xlv), the county answered the libel and there was one trial, involving the question whether either or both these defendants were liable for the damages therein claimed, which trial resulted as above. I think all this entitles the libelants to tax against the county the clerk's fees on their libel, the libelants' share of the stenographer's fees at the trial, the fees and travel of all witnesses summoned by the libelants, and a proctor's fee, but not the clerk's or marshal's fees on the process issued against the Staples Company.

3. Costs of Staples Coal Company: The result having been to exonerate this defendant and to hold the county liable for the libelants' damages, I think this defendant is entitled to costs against the county as the losing party, consisting of the clerk's fees on its petition, the marshal's fees for serving process under it, summoning the county and the county commissioners as representing the county, its shares of the stenographer's fees at the trial, the fees of all witnesses called by it at the trial, but not a proctor's fee, because the only purpose of its petition was to make the county answer the libel.

4. Costs as between Staples Coal Company and libelants: The Staples Company answered the libel, which as to it will stand dismissed in the final decree. I think this entitles it to tax its remaining costs as upon dismissal of the libel—that is, a proctor's fee—against the libelants.

In *The Starke* (D. C.) 182 Fed. 498, a case very similar to this, the claimant of the tug recovered its costs from the libelant, but precisely what costs does not appear. The libelant in the same case recovered a full bill of costs against the municipality held liable for the accident. It makes no difference to the Staples Coal Company, if its costs are paid, whether the libelants or the county pays them. The

county, as the party held responsible for the damage, ought, it would seem, to be liable to the party which brought it into court, for such costs as were necessarily incurred in order to bring it in, as well as those incurred in the trial of the issues raised between them.

### KUSNIR v. PRESSED STEEL CAR CO.

(District Court, S. D. New York. December 31, 1912.)

**1. MASTER AND SERVANT (§ 301\*)—EMPLOYMENT OF POLICE OFFICER—MISCONDUCT—MASTER'S LIABILITY.**

Where defendant, with the consent of the state, employed a police officer to preserve order and protect and preserve its property in and about its plant, and the officer, while engaged in the performance of his duties, shot and injured another employé without justification, the fact that he was such officer did not relieve defendant from liability for his act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210-1216; Dec. Dig. § 301.\*]

**2. STATES (§ 112\*)—POLICE OFFICER—WILLFUL ACTS—LIABILITY.**

The state is not liable for the willful act of a police officer in shooting an employé of a private manufacturing corporation, while the officer was also acting as an employé of such corporation to preserve order in its plant and protect its property.

[Ed. Note.—For other cases, see States, Cent. Dig. § 111; Dec. Dig. § 112.\*]

**3. MASTER AND SERVANT (§ 327\*)—INJURIES TO SERVANT—RIGHT ON MASTER'S PROPERTY.**

Where plaintiff and others employed in defendant's manufacturing plant had been ordered to return to their homes on the morning of plaintiff's injury. In order to prevent a threatened strike in the works, plaintiff was entitled to a reasonable time to leave the plant, and while doing so within such reasonable time was not a trespasser.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1266; Dec. Dig. § 327.\*]

**4. MASTER AND SERVANT (§ 330\*)—INJURIES CAUSED BY POLICE OFFICER—EFFECT OF EVIDENCE.**

Plaintiff a workman in defendant's plant, while leaving it was shot by a police officer doing private duty inside the plant. In an action for injuries so sustained, plaintiff claimed that he was shot while on his hands and knees under a rail table, and that the ball entered the outside of his arm and passed downward, part of it emerging just above the elbow. Defendant claimed that plaintiff was shot while clasping the officer from behind, facing his back, with both arms around him, and that the ball entered on the inside of the arm, passed upward toward the shoulder, and emerged on the outside. *Held* that, if the evidence showed that the bullet entered on the outside of the arm above the elbow and passed downward, emerging on the inside, that fact was corroborative of plaintiff's testimony and theory of the case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.\*]

**5. JUDGMENT (§ 559\*)—RES JUDICATA—CONVICTION ON CRIMINAL CHARGE.**

Plaintiff, an employé in defendant's plant, was shot and injured while leaving the plant by a police officer, employed by defendant to preserve order therein. Immediately thereafter the officer swore out a warrant

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

against plaintiff for felonious assault, on which he was tried, found guilty, and sentenced to pay a fine and to be imprisoned for three years. He was paroled, however, and never imprisoned, and at the trial defendant company was represented by its private counsel and took part in the prosecution. *Held*, that such conviction was not *res judicata* in a subsequent action by plaintiff against defendant for alleged injuries resulting from the willful misconduct of the police officer in shooting him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1077, 1078; Dec. Dig. § 559.\*]

**6. DAMAGES (§ 132\*)—EXCESSIVENESS—INJURIES TO SERVANT.**

Plaintiff, an employé of defendant, 32 years of age, and earning from \$15 to \$17.50 a week, was shot in the arm by a private police officer, employed by defendant to keep order in its plant. The bullet entered the arm above the elbow, and, having broken the bone, was shattered into fragments, which were driven downward toward the elbow, where they were imbedded in the flesh and muscles. Only a part of the bullet emerged from the arm. The bone did not unite, and was thereafter wired together. The wound did not heal, and continued to discharge, there being dead bone still in the arm, thus leaving plaintiff's arm useless for labor. There was a difference of opinion as to improvement and recovery. *Held*, that a verdict awarding plaintiff \$8,500 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

At Law. Action by Steve Kusnir against the Pressed Steel Car Company. Verdict for plaintiff for \$8,500 damages, and defendant moves to set aside the verdict as against the evidence, and as excessive, and for a new trial on the minutes. Denied.

Rufus M. Overlander, of New York City (H. Snowden Marshall, of New York City of counsel), for plaintiff.

Joline, Larkin & Rathbone, of New York City (Lewis H. Freedman and Harold Russell Griffith, both of New York City, of counsel), for defendant.

RAY, District Judge. The plaintiff at the time of the transaction complained of, about April 18, 1910, was a common laborer in the employ of the defendant corporation at its manufacturing plant in the state of Pennsylvania. He has and had a wife and three children. He is now doing odd jobs, such as his physical condition will permit. He was then working at piece work as a riveter of cars, and earned from \$30 to \$35 each two weeks. On the trial, October 28, 1912, it was evident that he was not able to do a full day's work of hard manual labor by reason of the condition of his arm, which had been broken and, to an extent, shattered above the elbow by a pistol ball fired by one Charles P. Smith, known in the record also as Captain Smith, who at the time of the transaction in question was in the employ of the defendant company as an armed watchman, and was also a police officer of the state, commissioned by the government of said state of Pennsylvania.

The defendant was and is a corporation of the state of Pennsylvania, engaged in manufacturing pressed steel cars, and had an extensive plant and employed hundreds of men. There was evidence

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tending to show, and which justified a finding, that April 18, 1910, one of the men in defendant's employment had been discharged; that there was disaffection in the department to which he belonged, and in which Kusnir was employed; that there had been some talk of a strike, and that defendant had some reason to apprehend one, and had determined to send the men home that morning without letting them go to work as the best means of averting trouble. In anticipation of some possible disorder, Smith, as an armed watchman in the employment of the defendant, was there at its instance and pursuant to such employment to act in its behalf, if occasion demanded. On the morning of the 18th, the men came to the number of several hundred, Kusnir being one, and after having taken their tools, but before going to work, were ordered home. They were entitled to a reasonable time in which to depart, and it was, of course, the duty of these men to depart in a quiet and an orderly manner, doing no violence. Smith, as stated, was there armed at the instance of the defendant, and as its employé and servant, to aid, if necessary, in keeping order and in protecting the property of the defendant. As a duly commissioned police officer of the state he unquestionably had the right, and it was his duty, if he saw a crime being committed, even there to apprehend the offender, even without process. On these questions the court charged the jury, and no exception was taken and there was no request to charge differently, as follows:

"Smith, the officer who did the shooting, and he admits that he did the shooting, was commissioned by the state of Pennsylvania, or its Governor, as an officer of the peace, and, of course, had the right, in the exercise of the police power of that state and the administering of the criminal laws and enforcing them, to arrest any one engaged in the commission of a crime in his presence. He was a peace officer at this time, and held his commission; but he was employed at this particular time by the defendant company, and represented it in the keeping of order and the protection and preserving of its property against unlawful acts, and riotous conduct, if any there should be, in its shops and on its premises, and was employed to keep order and preserve the peace, and was kept there at this particular time, and had been for some little time before, by the defendant company. Smith occupied a sort of a dual position, in this: As a peace officer, commissioned by the Governor of the state, of course, if he saw an offense being committed, a violation of the criminal law, he had the right as such officer, even without a warrant, to make an arrest to preserve the peace, and see that the law was properly enforced in that regard by arresting the offender. That right he had by virtue of the commission, irrespective of whether he was engaged by the defendant or not—irrespective of whether or not he was in the employ of the defendant company to preserve the peace against riotous conduct, unlawful acts, even on its property, and protect and preserve its property. For all such acts of Smith defendant is not liable. But he was employed there by the defendant company to protect its property, and therefore, at the time in question, was, admittedly, the alter ego of the company; that is, he represented in that respect, for that purpose, the company. Of course, the company itself had the right to protect its property against riotous conduct, and to have men there on its property to preserve the peace, and it was the duty of the men in the employ of the company, when they were not at work, under reasonable rules and regulations, to leave the premises of the defendant company in a quiet, peaceable, and orderly manner. Of course, they had a reasonable time to come and a reasonable time to go under ordinary circumstances."



Kusnir, the plaintiff, claimed, and gave evidence tending to show, and which justified the jury in finding, that he was departing in a quiet and a peaceable manner, doing no harm, creating no disorder, and neither committing nor attempting to commit any offense, or violate any law, or any rule or regulation, when he saw Smith in his path, armed and engaged in an altercation with a big Russian; that he was afraid, and to avoid danger and injury dodged under a table of steel rails or beams; that the Russian escaped Smith, who excitedly and negligently mistook Kusnir for the escaping Russian, and pursued him, and, as he endeavored to get from under the beams and go away, that Smith carelessly and negligently and wrongfully, seeking to keep order pursuant to his employment by defendant, first struck plaintiff on the head, and then, he not coming out, reached down and with his revolver or pistol willfully, negligently, and unnecessarily shot plaintiff through the arm as he was on his hands and knees, doing no harm and committing no violence. The plaintiff claimed, and gave evidence tending to show, and which justified the jury in finding, that the ball entered the arm on the outer part of the same some distance above the elbow, and, having broken the bone, was shattered into fragments, which were driven downward towards the elbow, where they are now imbedded in the flesh and muscles, and that only a small part of the bullet passed out. The bone, not having united, was at a later time wired together, and the wound has never healed, and still discharges, and there is still dead bone in the arm.

The contention of the defendant was and is that, as the men were going out, there was much disorder and many threats, and that Kusnir attacked Smith with a heavy piece of iron, and then dodged under the table of rails or beams, and later came out and seized Smith about the body with both arms from behind, pinioning him to a degree, and was endeavoring to gain possession of Smith's revolver, when he (Smith) as missiles were being thrown by others which endangered him, got out his revolver and, placing the muzzle against the inside of Kusnir's arm just above the elbow, fired, not intending to kill, and that the bullet entered on the inside, broke the bone, and passed upwardly and out on the outer side of the arm and higher up; that is, at the place where Kusnir and his witnesses say it entered. It was contended on the trial that if Kusnir was on Smith's back, and facing his back, with both arms around Smith's body, that it was well-nigh impossible and highly improbable that Smith reached far back and above Kusnir's elbow and pointed his revolver towards his own body (Smith's) before firing, as must have been the case if the parties occupied the position described by Smith and some of his witnesses, and the ball in fact entered on the outside of the arm and quite a distance above the elbow, and then passed down towards the elbow. There was not only this conflict of evidence as to the position of Smith and Kusnir when the shot was fired, but a conflict of medical evidence as to the place of entry of the ball, its course, and point of egress.

Kusnir was taken to the hospital the same day, and while there and on the same day Smith swore out a warrant against him for felonious assault. He was not tried until the following October, when he was

found guilty and sentenced to pay a fine of \$500 and to be imprisoned for three years. He was paroled, however, and not imprisoned. On the trial, if not before, the defendant here, Pressed Steel Company, was represented by its private counsel, who took part in the prosecution. The plaintiff claims he employed no counsel. Smith is a large, heavy man, and Kusnir is a slight, small man. Smith was armed; Kusnir was unarmed. On this trial the defendant called several witnesses, who claimed to have seen what occurred at the time Kusnir was shot. Their evidence was conflicting, and contradictory of each other and of Smith, in some important respects. The evidence presented a square question of fact as to what occurred April 18, 1910, and as to the motives and influences which impelled Smith, this employé of the defendant, to charge Kusnir with a deadly assault with intent to murder, and the defendant here to employ its private counsel in the prosecution of Kusnir. If the contention of Kusnir was correct as to what happened April 18, 1910, and the jury found it was, then the assault on him by Smith was not excusable or justifiable, but a grossly careless and reckless act, for which the defendant was responsible, and the shooting was willful and unnecessary.

Was or was not that criminal prosecution for the purpose of putting Kusnir in the wrong and discrediting him? It was for the jury to say. The only employé of the defendant who testified on that trial in behalf or favor of Kusnir was at once discharged by the defendant. The only purpose the defendant claimed for putting the record of that proceeding in evidence was to discredit Kusnir on this trial, but later excepted to the charge of the court that the verdict of the jury in the criminal case in Pennsylvania was not *res adjudicata* in this case. The defendant here now claims that there was no evidence that Smith, in assaulting and shooting Kusnir, was acting within the general scope of his employment for the defendant company, and that the fact that he was at the time a police officer of the state of Pennsylvania, duly commissioned by the Governor of that state, exonerates the defendant here from liability.

[1] Where private parties, even with the consent of the state, employ its police officers to represent them, and do special work for them in protecting and preserving their property and maintaining order on their premises, and such officers are engaged in the performance of their duties to their employers, and are acting within the scope of their powers and duties, they become and are the servants and employés of such private parties and their representatives, and for grossly negligent acts, wantonly, willfully, and unnecessarily committed by them in the line of their duty, and when engaged in the performance of such duties, to the injury of others, the master or employer is liable. Employers cannot escape responsibility for the grossly negligent, wanton, and willful acts of persons employed by them, and representing them, and paid by them, by employing constables, marshals, sheriffs, and peace officers of the state, provided such grossly negligent, willful, wanton, and wrongful acts are done by such representatives where and while acting within the general scope of the authority conferred on them. To establish a rule to the contrary would lead

to the grossest acts of infamy and outrage, and destroy, as it ought, respect for government and courts.

[2] The state would not be liable for such acts, and if the employer—that is, the master, who makes the officer his representative for his private purposes—is not, because the wrongdoer is a police officer, such officer may perform the work he is employed to do in the most grossly careless, wanton, and willful manner, fraught with great peril to others, and the injured party must look to the wrongdoer, usually of no pecuniary responsibility, and not the employer, who employed the wrongdoer to do the very acts complained of, but not in a wanton, willful, and negligent manner, a mode fraught with peril to others. Of course, the employé must be acting in the line of his duty to his master, and within the general scope of his authority, and represent him in that matter. The proposition is squarely decided by the Court of Appeals of the state of New York in *Sharp v. Erie R. R. Co.*, 184 N. Y. 100, 105, 76 N. E. 923, 6 Ann. Cas. 250, and in *Parke v. Fellman and Interborough Rapid Transit Co.*, 145 App. Div. 836, 838, 130 N. Y. Supp. 361, by the Appellate Division of the Supreme Court. *Magar v. Hammond*, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. (N. S.) 1038, is in effect the same. *Pennsylvania R. Co. v. Kelly*, 177 Fed. 189, 101 C. C. A. 359, 30 L. R. A. (N. S.) 481 (C. C. A., 2d Circuit), is in no way to the contrary.

In the *Kelly Case* a special policeman was assigned to duty on defendant's pier (that of the railroad company) and the railroad company paid his wages for keeping order on the premises. It was his duty to regulate traffic on the pier of the railroad company. He was subject to the orders of the chief of police. While under assignment to this particular duty, but not while performing it, and when off the pier and in the public street, this officer engaged in an altercation with the driver of a piano truck, and finally struck him with his club and inflicted severe injury. There was no evidence that the altercation had anything to do with keeping order or regulating traffic on the pier. The injured party sued the railroad company, and it was wisely and properly held that he could not recover. Judge Coxe, in giving the opinion of the court, in which Judges Lacombe and Noyes concurred, said:

"The question, then, for us to determine, may be stated as follows: Is a corporation which pays for the services of a policeman to guard its property and preserve order upon its premises liable for an unprovoked and wholly unjustifiable assault committed by him upon a public street? We are constrained to answer this question in the negative. \* \* \* To hold the person who pays a policeman's wages for keeping order upon his premises liable for such a malicious assault as this, committed upon a public highway, goes far beyond the doctrine of any well-considered case with which we are familiar. If the plaintiff tells the truth, there was no justification for the brutal assault made upon him; but the defendant has done no act of omission or of commission which renders it liable therefor."

If the officer had been on the pier, and engaged in the performance of duties to which assigned by the railroad company and for which it was paying, quite a different proposition would have been presented. The *Kelly Case* is in line with *Tyson v. Bauland Co.*, 186 N. Y. 397,

403, 79 N. E. 3, 9 L. R. A. (N. S.) 267, where it is held that it must appear the acts were done within the general scope of the employment, and not solely as an officer of the law.

In the Sharp Case, *supra*, George Sharp, a boy 17 years of age, with one or two others, had stolen a ride on one of defendant's trains. At Salamanca, learning there were detectives in the yard, they jumped from the train and ran, and were pursued by one Wheeler, who was a police officer, but in the employ of and paid by the railroad company, and it was a part of his duty to the company as such employé to drive off and keep off trespassers from the company's property. Sharp, in running away, left the property of the defendant company, and went on the land of others; but Wheeler continued the pursuit, drew a pistol, and fired, and killed the boy. It was contended that Wheeler was acting as an officer having power to arrest a trespasser on the railroad property, which he had, and that, even if, while on the property of the defendant company, he was acting within the general scope of his employment by the company, he ceased to be so acting when he left that property, and was an officer of the law merely, and acting as such at the time he fired the fatal shot. The Court of Appeals held that it was a question of fact for the jury whether Wheeler, after he passed the line of property and fired at the boy, was still acting pursuant to his employment by the railroad company, and within the general scope of his authority, or as an officer of the law. The court also held:

"A railroad company, employing a servant who happens to be a public officer, acquires no immunity from such employment. Constables and policemen are often employed by corporations in the same capacity as Wheeler was. It is not beyond the province of a jury in such a case to find that the official acts of the employé are to be used for the benefit of the defendant and in protection of its interests or property; and hence, in such a case, the character of the servant's act is to be determined in the same way and upon the same principles as if he was not a public officer at all. If he acts maliciously, or in pursuit of some purpose of his own, the defendant is not bound by his conduct; but, if, while acting within the general scope of his employment, he simply disregards his master's orders, or exceeds his powers, the master will be responsible for his conduct."

[3] Kusnir was not a trespasser. He was rightfully where he was, and, as the jury found, doing no wrong. He was on the defendant's property as its employé, and on his way home pursuant to its orders. Smith was there, not as a police officer, but as the employé and representative of defendant, and was, the jury found, at the time engaged in the performance of his duties to the defendant pursuant to such employment and acting within the general scope of his employment. The jury was instructed in plain and unequivocal terms that for all acts done by Smith as a police officer the defendant was not liable, and were repeatedly told that it was for them to determine whether Smith, when he shot Kusnir, was acting within the general scope of his employment and authority from the defendant company, and also that the plaintiff could not recover unless they found that Smith was acting within the general scope of his employment, and in the discharge of his duty to the company pursuant to his employment, when



he shot Kusnir, and it was also left to the jury to determine what Smith's employment and duty to his employer was. The jury was also instructed that Smith had the right to defend himself against an assault by Kusnir, and that if the shot was fired while so defending himself the defendant here was not liable; also that defendant was not liable if Smith was assaulted, and in defending himself—

"made a mistake in his judgment and went a little too far; the law would not hold him or the defendant responsible for a mistake or error of judgment under such circumstances."

Other cases in line with and to the same effect as *Sharp v. Erie R. Co.*, 184 N. Y. 100, 76 N. E. 923, 6 Ann. Cas. 250, are *Ill. Steel Co. v. Novak*, 84 Ill. App. 641, affirmed 184 Ill. 501, 56 N. E. 966, *Brill v. Eddy*, 115 Mo. 596, 22 S. W. 488, *King v. Ill. Cent. R. R. Co.*, 69 Miss. 245, 10 South. 42, *Dickson v. Waldron*, 135 Ind. 524, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440, and *St. L., etc., Ry. Co. v. Hackett*, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105.

[4] It is urged that it was error for the court in charging the jury to say that if they found that the bullet entered on the outside of the arm above the elbow, and passed downwardly towards the elbow and emerged on the inside, such fact was a corroboration of the plaintiff's testimony and theory of the case. As the defendant all through the trial had contended and argued, and given evidence to the effect, that the ball entered on the inside of the arm and passed rather upwardly towards the shoulder and emerged on the outside of the arm, and that therefore Kusnir's claim as to the position of the parties when the shot was fired could not be true, and that Smith's claim was, I see little force in this contention. All through the trial both parties placed stress on the point of ingress, the course, and point of egress of the ball as bearing on the position of the parties when the shot was fired. It was a crucial point in the case whether Kusnir was on his hands and knees on the floor, with Smith on the table above pointing down, when shot by Smith, or on the back of Smith, facing his back, with both arms clasped around him, when the shot was fired.

It is evident, I think, to the ordinary mind, that while Smith might have reached, still it is not probable that he did reach, far back as Kusnir was on his back, turn his revolver, and shoot towards his own person, and he denied that he did. If Kusnir was on his hands and knees, it is equally improbable that Smith reached down and pointed his revolver up in his own direction, and then fired, endangering himself. In any event, the position of parties was very material, as bearing on the truth of the story told by each, and the point of entry, course, and point of egress of the bullet was important on this issue. Smith claimed he pointed his pistol backward, and fired backward into one of the arms of plaintiff clasped about his (Smith's) body from behind. If so, the ball could not have *entered* on the outer side of the arm at the point shown, but could have emerged there. On the other hand, if Kusnir was on his hands and knees, and Smith reached down and fired when over Kusnir, it is very probable the ball would have

entered at the place Kusnir and his medical experts say it did. If A. is shot by B., and the defense urged is self-defense, and A. says he was shot at and wounded by B. while his (A.'s) back was towards B., and B. says he fired when A. was facing him, and it is proved that the ball entered the back of A. and emerged in front, it seems to me clear that this fact is competent proof in corroboration of the story of A. as to the shooting and the position of the parties when the weapon was discharged.

[5] As to the defense of *res adjudicata* by virtue of the criminal prosecution. If A. sues B. for assault and battery, but B. was beforehand, and swore out a warrant for A., and obtained a verdict in the criminal case, in which the people or the government was complainant, that A. assaulted B. in that transaction, and a judgment is pronounced accordingly, is this *res adjudicata* between A. and B., in the civil case for assault and battery? The parties are not the same, and B. could not change the rule by employing counsel to prosecute the criminal case. Again, there is no privity, and the purpose of the proceedings are different. But the rule is settled that:

"A judgment in a criminal prosecution constitutes no bar or estoppel in a civil action based upon the same acts or transactions, and conversely of a judgment in a civil action sought to be given in evidence in a criminal prosecution." 24 Cyc. 831, title "*Res Judicata*," and the numerous cases there cited, both English and American; 1 Greenl. on Ev. § 587; 2 Wharton's Law of Ev. § 776; *Wilson v. Manhattan Ry. Co.*, 2 Misc. Rep. 127, 20 N. Y. Supp. 852, affirmed 144 N. Y. 632, 39 N. E. 495; *Johnson v. Girdwood*, 7 Misc. Rep. 651, 28 N. Y. Supp. 151, affirmed 143 N. Y. 660, 39 N. E. 21; *Betts v. New Hartford*, 25 Conn. 180; *State v. Bradnack*, 69 Conn. 212, 37 Atl. 492, 43 L. R. A. 620.

[6] It is clear on the record that the verdict was not contrary to the weight of evidence, or unsupported thereby. The jury saw and heard the witnesses, and judged of their fairness and honesty. They saw and heard Kusnir and Smith. There were no appeals to passion or prejudice. The amount of the verdict is large, but I do not think it excessive. At the time of the transaction in question Kusnir was 32 years of age. He had worked for the defendant company several years. He was earning from \$15 to \$17.50 per week, or at least \$780 per year. It was a self-evident fact on the trial that the arm was then useless for labor. There was a difference of opinion as to improvement and recovery. It was for the jury to determine the extent and probable duration of the disability. Courts should be slow to interfere with the verdicts of juries in these matters, and in attempting to regulate them to suit their own notions. It is presumed the plaintiff will earn something, but how much is speculative and conjectural. If not disabled, he would have earned \$1,500 or over in the two years preceding the trial, and considering his probable duration of life, and the reasonably probable continuation and extent of his disability, and his earning capacity before and since the shooting, I think the verdict not excessive, at least to an extent that will justify the court in interfering with the verdict.

Motion denied.

## PARKER v. SHERMAN.

(District Court, D. Vermont. November 27, 1912.)

**BANKRUPTCY (§ 184\*)—ACTION BY TRUSTEE—FRAUDULENT TRANSFER OF PROPERTY.**

A sale of a stock of merchandise by an insolvent immediately prior to his bankruptcy held on the evidence fraudulent and void under Personal Property Law New York (Consol. Laws 1909, c. 41) § 44, relating to the transfer of goods in bulk, requiring previous notice to creditors, etc., and to render the purchaser liable for their value to the bankrupt's trustee; the bankrupt having made a preferential payment with the proceeds.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.\*]

In Equity. Suit by Nathaniel Parker, trustee in bankruptcy of Hugh Owens, against D. C. Sherman. Decree for complainant. See, also, 195 Fed. 648.

S. E. Everts, of Granville, N. Y., for complainant.

T. W. Moloney, of Rutland, Vt., for defendant.

MARTIN, District Judge. One Fred W. Allen is, and has been for some years, postmaster in Granville, N. Y. He gave the required bonds to the government. Hugh Owens, now in bankruptcy, was assistant postmaster in the same post office, and a resident of said Granville. He was a merchant, and the post office was kept in his store. He gave no bonds as such assistant postmaster, and embezzled funds belonging to the Post Office Department to the amount of \$2,800. The said Owens, in the language of some of the witnesses, had been in "straitened circumstances" for several years, and it was quite generally known in Granville and vicinity that he was not able to pay his debts. He was arrested for said embezzlement late in the fall of 1910, and was released on bail. On the 9th day of December, 1910, said Owens gave said Allen a bill of sale of certain furniture, etc., that was exempt from attachment, and also a chattel mortgage on his store of goods, the purpose of which is hereinafter set forth. About that time there were several conferences between Owens and some of his creditors, notably the officers of both of the banks in Granville, as to raising more money. Both Allen and Owens consulted counsel before and after the giving of the bill of sale and chattel mortgage above mentioned, and on the day following the last consultation, and on the 13th of the same December, Owens went to Poultney, Vt., and proposed to the defendant Sherman to sell him his entire stock of goods. Sherman was a merchant, dealing in gents' clothing principally. Owens offered Sherman his goods at 50 per cent. of their cost price. Sherman then told him that he would take the goods, if, upon conference with counsel, he found everything to be free of liens. The defendant went to Granville, and consulted J. B. McMormick, Esq., and then informed Owens, at Granville, that he would take the goods on the terms which he had given him, and would come to Granville to work on the inventory

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that night. Sherman went back to Poultney, stayed in his store until about 9 o'clock, then took his clerk, and went back to Granville, and worked on the inventory until 1 or 2 o'clock in the morning, and then went home to Poultney. He returned the next night and continued work on the inventory at Granville, and the following night, during the night, the goods were removed from Granville, N. Y., to Poultney, Vt., and delivered to the possession of the defendant, Sherman. Immediately an involuntary petition in bankruptcy was filed against Owens in the Northern District of New York, and in due time, to wit, February 23, 1911, the complainant in this case was appointed trustee of said Hugh Owens' bankrupt estate in the Northern District of New York, and, after investigating the facts, he brought this bill in chancery.

The plaintiff claims that the goods were sold in violation of the New York statute relating to the sale of goods in bulk, a copy of which is hereto attached.<sup>1</sup>

The defendant claims that the contract was made in Vermont and the goods delivered to the defendant in Vermont, and therefore the New York statute does not apply, and that, the goods coming from the state of New York, section 5010 of the statutes of Vermont does not apply. A copy of the Vermont statute relating to fraudulent sales of merchandise is hereto attached.<sup>2</sup>

#### <sup>1</sup> New York Statute.

##### Sec. 44. Transfer of Goods in Bulk.

(1) The transfer of any portion of a stock of goods, wares or merchandise otherwise than in the ordinary course of trade, in the regular and usual prosecution of the transferrer's business, or the transfer of an entire such stock in bulk, shall be presumed to be fraudulent and void as against the creditors of the transferrer, unless the proposed transferee shall, at least five days before the transfer, in good faith, make full and explicit inquiry of the transferrer as to the names and addresses of each and all of the creditors of the transferrer, and unless such transferee shall, at least five days before the transfer, in good faith notify, or cause to be notified of the proposed transfer, personally or by registered mail, each of the creditors of the transferrer of whom such transferee has knowledge, or can with the exercise of reasonable diligence acquire knowledge.

(2) The transferrer shall at least five days before such transfer fully and truthfully answer in writing such transferee's inquiries as to the names and addresses of the transferrer's creditors, and if such transferrer shall knowingly or willfully refuse so to answer or make or deliver, or cause to be made or delivered to such transferee any false or incomplete answer to such inquiries, such transferrer shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished accordingly.

(3) Transfers under this section shall include sales, exchanges and assignments, but nothing contained in this section shall apply to the transfers by executors, administrators, receivers, assignees under a voluntary assignment for the benefit of creditors, trustee in bankruptcy or by any public officer under judicial process.

#### <sup>2</sup> Statute of Vermont.

##### Fraudulent Sales of Merchandise.

Sec. 5010. Regulations. The sale in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser,



I find that, while the price for the goods was agreed upon in Vermont, it was subject to what the defendant might ascertain as to liens thereon by an investigation and consultation with counsel at Granville, N. Y., so as a matter of law I find that the contract was concluded in New York, and that the New York statute applies.

The plaintiff further claims that the defendant bought these goods under such circumstances that he must have known, or ought to have known, that Owens was insolvent, and that such a purchase would be, and was, in fact, a preference and a fraud upon the general creditors of the bankrupt. The defendant testified that he had no knowledge of the bankrupt's financial condition, except that he was embarrassed by his defalcation of the post office funds. The evidence on the part of the plaintiff shows that the bankrupt and the defendant were personal friends, frequently boarding at the same hotel and visiting each other. This evidence is not denied. The defendant knew that the said Owens had not sufficient funds at his command with which to make good to Allen, the postmaster, the funds that the said Owens, as assistant postmaster, had abstracted from the post office funds. The defendant must have known that Owens was bankrupt, and I find from these circumstances, notwithstanding his denial, that he did know it. All the circumstances indicate that he knew of the execution of the lien and chattel mortgage aforesaid by said Owens to said Allen to secure Allen from his liability to the government for Owens' embezzlement of the postal funds. He must have known that there was some reason for changing that arrangement of securing Allen to that of a sale of the stock of goods to raise the funds to cover the embezzlement. From all the circumstances I find that the defendant entered into this arrangement of purchasing the goods in bulk knowing that the said Owens was in a bankrupt condition, and that this transaction would result in a preference to Allen over the other creditors of said Owens.

I further find that the lien and mortgage given by Owens to said Allen was to secure Allen for his liability to the government for said post office funds embezzled by Owens; that in said transaction this liability was treated as an indebtedness by said Owens to said Allen. Neither the defendant nor Owens did anything in compliance with either the New York statute relating to the sale of goods in bulk, or the Vermont statute relating to fraudulent sales of goods. The contract of sale was a secret, and the goods were removed in the nighttime, that the matter might be kept a secret until possession was ob-

at least five days before the sale, make a full detailed inventory, showing the quantity and, so far as possible with the exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, and unless the purchaser demands and receives from the seller a written list of the names and addresses of the creditors of the seller, with the amount of indebtedness due or owing to each and certified by the seller, under oath, to be, to the best of his knowledge and belief, a full, accurate and complete list of his creditors and of his indebtedness, and unless the purchaser, at least five days before taking possession of such merchandise, or of paying therefor, notifies personally or by registered mail, every creditor whose name and address are stated in such list, of the proposed sale and of the price, terms and conditions thereof.

tained. The undisputed evidence is that the defendant paid all that the store of goods was worth, and I so find the fact.

I further find that the defendant paid for this stock of goods with his check given to said Owens, and that Owens took the avails of said check, and secured a cashier's draft, which went to the government in part payment of said Owens' defalcation. This store of goods bought by the defendant comprised substantially the bankrupt's assets. His indebtedness exceeded \$7,000, besides said defalcation. The exhibits in the case show that the said Owens was duly adjudged a bankrupt in the Northern District of New York. For the exact date I refer to the exhibits. The complainant was duly appointed trustee on February 23, 1911. Said bankruptcy cause is now pending in the United States District Court for the Northern District of New York, and the proceedings have been regular and in accordance with the provisions of the National Bankruptcy Acts. Said exhibits are referred to, and made a part of these findings of fact.

The defendant has disposed of the goods, and put them beyond the reach of the court, wherefore the complainant may have a decree for the value of the goods, with interest.

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**In re CANTELO MFG. CO.**

**IVES v. CANTELO MFG. CO. et al.**

(District Court, D. Maine. December 10, 1912.)

. No. 179.

**1. BANKRUPTCY (§ 288\*)—CLAIMS—DETERMINATION—TRIAL—PLENARY SUIT—SUMMARY PROCEEDINGS.**

Where a claim of adverse title to property of a bankrupt is based on a transfer antedating the bankruptcy proceedings, a plenary suit must be brought either at law or in equity to adjudicate the claim; but, if it is not based on any transfer prior to bankruptcy, but the property is in the physical possession of a third party, or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refused to deliver it to the trustee, then the bankruptcy court has jurisdiction to compel its delivery to the trustee in summary proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.\*]

**2. BANKRUPTCY (§ 136\*)—CORPORATIONS—ASSETS—PATENTS—OWNERSHIP.**

Where claimant, after patenting a metal stepladder, organized a corporation to manufacture and exploit the invention, receiving \$30,000 of its capital stock in consideration of an assignment of his rights and patents to the corporation, his rights with reference to the patents thereafter were merely those of an officer of the corporation in possession of the assets of the corporation, and hence, on bankruptcy intervening, he was properly compelled to transfer such patents to the trustee in summary proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.\*]

**In Bankruptcy.** In the matter of bankruptcy proceedings of the Cantelo Manufacturing Company. On petition by Howard R. Ives, as

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

trustee, against the bankrupt and John S. Cantelo to obtain a transfer of certain patents alleged to belong to the corporation. A decree in favor of petitioner was rendered by the referee, and Cantelo applies for review. Affirmed.

See, also, 185 Fed. 276.

Howard R. Ives, of Portland, Me., pro se.

George E. Curry, of Boston, Mass., for bankrupt and petitioner for review.

HALE, District Judge. In a summary proceeding in bankruptcy, the trustee of the bankrupt estate, by petition, seeks for an order that certain applications for letters patent, owned by the bankrupt corporation, and now claimed and held by John S. Cantelo, president of the corporation, a director of it, and the owner of a majority of the stock of the corporation, be transferred to the trustee as the property of the corporation; and that the title thereof be declared to be in the trustee. The matter first came before this court on a demurrer, by John S. Cantelo, to the trustee's petition. The principal contention raised by the demurrer was that the patent applications which formed the subject of the petition were not such "property" as was intended by the bankrupt law to pass to the bankrupt estate and to vest in the trustee in bankruptcy. The court overruled the demurrer. After the overruling of the demurrer, the case was submitted to the referee upon the petition, answer, and proofs. A full hearing was had before the referee, in which evidence was submitted on both sides. The referee makes the following order:

"First. That the defendant John S. Cantelo in or about the month of August, A. D. 1906, made and duly filed in the Patent Office of the United States of America, four certain applications for letters patent upon a certain metal stepladder; that said applications were made, and were at all times thereafter held, by said Cantelo solely in trust for and for the benefit of the defendant Cantelo Manufacturing Company; that said applications at all times prior to the filing of the petition in bankruptcy against said defendant, Cantelo Manufacturing Company, were the property of said Cantelo Manufacturing Company; and, said Cantelo Manufacturing Company having been adjudged a bankrupt, and the petitioner Howard R. Ives having been duly appointed and qualified trustee of said bankrupt, that the title to said applications for letters patent has vested and is now in said Howard R. Ives as trustee of said bankrupt.

Second. Said defendant John S. Cantelo is hereby ordered forthwith to assign, transfer, and convey said applications for letters patent to said Howard R. Ives as trustee, and forthwith to deliver to said trustee any and all receipts, certificates or documents relating to said applications for letters patent issued to said John S. Cantelo out of the United States Patent Office, and now in his possession.

From this order of the referee, the respondent John S. Cantelo appeals and asks the court to review the same.

The respondent says that the court has no jurisdiction. He insists that he has an adverse interest in the patent applications in question, and that this question between himself and the bankrupt estate can be settled only by a plenary suit, either in law or in equity, and cannot be reached by this summary proceeding.

[1] In *Babbitt v. Dutcher*, 216 U. S. 102, 113, 30 Sup. Ct. 372, 377

(54 L. Ed. 402, 17 Ann. Cas. 969), in speaking for the Supreme Court, Mr. Chief Justice Fuller said:

"There are two classes of cases arising under the act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy.

"In the former class of cases a plenary suit must be brought, either in law or in equity; by the trustee, in which the adverse claim of title can be tried and adjudicated.

"In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation.

"The former class falls within the ruling in the case of *Bardes v. Hawarden Bank*, 178 U. S. 524 [20 Sup. Ct. 1000, 44 L. Ed. 1175], and in the case of *Jaquith v. Rowley*, 188 U. S. 620 [23 Sup. Ct. 369, 47 L. Ed. 620], which hold that such a suit can be brought only in a court which would have had jurisdiction of a suit by the bankrupt against the adverse claimant, except where the defendant consents to be sued elsewhere.

"In the latter class of cases a plenary suit is not necessary, but the case falls within the rule laid down in *Bryan v. Bernheimer*, 181 U. S. 188 [21 Sup. Ct. 557, 45 L. Ed. 814] and *Mueller v. Nugent*, 184 U. S. 1 [22 Sup. Ct. 269, 46 L. Ed. 405], which held that the bankruptcy court could act summarily."

[2] If, then, John S. Cantelo is an adverse claimant in reference to the patent applications in question, this court has no jurisdiction to determine the question before it upon this process. If, however, John S. Cantelo's claim to and possession of the property in question is merely that of an officer and agent of the bankrupt company, and not of Cantelo as an individual, then the bankruptcy court may exercise summary jurisdiction to recover the property. Under the clearly stated doctrine of *Babbitt v. Dutcher*, the officers of a bankrupt company, in their capacity as such officers, have possession of the property of the corporation, are subject to the summary jurisdiction of the bankruptcy court, and are not adverse claimants within the meaning of the law. The question, then, before this court is whether or not the proofs in this case show that the patent applications in question were the property of the bankrupt corporation, and not that of Cantelo as an individual. And the burden is upon the petitioner, the trustee in bankruptcy, to show that the patent applications in question were held by Cantelo merely as an officer of the bankrupt corporation; so that Cantelo's possession was, in law, the possession of the corporation.

The proofs show that, prior to 1901, John S. Cantelo had invented a steel stepladder, and taken out certain applications for patent; that he had promoted a corporation, organized under the Laws of Massachusetts, to develop the invention. In 1901, he determined to form a Maine corporation, and to have the invention transferred to such corporation, in consideration for stock to be issued to him. Accordingly, the Cantelo Manufacturing Company was organized in July, 1901, un-



der the laws of Maine, with a capital stock of \$60,000. John S. Cantelo was made president, and a director of the company; Joseph H. Avery was made treasurer. There was issued to Cantelo \$30,000 of the capital stock, in consideration for which he assigned all his rights and patents to the corporation. After the corporation was organized, Cantelo took charge of its mechanical affairs, and sold a large amount of its stock for cash. It seems clear from the testimony that Cantelo did not turn over to the treasurer the money realized from such sale of stock, but assumed the control and disbursement of this money, and used it for the business expenses of the corporation. In his deposition Cantelo admits having received \$9,264 for sale of stock, and \$1,000 borrowed money, making in all \$10,264, which he paid out in the business of the corporation.

Cantelo now contends that he did no work perfecting the ladder while he was in the direct employment of the defendant corporation, but that the only work he did for the corporation was in connection with the machinery in the factory, and that the improvements on the ladder which formed the subject of the four new applications for patent did not require any experimentation, but were evolved by him for his own benefit, and were not to be given the company unless he was paid for them. Upon a careful examination of all the proofs in the case, I cannot sustain this contention of the respondent. I find that, in his examination at the first meeting of creditors, Cantelo made statements entirely inconsistent with the proposition which he now advances. In that examination he states distinctly that whatever work he did since the organization of the company was done for the company. He admits that the company had the whole benefit of his services, and that a large part of those services were in the line of experimentation upon the ladder. The testimony of Mr. Avery, the treasurer, shows that, during the six years subsequent to the organization of the corporation, he was familiar with Cantelo's work at the factory; that such work consisted largely in developing the patents and experimenting upon the ladder; that Cantelo told him he was making changes in the machinery for the purpose of making improvements on the ladder, and that he was taking out additional applications for the purpose of keeping up the life of the patents, and that the improvements were to be for the benefit of the company, and that the expense of taking out the applications was paid out of the company's funds. It further appears that Cantelo represented to persons to whom he was selling stock of the company that all the interest which Cantelo had in the patents, and patent rights, belonged to the company. The testimony utterly fails to sustain Cantelo's claim that he was to be paid an additional amount for any improvements he might make upon the ladder; he had already received one-half of the entire capital stock of the corporation as a consideration for what he agreed to transfer. I think there is much force in the trustee's position that if, having acquired one-half of the stock, Cantelo could go ahead, experiment upon the company's machinery in the company's factory, all the time charging up his time to the company at \$30 per week, and thereby evolve improvements on the ladder, and take out patent applications

on the improvements and hold the same in his own personal right and demand payment from the company therefor, he would thus have the power of making the original invention which he transferred to the company and for which he received half of its stock, of no value; for he would be able, if the company did not pay him for his new applications, to put the ladder in its improved form on the market, and undersell the company's product, which would not be up to the latest improvements. Thus he would be able to make the company pay him twice for the ladder, to say nothing of making it pay in the meantime for all his time and expense in evolving the improvements.

Upon all the proofs in the case, I am satisfied that the applications were made and held by Cantelo in trust for the Cantelo Manufacturing Company; that prior to the filing of the petition in bankruptcy the applications were the property of the company; and the company now having been adjudged a bankrupt, and the petitioner having been duly appointed trustee, the title to these applications has vested, and is now in the trustee of the bankrupt corporation.

The order of the referee is affirmed.

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**In re T. C. BURNETT & CO.**

(District Court, E. D. Tennessee. July 17, 1912.)

No. 1,253.

**1. BANKRUPTCY (§ 143\*)—ADJUDICATION—EFFECT—TRANSFER OF PROPERTY.**

Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), provides that the act shall not affect the allowance to bankrupts of the exemptions prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for six months or the greater portion thereof immediately preceding the filing of the petition, and section 70a declares that the trustee of the bankrupt's estate shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as relates to property which is exempt, to all property which prior to the filing of the petition he could by any means transfer or which might have been levied on and sold under judicial process against him. *Held* that, under such sections, the trustee is vested with the bankrupt's title to all property which either could have been transferred, or which might have been levied on and sold under judicial process, except property exempt to the bankrupt under the laws of the state.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.\*]

**2. BANKRUPTCY (§ 143\*)—TITLE OF TRUSTEE—PROPERTY NOT SUBJECT TO LEVY.**

Under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), providing that the bankrupt's trustee shall be vested by operation of law with the bankrupt's title to all nonexempt property which prior to the filing of the petition he could by any means have transferred, or which might have been levied on and sold under judicial process against him, the mere fact that property which is not exempt under the state law could not have been levied on and sold at the date of the adjudication would not prevent the bankrupt's title from passing to the trustee if the bankrupt by any means could have transferred the title.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. BANKRUPTCY (§ 396\*)—"EXEMPTIONS"—STATE LAWS.**

Shannon's Code Tenn. § 4764, provides that a levy may be made on a growing crop, but not until November 15th after the crop is matured, and then only subject to the landlord's lien, if any, but, if the crop owner absconds, conceals himself, or leaves the country, an attachment or execution may be levied on the standing crop at any time. *Held* that, since an exemption is defined to be a right given by law to a debtor to retain a portion of his property without its being liable to execution at the suit of a creditor or to a distress for rent, such section does not render a debtor's interest in a growing crop exempt property, and hence a bankrupt was not entitled to have it set aside to him as property exempt under the state law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668, 670; Dec. Dig. § 396.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2579-2581.]

**4. BANKRUPTCY (§ 143\*)—ASSETS—PROPERTY PASSING TO TRUSTEE—GROWING CROP.**

Since a bankrupt's interest in a growing crop in Tennessee is not exempt property, but is an interest which he may sell or mortgage prior to the time of levy, it constitutes property passing to the trustee on adjudication as provided by Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of T. C. Burnett & Co. The referee denied the bankrupt's application to set aside his interest in a wheat crop as an exemption, and he filed a petition for review. Affirmed.

McCanless & Coleman, of Morristown, Tenn., for bankrupt.

E. R. Taylor and Holloway & Hickey, all of Morristown, Tenn., for trustee.

SANFORD, District Judge. An involuntary petition in bankruptcy was filed against the defendant T. C. Burnett, individually and trading under the name of T. C. Burnett & Co., on April 27, 1912, and he was adjudged a bankrupt thereunder on May 15, 1912. He subsequently filed his schedules in which he claimed as exempt a one-half undivided interest in a growing wheat crop on certain lands. The trustee in bankruptcy having refused to set aside this interest in the wheat crop as an exemption, and the bankrupt having excepted to his action, the Referee in Bankruptcy entered an order sustaining the trustee's action in refusing to set aside this interest in the wheat crop as an exemption; and overruling the bankrupt's exceptions thereto. The bankrupt thereupon filed a petition for the review of this order of the Referee.

[1, 2] Section 6 of the Bankruptcy Act provides that the Act "shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition." Section 70a provides that the trustee of the bankrupt's estate shall "be vested by operation of law with the title of the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all \* \* \* (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Clearly under these two sections the trustee is vested with the bankrupt's title to all property which either could have transferred or which might have been levied upon and sold under judicial process, except property exempt to the bankrupt under the laws of the State. And if the property is not so exempt under the State laws, then manifestly, under section 70, the mere fact that the property could not have been levied upon and sold at the date of the adjudication would not prevent the bankrupt's title from passing to the trustee if it were property which the bankrupt could by any means have transferred, the language of this provision being in the alternative form. The statement in *Smalley v. Laugenour*, 196 U. S. 93, 97, 25 Sup. Ct. 216, 217 (49 L. Ed. 400), that if "exempt property" under the State statute is not subject to levy and sale under those statutes it cannot be made to respond under the Act of Congress, is not in conflict with this view, as it does not refer to property which is merely not subject to levy and sale, but to "exempt property" which is not subject to levy and sale.

The question to be determined in this case, then, is whether or not the bankrupt's interest in the growing wheat crop was exempt property under the laws of Tennessee. Whether this exemption is to be determined as of the date the petition in bankruptcy was filed or as of the date of the adjudication in bankruptcy, as to which there has been a conflict of opinion, as appears from 1 *Loveland on Bankruptcy* (4th Ed.) § 416, p. 863, and the cases therein cited, is, in the present case, immaterial, since the status of the property, so far as this exemption is concerned, was the same at these two dates.

[3] The bankrupt claims that this interest in the growing crop was exempt property when the adjudication was made, under the provisions of section 3036 of the Code of Tennessee (Shan. § 4764), which reads as follows:

"A levy may be made upon a growing crop, but not until the fifteenth of November after such crop is matured, and then only subject to the landlord's lien, if any. If, however, the owner of the crop absconds, conceals himself, or leaves the country, an attachment or execution may be levied on a standing crop at any time."

His contention is, that as this petition in bankruptcy was filed and the adjudication made before the fifteenth of November after the crop matured, such growing crop was then "exempt property" within the meaning of the Tennessee Code and the provisions of the Bankruptcy Act.

After careful consideration, however, I am constrained to conclude that the effect of this Code provision was not to render the bankrupt's interest in this growing crop "exempt property" either at the time the petition was filed or the adjudication made, but merely to postpone the creditors' right to levy thereon after the fifteenth day of



November, when, by the plain terms of the Code provision, it became subject to levy as at common law. This provision of the Code recognizes the common law right to levy upon a growing crop, but postpones its exercise. *Edwards v. Thompson*, 85 Tenn. 720, 721, 4 S. W. 913, 4 Am. St. Rep. 807. And see *Williamson v. Steele*, 3 Lea (Tenn.) 527, 31 Am. Rep. 652. Such recognition and postponement of the creditors' common law right to levy upon a growing crop is, however, in my opinion, not equivalent to an exemption of such crop in the hands of the debtor, within the meaning of the exemption laws. No intention is shown on the part of the legislature to permanently set apart such growing crop as an exemption to the owner. On the contrary the very Code provision in question expressly makes the property subject to levy after a specified date. The plain purpose of this provision is evidently, as its language indicates, to protect the crop from levy until time has been allowed for its maturity, and after such date to subject it to levy as other property of the debtor. This provision as to the postponement of the levy is not included in any of the sections of the Code of Tennessee relating to exemptions; and no provision creating an exemption in a growing crop appears in chapter 4, tit. 2, pt. 2 of the Code relating to exemptions. See *In re Moore* (D. C.) 173 Fed. 679. However, an essential feature of the exemption of property is that it shall be permanently exempt in the debtor's hands from seizure by his creditors under judicial process. In 1 *Bouvier's Law Dict.* (15th Ed.) 631, an exemption is defined as "the right given by law to a debtor to retain a portion of his property without its being liable to execution at the suit of a creditor, or to a distress for rent." In *Taylor v. Winnie*, 59 Kan. 16, 51 Pac. 890, 68 Am. St. Rep. 339, it is said that: "As has frequently been declared, exempt property is something towards which the eye of the creditor need never be turned." And in the very definition of "exemption" contained in 18 Cyc. 1374, upon which the bankrupt relies, it is described as "a privilege or immunity allowed by law to a judgment debtor by which he may hold property to a certain amount or certain classes of property, free from all liability to levy and sale, on execution, attachment or other process issued in pursuance of and for the satisfaction of money judgment." And since, as I view it, it is essential to the exemption of property that it shall be permanently exempt from seizure by creditors in satisfaction of their judgments, it follows that the mere postponement for a limited period of the right to levy upon property, with an express recognition of the right to levy thereon after such period of postponement has passed, cannot be regarded, in my opinion, as equivalent to the statutory setting apart of the property as exempt.

I therefore conclude that while, at the date the petition was filed and the adjudication in bankruptcy made, the bankrupt's interest in this growing crop was not subject to levy and sale, it was nevertheless not property "exempt" to the bankrupt under the Tennessee statute.

[4] It is furthermore well settled in Tennessee that the owner's interest in a growing crop is one which he may sell or mortgage prior to the time that a levy is made upon it in accordance with the provi-

sions of the section of the Code in question. *Butler v. Hill*, 1 Baxt. (Tenn.) 375; *Polk v. Foster*, 7 Baxt. (Tenn.) 98, 100; *Williamson v. Steele*, 3 Lea (Tenn.) 527, 529, 31 Am. Rep. 652; *Edwards v. Thompson*, supra, 85 Tenn. at page 721, 4 S. W. 913, 4 Am. St. Rep. 807; *Layman v. Denton* (Tenn. Ch. App.) 42 S. W. 153. It therefore follows that, not being exempt property, and being property which the bankrupt could have transferred at the time the petition was filed and the adjudication in bankruptcy made, title thereto must be held to have passed to the trustee under the provisions of section 70 of the Bankrupt Act.

Finding therefore no error in the order of the Referee overruling the bankrupt's exception to the trustee's report refusing to set aside to the bankrupt as exempt his one-half interest in this growing crop, the order of the Referee will be in all things confirmed, and the bankrupt's petition to review dismissed at his costs.

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In re SCHWARTZ & CO.

(District Court, S. D. New York. September, 1912.)

**1. BANKRUPTCY (§ 407\*)—DISCHARGE—CREDIT—FALSE STATEMENT—STATEMENT SIGNED BY MANAGING AGENT OF PARTNERSHIP.**

Where the manager of a bankrupt firm, acting within the scope of his authority, signed a false statement of the firm's assets and liabilities and delivered the same to a commercial agency and creditors, to obtain credit, such statement was available to bar a discharge of the partners.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.\*]

**2. BANKRUPTCY (§ 407\*)—PARTNERSHIP—DISCHARGE—FALSE STATEMENTS.**

Where the managing agent of a bankrupt firm, acting within the scope of his authority, made a false statement in writing of the bankrupt firm's assets and liabilities, it was conclusive against the right of one of the partners to a discharge, though she was an old lady who took no part in the management of the business, but intrusted her interest to her son, who acted as the firm's manager.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.\*]

**3. BANKRUPTCY (§ 408\*)—BANKRUPT FIRM—CONCEALMENT OF ASSETS—PRESUMPTION OF SHRINKAGE.**

Where statements of the financial condition of a bankrupt firm were false and a large part of the property and assets alleged to have been owned by the firm never in fact existed, the usual presumptions arising from a large shrinkage or disappearance of assets within a short period could not avail.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.\*]

**4. BANKRUPTCY (§ 407\*)—DISCHARGE—REFUSAL TO ANSWER QUESTIONS.**

Where a bankrupt on his examination refused to answer material questions, relying on privilege, such election was sufficient to bar his discharge, though he subsequently answered the questions on the hearing of specifications of objections to his discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**5. BANKRUPTCY (§ 408\*)—DISCHARGE—GROUNDS—FALSE OATH.**

Where bankrupts scheduled as a creditor the estate of the deceased husband of one of the members of the firm to enable such estate to share in the dividends, they were guilty of knowingly and fraudulently making a false oath which was sufficient to bar their discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Schwartz & Co. On a motion to confirm a referee's report recommending that the discharge be denied. Report confirmed, and discharge denied.

The following is the report of Referee Dexter:

I find and report the facts as follows:

On November 10, 1910, a petition in involuntary bankruptcy was filed by G. Reiss & Bro. and others against Augusta Schwartz and Emanuel M. Schwartz, individually and as members of the firm of A. Schwartz & Co., and Clarence S. Houghton, Esq., was appointed receiver. Adjudication was ordered on consent of the bankrupts on November 25, 1910. Schedules were filed January 3, 1911, and at a first meeting of creditors held January 30, 1911, Mr. Houghton was elected trustee.

Objections to the bankrupts' discharge were filed by Lewis Frank & Sons, creditors, containing 37 specifications charging various offenses.

It is unnecessary to consider them seriatim. Nine specifications were abandoned (Nos. 1, 14, 15, 18, 21, 22, 28, 29, 30). The remaining specifications group themselves in five classes:

(1) Obtaining money or property on credit from Lewis Frank & Sons and sundry others upon a false written statement (Nos. 2, 3, 4).

(2) Concealing assets in failing to account for the deficit between their assets and liabilities (Nos. 5 to 11, inclusive).

(3) Refusal to answer certain material questions approved by the court (No. 16).

(4) False oath in relation to the proceedings in bankruptcy (Nos. 17, 19, 20, 23, 31, 32, 38).

(5) Destruction of certain books of account (No. 24) and failure to keep proper books (Nos. 25, 26, 27).

The bankrupts were a mother and son engaged in the business of manufacturing shirts under the name of "Criterion Shirt Company, A. Schwartz & Co., proprietors." The mother was an old lady, and took no part in the management. She intrusted her interests entirely first to her husband, and, on his death, to another son, Samuel D. Schwartz, who died since these proceedings were begun. The mother and son lived together and paid their joint expenses by withdrawals from the business. Samuel, though not a partner in name, was practically so in fact. He signed checks, contracts, leases, and other papers in the name of the firm, frequently signing his brother's name, E. M. Schwartz, without any indication to show that he did so per procuration. He was the manager of the business, opened the mail, attended to the correspondence, checked credits, had charge of the manufacturing, and generally all "inside" business. He had an indeterminate share of the profits for his compensation. He was regarded by his mother as her special representative and silent partner (specifications, pp. 31, 32).

The schedules verified by Augusta and Emanuel Schwartz set forth assets of \$10,755 and liabilities of \$40,111. Emanuel Schwartz had no individual liabilities or assets. Augusta Schwartz had liabilities of \$826, and assets consisting of furniture claimed to be exempt for \$285.

#### 1. False Statements.

[1] Five statements purporting to show the financial condition of A. Schwartz & Co. were shown to have been issued in the name of the firm and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to have been signed in the firm name. The bankrupt Emanuel Schwartz denied that he had signed these statements or had authorized any one to do so. At his first examination under section 21a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]) before the commissioner he refused to answer any questions concerning statements or in whose handwriting they were on the ground that his answers might incriminate him. At that time his brother Samuel was living. Subsequently, after his brother's death, he testified that the statements were in his brother's handwriting, and were signed by his brother in the bankrupts' name, without authority and without their knowledge. I have no doubt from the testimony that Samuel Schwartz did sign and issue these statements, and that he did so within the scope of his authority as agent and manager for the firm. It is unnecessary to consider the effect of these statements given to Bradstreets or other creditors, as it is in evidence that the statement (Exhibit G) was delivered directly to Lewis Frank & Sons by Emanuel Schwartz for the purpose of obtaining credit, and that his firm obtained merchandise on credit from Frank to the amount of \$181.80 (page 106). This statement showed a net worth of over \$28,000, according to inventory of July 15, 1910. The bankrupt admitted it to be absolutely false (page 20), and it was materially false as a matter of fact. The merchandise was overvalued. The outstanding accounts had been hypothecated, and there was no inventory taken on July 15, 1910, as there had been a fire and the goods were destroyed or badly injured.

[2] The bankrupts should be held liable for the act of their agent, especially in view of the participation of the bankrupt Emanuel in the Frank transaction. *Bradner v. Strang*, 89 N. Y. 300, affirmed 114 U. S. 555, 5 Sup. Ct. 1038, 29 L. Ed. 248; *In re Reed* (D. C. Okl.) 26 Am. Bankr. Rep. 286, 191 Fed. 920; *In re Berry* (D. C. N. Y.) 15 Am. Bankr. Rep. 360, 362, 146 Fed. 625, 77 C. C. A. 161.

I do not think the rule announced in *Re Dresser* (D. C. N. Y.) 13 Am. Bankr. Rep. 616, 144 Fed. 318, affirmed 16 Am. Bankr. Rep. 561, 146 Fed. 383, 76 C. C. A. 655, and in *Hardie v. Swafford* (C. C. A. Fifth Cir.) 21 Am. Bankr. Rep. 457, 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785, is at variance with the foregoing conclusion.

In those cases an innocent partner was granted his discharge which was denied to the other partner who had made a false statement. Those cases were peculiar in their facts, and the equities were strongly in favor of the innocent partner. No such facts appear here, for Emanuel himself actively participated in the fraud and shared in the proceeds.

I find and report that specification No. 4 is sustained.

## 2. Concealment of Assets.

[3] There is no satisfactory evidence showing that the bankrupts have actually concealed assets. The usual presumptions arising from a large shrinkage or disappearance of assets within a short period cannot avail here, for the reason that the major premise of an actual net worth at a preceding date is wanting. It is shown that the statements of financial condition were false. Hence the assets, based on that presumption, have not disappeared, for they never in fact existed.

Various losses and expenses stated in the evidence might account for the shrinkage, but at all events the evidence is not sufficient to sustain the specifications, Nos. 5 to 11, inclusive.

## 3. Refusal to Answer.

[4] On the examination under section 21a the bankrupt refused to answer certain material facts as to the signature on the financial statements and the authority of Samuel Schwartz to sign the firm name on the ground that it would incriminate him. The questions were material and the bankrupt should have answered. Instead of answering, he asserted his privilege. He therefore made an election which will bar his discharge. *In re Dresser* (D. C. N. Y.) 13 Am. Bankr. Rep. 616, 636, 144 Fed. 318, affirmed 16 Am. Bankr. Rep. 561, 146 Fed. 383, 76 C. C. A. 655.

It is immaterial that subsequently he answered the questions upon the hear-



ing on specifications. In the meantime Samuel had died, and it was safer then for the bankrupt to place the blame on his deceased brother, who could not be called by the creditors to contradict him. *In re Weinreb* (C. C. A. Second Cir.) 18 Am. Bankr. Rep. 387, 153 Fed. 363, 82 C. C. A. 439.

I find and report that specification 16 is sustained.

#### 4. False Oaths.

[5] Various misstatements in the testimony of the bankrupts are made the basis of charges that they have knowingly and fraudulently made false oaths in this proceeding. The only specification under this head of sufficient definiteness to discuss is No. 17.

The estate of David Schwartz appears as a creditor in the schedules in the amount of \$4,300. The only basis for such a claim arises out of the payment of certain life insurance policies to the bankrupt Augusta Schwartz, the widow of David, in the year 1909. Some of this money appears to have been invested by the widow in the business. If so, it should be deemed to have been an investment by the widow in her partnership business, and postponed to the claims of other creditors. It could not, in any event, be owing to the estate of David Schwartz, for the moneys were paid direct to the widow, as such. There appears to have been a will, but it was not probated, and seems to have been destroyed by the widow.

I think that this claim was improperly scheduled with intent to enable Augusta Schwartz to share in any dividend, and that it was not a bona fide indebtedness of the firm. I find and report that specification No. 17 is sustained.

#### 5. Destruction of Books, etc.

There is no evidence tending to show that books and records were destroyed with fraudulent intent, or that the firm failed to keep the usual and proper books of accounts.

I find that these specifications Nos. 25, 26, and 27 are not sustained.

#### Conclusions.

For the reasons above assigned I recommend that the discharge of Augusta Schwartz and Emanuel Schwartz should be denied.

Harry L. Herzog, of New York City, for objecting creditor.

Reiss & Reiss, of New York City, for bankrupts.

HOUGH, District Judge. On the notice of motion filed herewith report confirmed; discharge denied on Mr. Dexter's opinion.

#### . In re LIPMAN.

(District Court, D. New Jersey. December 21, 1912.)

#### 1. BANKRUPTCY (§ 116\*)—BANKRUPT ACT—COLLECTION OF ASSETS—STATUTES—CONSTRUCTION.

Bankruptcy Act July 1, 1898, c. 541, § 23b, 30 Stat. 552 (U. S. Comp. St. 1901, p. 8431), limiting the jurisdiction of the bankruptcy court over controversies relating to the collection, etc., of bankrupts' estates referred to in section 2, cl. 7, relates only to suits brought by the trustee, and does not restrict the right of receivers or trustees to maintain or defend their possession of goods seized as those of the bankrupt in the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 116.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. BANKRUPTCY (§ 293\*)—COURTS—ANCILLARY JURISDICTION.**

Ancillary jurisdiction in bankruptcy is exercised to aid the court of primary jurisdiction to collect the estates of bankrupts and to distribute them among those entitled thereto.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.\*]

**3. BANKRUPTCY (§ 116\*)—BANKRUPTCY COURT—JURISDICTION—ANCILLARY PROCEEDINGS—TITLE TO PROPERTY SEIZED—DETERMINATION.**

Where property alleged to have been conveyed by a bankrupt in fraud of creditors was yielded by the buyer to an ancillary receiver, whether willingly or unwillingly, it thereby came into the possession of the court exercising ancillary jurisdiction in bankruptcy, which acquired jurisdiction to determine the rights of the buyer and grant complete relief.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 116.\*]

**4. COURTS (§ 37\*)—JURISDICTION—DENIAL—ESTOPPEL.**

Where an ancillary receiver of a bankrupt obtained possession of goods alleged to have been fraudulently transferred by the bankrupt, the buyer, by petitioning the court for a discovery from the receiver of his right to take the goods, and for the return thereof to her, estopped herself to challenge the court's jurisdiction over her person, even though such jurisdiction depended on her consent or acquiescence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147-151; Dec. Dig. § 37.\*]

**5. BANKRUPTCY (§ 184\*)—"SALES IN BULK"—STATUTES.**

The bankrupt's main business was wholesaling merchandise in Philadelphia, but he also carried on a single retail business in a town in New Jersey. Such stock embraced all the property that the bankrupt had in New Jersey and all that he had in the retail business anywhere. Within four months prior to bankruptcy he sold the entire stock in bulk to his sister, without making any attempt to comply with 2 N. J. Comp. St. 1910, p. 2622, regulating sales in bulk. *Held*, that such transfer was a "bulk sale" within the act, though not a transfer of the bankrupt's main business, and, though not ipso facto void, was voidable at the instance of creditors injured or affected thereby.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.\*]

**6. BANKRUPTCY (§ 178\*)—TRANSFERS—FRAUD—SALE IN BULK.**

Facts attending a sale of a retail business owned by a bankrupt to his sister within four months prior to bankruptcy, without any attempt to comply with 2 N. J. Comp. St. 1910, p. 2622, regulating sales in bulk, *held* to sustain a finding that it was fraudulent as to creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 264-274, 283, 284; Dec. Dig. § 178.\*]

In Bankruptcy. In the matter of bankruptcy proceedings against Abe Lipman. On petition of Annie Solotist for an order requiring an ancillary receiver to surrender certain goods, wares, and merchandise purchased by her from the bankrupt, or that she be permitted to commence an action against such receiver to replevin the same. The petition having been referred to a master who reported in favor of dismissal thereof, petitioner brings exceptions. Overruled.

John H. Backes, of Trenton, N. J., for exceptant.

Bertram D. Rearick, of Philadelphia, Pa., opposed.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RELLSTAB, District Judge. On November 2, 1911, a petition in bankruptcy was filed against Abe Lipman, in the United States District Court for the Eastern District of Pennsylvania. On November 8th that court appointed Herman O. Hark receiver of said estate; and on December 11th, this court, on the petition of such receiver, appointed John G. Hughes "ancillary receiver to take charge of the assets of the above-named alleged bankrupt within the jurisdiction of this court and to preserve and dispose of the same as this court may hereafter order."

In his petition seeking such appointment, the receiver alleged, *inter alia*, that Lipman, a few days prior to the filing of the petition in bankruptcy, being the owner of a certain store at Pleasantville in this district, where he was conducting business in the name of the United Cut Price Dry Goods Stores Company, transferred the same to his sister, Mrs. A. Solotist, but that he still continued to exercise control over it; that he (the receiver) expected to prove that such transfer was intended to defraud the creditors of the bankrupt; that the contents of such store, consisting of fixtures, dry goods, and notions of the probable value of \$4,000, were about to be sold by said bankrupt; and that it was absolutely necessary for the preservation of such assets for the benefit of such creditors that an ancillary receiver be appointed.

On December 15th, said Annie Solotist presented a petition to this court, alleging, *inter alia*, that she was a resident of New Jersey and the owner of said store and the stock of merchandise, having purchased them from the bankrupt on October 20, 1911, for the sum of \$4,000; that the said ancillary receiver had taken it out of her possession without authority in law, but under the color of his office; that such conduct was illegal, and prevented her from carrying on her lawful occupation; that she purchased said merchandise in good faith for her own use, without being aware that said bankrupt was in financial difficulty, and in no wise to defraud his creditors; that said bankrupt in no wise exercised ownership or control of said merchandise or business; and that she controlled and managed the same for her own use. Her prayers are:

"That the said John G. Hughes, ancillary receiver, may discover by what right he has taken into his possession goods, wares, and merchandise of your petitioner, and of the premises wherein the same are contained; that the said ancillary receiver may be ordered to surrender the same to your petitioner; or that your petitioner have leave to commence her action against the said ancillary receiver to replevin the same."

In the answer to Mrs. Solotist's petition, filed December 18, 1911, the ancillary receiver, in addition to putting in issue many of the allegations of the petition, in substance, alleged that on the date he took possession (December 12th) he found such petitioner and the bankrupt in possession; that, upon notifying them of his appointment as ancillary receiver and his demand for possession, they withdrew from the said store and surrendered possession thereof to him.

Upon a reference of the issues raised by such petition and answer, and the taking of considerable testimony, the special master found that such transfer was made with intent to defraud creditors, and that the petitioner was not a purchaser in good faith for a present

fair consideration, and recommended that the petition be dismissed. To this report Annie Solotist, the petitioner, has filed a number of exceptions, which may be summarized under two heads: First, want of jurisdiction of the court of bankruptcy to try the title of the property; and, second, that the transfer of such property was bona fide, and vested a good title in such exceptant.

As to lack of jurisdiction: The exceptant insists that she is an adverse claimant in possession and not subject to the summary jurisdiction of the bankruptcy court. By the Bankruptcy Act, § 2 (as amended by Act June 25, 1910, c. 412, §§ 1, 2, 36 Stat. 838, 839 [U. S. Comp. St. Supp. 1911, p. 1491]), the bankruptcy courts are empowered to (clause 3) appoint receivers to take charge of the property of bankrupts whenever absolutely necessary for its preservation; (clause 6) bring in additional persons in the bankruptcy proceedings when necessary for the complete determination of a matter in controversy; (clause 7) cause such estates to be collected and determine controversies in relation thereto, except as by the act otherwise provided; (clause 15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; and (clause 20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.

[1] Section 23b of the act invoked to sustain exceptant's contention, and which limits to some extent the jurisdiction of the bankruptcy court over controversies relating to the collection, etc., of estates of bankrupts referred to in section 2, cl. 7, of the act, *relates only to suits brought by the trustees*, and has no restrictive effect on the right of receivers (or trustees for that matter) to maintain or defend their possession of goods seized as those of the bankrupt. *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; *Murphy v. John Hofman Co.*, 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327.

[2] Ancillary jurisdiction is exercised for the purpose of aiding the court of primary jurisdiction to collect the estates of bankrupts and distribute them among those entitled thereto. The following of property transferred within four months of the institution of bankruptcy proceedings in such circumstances as suggest the probability of an effort to defraud creditors, and the taking charge of it though in the possession of third parties claiming title thereto, when it may be done peaceably, or failing that, to insure by proper restraining order, its production when wanted, is necessary if the beneficent purposes of the bankruptcy act are to be achieved.

[3] When such property is obtained, whether willingly or reluctantly yielded, it is in the possession of the court exercising such ancillary jurisdiction, and that court, by its very possession, draws to itself the power to determine the interests therein of all parties making claim thereto, and it becomes its duty to so determine and grant



complete relief, that further litigation in regard thereto may be avoided. *Fidelity Trust Co. v. Gaskell* (C. C. A.) 195 Fed. 865; *In re Rochford*, 124 Fed. 182, 59 C. C. A. 388; *In re Leeds Woolen Mills* (D. C.) 129 Fed. 922; *In re Moody* (D. C.) 131 Fed. 525.

[4] Whether the goods were in the possession of the bankrupt or the petitioner at the time they were taken by the ancillary receiver, and whether they were voluntarily surrendered, or were forcibly taken by the receiver (not raised by her petition), are disputed questions of fact that need not be decided. The court having undoubted jurisdiction of the subject-matter of the controversy, it follows that by petitioning this court for a discovery from the receiver of his right to take such goods, and for the return thereof to her, the petitioner is estopped from challenging the court's jurisdiction over her person, even if its jurisdiction in that respect depended upon her consent or acquiescence.

As to the bona fides of such transaction: This involves the application of the test contained in section 67e of the Bankruptcy Act and the state laws adopted by it. This section nullifies all conveyances of any part of the bankrupt's property made within four months of the filing of the petition in bankruptcy with the intent to hinder, delay, or defraud any of his creditors "except as to purchasers in good faith and for a present fair consideration." It also nullifies all conveyances made by him within the same period while insolvent, which under the state laws are null and void, as against his creditors.

[5] The act of New Jersey entitled "An act to prohibit sales of merchandise in bulk in fraud of creditors" (P. L. 1907, p. 570; 2 Comp. St. N. J. p. 2622), thus brought into operation by such section, declares:

"Sec. 1. The sale in bulk of the whole or a large part of the stock of merchandise and fixtures, or merchandise or fixtures, otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller, unless the purchaser shall, in good faith and for the purpose of giving the notice herein required, make inquiry of the seller and receive from him a list in writing of the names and places of residence or business of and indebtedness to each and all of such creditors, and unless the purchaser shall, at least five days before the consummation of the sale, give personal notice of said proposed sale to each of the creditors of the seller as appearing on said list, or use reasonable diligence to cause personal notice to be given to them, or shall deposit in the mail a registered letter of notice; postage prepaid, addressed to each of the seller's said creditors at his post office address, according to the written information furnished; provided, however, that no proceedings at law or equity shall be brought against the purchaser to invalidate any such voidable sale after the expiration of ninety days from the consummation thereof."

The petitioner admits that she did not make the inquiries or give the notices to the creditors of the seller, required by the New Jersey act. It is contended, however, on the part of the petitioner, that as the bankrupt's main business, which he carried on in Philadelphia, was wholesale, while that carried on by him at Pleasantville was retail, and as such sale embraced only his retail business, such transfer was not a "bulk sale" within the meaning of such act; that "the statute condemns bulk sales only when the bulk sale involves the business en-

terprise or plant of the vendor, and does not relate to instances where only a part of one's business is sold in bulk." The statute, however, in terms, provides otherwise. It comprehends sales of "a large part of the stock \* \* \* otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business."

The stock of merchandise in the Pleasantville store embraced all that the bankrupt had in this state, and all that he had in the retail business anywhere. The entire stock in such store was sold in bulk, and the sale was obviously not in the ordinary course of the bankrupt's trade or business. This sale, while not ipso facto void, was voidable at the instance of the creditors injured or affected thereby. *Dickinson v. Harbison*, 78 N. J. Law, 97, 72 Atl. 941.

[6] The circumstances attending the transfer of this store show a purpose on the part of both the bankrupt and his sister, the petitioner, to defraud his creditors. The finding of the master that this transfer of the store by the bankrupt to his sister, Mrs. Solotist, was but a pretense and with intent and purpose on the part of the bankrupt to hinder, delay and defraud his creditors, and that Mrs. Solotist was not a purchaser in good faith and for a present fair consideration, is fully justified by the evidence in this case. The execution of the bill of sale and the notes representing a part of the consideration, and of the mortgage to secure such notes, the obtaining and depositing of the moneys to pay such consideration, the giving of the check to meet the cash payment required in such sale, the subsequent purchase of such notes from a third party to whom the bankrupt had transferred them, and the giving and cashing of checks therefor, relied upon as indications of a bona fide sale, are, in the light shed thereon by unimpeached and credible testimony, but the means selected by these fraud doers to carry out their fraudulent scheme.

The transfer of the merchandise in the Pleasantville store was contrived and consummated in fraud of the bankrupt's creditors, and is within the inhibition of section 67e of the bankruptcy act, and is void as against such creditors.

The exceptions to the master's findings are overruled, and the petition is dismissed, with costs to be taxed.

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**J. S. WINSLOW & CO. v. SUSQUEHANNA COAL CO. et al.**

(District Court, D. Maine. December 10, 1912.)

No. 199.

**COLLISION (§ 71\*)—VESSEL DRAGGING ANCHOR—COLLISION WITH ANCHORED VESSEL.**

The large coal barge *Occidental*, light, anchored in Boston Harbor during a high wind at night, dragged her anchors, and after some hours drifted against the barge *Shamokin*, anchored a quarter of a mile to leeward, causing her to also drag her anchor, and the two drifted until they came into collision with a schooner a quarter of a mile further on.

*Held*, on the evidence, that the *Occidental* was in fault for failing to keep

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexed

a proper anchor watch, it appearing that, if her anchor chains had been paid out to a proper length when she commenced dragging, they would have held her, and that she then had sufficient room to swing. *Held*, further, that under the circumstances the Shamokin did not anchor so near the Occidental as to give her a foul berth, and that neither the Shamokin nor the schooner was in fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.\*]

In Admiralty. Suit for collision by J. S. Winslow & Co., owners of the schooner Jane Palmer, against the Susquehanna Coal Company, owner of the barge Shamokin, and the Seaboard Transportation Company, owner of the barge Occidental. Decree against the Seaboard Transportation Company.

Benjamin Thompson, of Portland, Me., for libellant.

Burlingham, Montgomery & Beecher, of New York, N. Y., for Susquehanna Coal Co.

Blodgett, Jones & Burnham, of Boston, Mass., for Seaboard Transp. Co.

HALE, District Judge. This libel is brought by the owners of the schooner Jane Palmer to recover damages sustained by that schooner by reason of a collision with the barge Occidental, owned by the Seaboard Transportation Company, and the barge Shamokin, owned by the Susquehanna Coal Company. The Jane Palmer is a five-masted schooner, 325 feet long, 49 feet beam, having a depth of hold of 22 feet. She is of the burden of 3,138 gross tons. At the time of the collision she had on board a cargo of 4,600 tons of coal, and was drawing 29 feet. She arrived in Boston Harbor about 4 o'clock on the afternoon of Tuesday, January 2, 1912, and came to anchor inside of Deer Island Light. She anchored upon the regular anchorage ground where there was abundant sea room all about her. She anchored with her port anchor. This anchor weighed about 4½ tons, and carried from 110 to 120 fathoms of chain. At the time of anchoring there were about 45 fathoms of chain paid out. An hour later 15 fathoms more were paid out. As she lay at anchorage, she had 8 or 9 feet of freeboard amidships. She remained at her anchorage until after the collision.

The Occidental is a barge of 1,424 tons burden, 210 feet in length, 39.9 feet beam. Her draft when loaded is 24.6 feet. When light, as she was at the time in question, her draft was 11.6 feet, and she then had about 24 feet of freeboard amidships, and 26.5 feet at the bow. Having discharged a cargo of coal in Boston on January 4, 1912, she was towed from Mystic wharf by one of the T wharf steam tugs, and then taken in tow by the steam collier William Chisholm, and towed out as far as the Lightship. By reason of the unfavorable weather she was towed back and anchored, about half past 10 in the forenoon, about midway between Deer Island and Governors Island; the place of anchorage being selected by the master of the Chisholm. The barge dropped her starboard anchor. About 35 fathoms of chain were given her. She had in all 120 fathoms on each cable. At the time the Oc-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cidental came to anchor, the steamer Charles F. Mayer and two barges were anchored about a mile to the eastward. The schooner Jane Palmer was anchored off the Occidental's starboard quarter, at least a half mile to the southeast. There were no vessels lying between the Occidental and the Palmer.

The Shamokin is a barge of 829 tons burden, employed in the coast-wise business, carrying coal. She is 193 feet long, 32.2 feet beam, 13.7 feet depth of hold. She arrived in Boston Harbor about half past 10 o'clock in the evening of January 4, 1912, in tow of the steam tug Paoli. She then had on board 4,700 empty barrels, and was drawing 5.5 feet, with 9 or 10 feet freeboard. She came to anchor nearly on a line between Governors Island and Deer Island Lighthouse, about half way between the schooner Jane Palmer and the Occidental. Her starboard anchor was dropped, and about 45 fathoms of chain were paid out. When she dropped back on her chain, her captain thought she was about a quarter of a mile from the Jane Palmer, and about the same distance from the Occidental. The starboard anchor weighed 5,100 pounds, and the port anchor 1,650 pounds. The barge had 90 fathoms on her starboard chain, and 65 fathoms on her port chain.

On the following day, Friday, January 5th, owing to weather conditions, none of the vessels left their anchorage. During the latter part of the day the wind, which had been strong from the northwest, increased. During Friday night the Occidental dragged down, so that her stern came in contact with the Shamokin's stem. After she cleared the Shamokin's stem, she lay across the Shamokin's bow for a short time. While the two barges were in that position, both of them started to drag. Very soon the Occidental dropped down along the starboard side of the Shamokin. The two barges were made fast together. They then dragged down towards the Palmer, until between 6 and 7 o'clock in the morning of Saturday, January 6th, when they were about 200 to 300 feet from the Palmer. As the tide began to flood, the Palmer swung to the northward and westward, so that her port side came in contact with the starboard side of the Shamokin. The barges were then lashed to the schooner with their anchors and chains still out to windward. The vessels remained in this position until about 11 o'clock of the same forenoon, when the Palmer began to swing with the ebb tide. The lines between the schooner and barges parted; and, as the barges swung clear, the Shamokin's port quarter and stern did further damage to the schooner.

It is clear, then, that, the barge Occidental having driven upon a vessel at anchor, a prima facie case is made out against her. It is for her to show affirmatively that the drifting was due to some cause other than her own fault. *The Lincoln*, Fed. Cas. No. 8354; *The Louisiana*, 3 Wall. 164, 18 L. Ed. 85.

The Occidental contends in argument that the disaster was caused by vis major. This contention is not, however, set up in its answer, nor supported by its proofs. A fresh gale was blowing; but the whole testimony fails to sustain the contention of the Occidental that her dragging was caused by inevitable accident. The whole weight of evidence is to the effect that there was nothing, so far as the wind and sea were



concerned, that would cause vessels to drag, provided they had suitable ground tackle, and were properly looked after. There is some testimony that on the night in question a fishing schooner dragged; but none of the large vessels, anchored in this locality, dragged. The *Jane Palmer* rode securely at a single anchor.

The *Occidental* contends that the injury was occasioned by the *Shamokin* coming to anchor in a dangerous proximity to her, thereby giving her a foul berth. It is urged that the *Occidental* did not have room enough to maneuver in, or to pay out chain sufficient to prevent dragging; that her dragging did not cause the injury; that she had plenty more scope of chain which she could have paid out, but was so close to the *Shamokin* that it was impossible to pay out more chain without danger of collision; that, before the collision, she dragged probably not more than her length; that such dragging was almost imperceptible; that, when her captain let go her second anchor at six o'clock in the evening, he paid out chain as the wind increased, and as he found it necessary, to overcome the tendency to drag; but that this paying out of the chain brought him nearer and nearer to the *Shamokin*; that it was the part of prudence, under the circumstances, for him to pay out only so much chain as was from time to time demanded; that with the *Shamokin* so near he had to exercise great care in paying out his chain. It is urged that the *Shamokin* had at the time the two barges came together five fathoms of chain left which she had not paid out; and that, if she had paid out this remaining chain, the *Occidental* could have paid out five fathoms more of her chain, and that this would have been sufficient to prevent the two barges from coming together. With reference to the seamanship of the *Occidental*, it appears from testimony in her behalf that on the night of the injury the captain anticipated giving his vessel a second anchor. After 6 o'clock in the evening it breezed up, and continued to breeze up until the two barges came together. At 6:15 he dropped his port anchor, and paid out 15 fathoms of chain, and slacked out 15 fathoms more on the starboard chain. At 10 o'clock in the evening he gave her 15 fathoms more on each chain; and, as the wind increased after midnight, he gave her 15 fathoms more on each chain. At the time he fouled the *Shamokin* he had 45 fathoms on the port anchor, and about 80 fathoms on the starboard. He says that he was not on deck all the time during the night, but was "in and out." Up to 12 o'clock a deck hand, Smato, was the only man acting as anchor watch; and he was in and out of the pilot house. At midnight he was relieved by Chius. The testimony of Chius is not such as to satisfy the court that he was of much value in that position. Although an old man, Capt. Smith was apparently the only man on board, other than the steward, with experience sufficient to be of value as an anchor watch; and he was on deck only a portion of the time during the latter part of the night when his vessel dragged. The *Occidental* was high out of water; and with the gale increasing it was imperative that great care should be exercised in keeping a proper anchor watch, to look out for her; for the danger was apparent that, if she dragged, she would come near the *Shamokin*, and this danger was all the greater if she was so near

the other barge as the testimony in her behalf places her. The evidence shows that her ground tackle was sufficient, if she had been properly watched, and if sufficient scope of chain had been paid out at the proper time. It seems clear that a competent anchor watch would have promptly discovered that the barge was dragging, and would have thus enabled those in charge to give sufficient scope to her chains to check her dragging before she reached the Shamokin. The failure to have a competent watch was the chief cause of her dragging down upon the Shamokin. By such dragging down she fouled the Shamokin, and broke out her anchors. Her port chain fouled the Shamokin's port anchor in such a way as to lessen the holding power of the ground tackle. I cannot sustain the contention that the injury was caused by reason of the Shamokin having anchored too near the Occidental. The distance between the two barges must have been about a quarter of a mile. The Occidental, then, could have paid out the whole of her 120 fathoms of chain, and yet kept clear of the Shamokin, even though the Shamokin did not pay out any chain. And the proofs lead me to believe that the Shamokin was also paying out chain; so that the Occidental must have dragged more than 720 feet. In order to do this, she must have been dragging, without anybody on the barge having knowledge of it. If there had been a proper anchor watch, who seasonably observed that she did not have sufficient scope of chain, she could have readily paid out at least 25 fathoms more chain without endangering the barge, or getting into close quarters with the Shamokin. After the two barges were lashed together, their further dragging could have been prevented by giving more scope to the chains of the Occidental. This was a reasonable precaution to adopt. And, as the barges were then a quarter of a mile from the schooner, there was time for her to adopt this precaution. I am of the opinion that the Occidental has not met the burden of showing that the collision between the two barges is accounted for by the fact that the Shamokin anchored so near the Occidental that, in paying out chain, the Occidental was set down upon the Shamokin. After the Occidental fouled the other barge, those in charge of the Occidental were in fault still further, in that they did not promptly pay out sufficient chain to prevent the barges dragging into the locality where the flood tide would necessarily set the Palmer.

The Occidental charges the Shamokin with the initial negligence in the case, in that she anchored so close to the Occidental as to give her a foul berth, and prevented her from paying out sufficient chain to hold her. In considering the alleged fault of the Shamokin, I may find it convenient to restate some of the proofs to which I have adverted in passing upon the fault of the Occidental. When the Shamokin anchored on Thursday night, January 4th, she found the Occidental and the schooner already at anchor. The testimony leads me to believe that they were lying rather more than a half a mile apart, that the Shamokin anchored at a point half way between the barge and the schooner, so that she was not far from a quarter of a mile distant from each vessel. In *The Lincoln*, Fed. Cas. No. 8,354, Judge John Lowell referred to the case of *The Volcano*, 2 W. Rob. Adm.

337, in which Dr. Lushington, with the advice of the Trinity Masters, pronounced a steamer to be negligently moored when she had taken her berth at two cable lengths, or 240 fathoms to the windward of the injured vessel. He refers to another case in which the Trinity Masters pronounced it bad seamanship to anchor so near another vessel, directly ahead or directly astern, that in case of striking adrift there would not be room to bring up and sheer the drifting ship, without danger of collision. Judge Lowell also cites *The Julia M. Hallock*, Ped. Cas. No. 7,579, in which Judge Sprague held that 125 fathoms to leeward was ample distance under the circumstances, and upon the nautical testimony of the case. Each case must be decided upon its own circumstances, and upon the nautical conditions prevailing. Under the conditions in this case, I cannot hold that the *Shamokin* anchored so near the other barge as to give her a foul berth. Upon an examination of the proofs, if we assume that the *Occidental* paid out all the chain which she claims to have paid out, it is clear that there still must have been some distance left between the two barges, and that it was the dragging of the *Occidental's* anchors which brought the two barges together. It is undisputed testimony that the *Shamokin* was paying out her chain while the other barge was drifting down upon her. Until at the time of their coming together, there were only 5 fathoms left on her starboard anchor, which carried 90 fathoms. I am satisfied that the *Shamokin* had dropped back nearly as far on her chains as the *Occidental* had dropped back on her chains. I have tried to give full weight to all the proofs in the case upon this point, and I do not find that there was any maneuver which the *Shamokin* could have made which would have prevented the two barges coming together. The testimony on her part is that her captain and steward were on deck, and that they did all that could be done. I find nothing in any of the proofs, or in the circumstances of the case, to controvert this contention of the *Shamokin*. The fact that, after the two barges came together, they both dragged, does not impute fault to the *Shamokin*. It is not strange that the anchors of the *Shamokin* were unable to hold her with the *Occidental* lying across her stern. I find that the *Shamokin* is not chargeable with any fault which contributed to the collision with the schooner.

On the part of the *Occidental*, it is also urged that the schooner *Jane Palmer* was herself at fault, and that by proper seamanship she might have avoided the injury. It is urged that she could have been moved by the use of her head sails out of the way of the barges, and thus could have escaped injury, in view of the fact that she had abundance of time to maneuver, while the two barges were gradually coming down upon her in almost a straight course from 2 o'clock to 7 o'clock on Saturday morning. The *Occidental* offered some testimony tending to show that it was practicable for those in charge of the *Palmer* to heave in on her port chain a sufficient amount to break her anchor out and enable her to drag down far enough to carry her completely out of the path of the barges, and that then, by paying out her chain, they could have readily picked her up again, and that this was a feasible and practicable maneuver, that it could have read-

ily been accomplished, even with her one anchor out, but that it is also true that she had a second anchor which could have been used, if it had been necessary, in order to hold her after she had dragged out of the way of the barges. On the part of the schooner, the mate testifies that, "if he had hove the schooner ahead her length or more, it would not have cleared the barges." He says, too, that it would have been pretty dangerous "to heave ahead the length of the vessel and drop another anchor while it was blowing a living gale." It requires very little testimony to convince me that to shorten up her chain in a gale of wind, under the circumstances in which the Jane Palmer was placed, would have been a maneuver involving great danger. I do not think it necessary to discuss in detail all the expedients which the Occidental now advances as proper maneuvers for the Jane Palmer to adopt while the barges were drifting down upon her in order to escape the threatening danger. No one of the theories now offered in behalf of the Occidental was suggested by her master, or by the master of the Shamokin, at the time of the injury. I do not see how any maneuver which would have stood the test of practical seamanship could have safely been made by the schooner. The testimony leads me to believe that she was competently manned, that she maintained a diligent watch throughout the night in question, and that everything was done by her which could reasonably have been done to avoid injury. I am of the opinion that the schooner was free from fault.

Let a decree be entered for the libelant against the Seaboard Transportation Company, with costs. Fritz H. Jordan may be appointed assessor. The libel against the Susquehanna Coal Company is dismissed, with costs,

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**In re BERKMAN et al.**

(District Court, D. Massachusetts. April 11, 1901.)

No. 3,266.

**BANKRUPTCY (§ 302\*)—PROCEEDING BY TRUSTEE—PETITION—CERTAINTY.**

A court of bankruptcy, in the exercise of its equitable powers, will not compel a respondent to answer a petition or bill which did not state a cause of action with reasonable certainty, but the petitioner will be given leave to amend within a specified time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 456, 457; Dec. Dig. § 302.\*]

**In Bankruptcy.** In the matter of bankruptcy proceedings of Jacob Berkman and others. On petition of Samuel O. Reinstein, trustee, to recover certain alleged withheld property. Petition held fatally defective for uncertainty.

A. K. Cohen, of Boston, Mass., for bankrupt.

Samuel O. Reinstein, of Boston, Mass., pro se.

J. J. Silverman, of Boston, Mass., for creditor.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



LOWELL, District Judge. In this case the jurisdiction of the court is consented to. To the trustee's petition, a paper in the form of a demurrer has been filed. As was said in *Re Mullen* (D. C.) 101 Fed. 413, it is doubted if a demurrer be applicable to a summary petition in bankruptcy like this. By special leave of the court, however, the case has been heard on the question of law at this time, before the referee has had an opportunity to hear the facts and pass upon them.

The trustee's amended petition in this case may be taken to allege, though not very clearly, that the bankrupt had some interest in real estate before his adjudication, and that, with fraudulent intent, he failed to enter this interest upon his schedule; that one Lynch, who was in some undescribed way his trustee, at his request, gave a lease of this real estate to one Ginsberg at a rent less by \$600 than its fair letting value; that in consequence of this reduction Ginsberg entered into a contract with the bankrupt, by which he agreed to pay the bankrupt for services to be rendered by the latter. These services, the trustee alleges, were of little or no value; the real consideration of the payment which Ginsberg agreed to make having been the reduction in rent aforesaid. Thereafter Ginsberg broke his contract, and, as the result of arbitration, agreed to pay \$1,100 to Berkman as damages for the breach, which sum the trustee seeks to recover by his petition.

If the sum to be paid by Ginsberg to Berkman, nominally for Berkman's services, but really for rent of Berkman's premises, had been paid to Berkman, he might, by bill in equity, be compelled to turn over the money so received to the trustee in bankruptcy; but the allegations in the petition are so vague, and so much irrelevant matter is therein contained, that I am not able, after a careful reading, to ascertain its fair meaning. Equity will not compel a defendant to answer a bill, nor will a court of bankruptcy in the exercise of its equitable power compel a respondent to answer a petition in bankruptcy, where bill or petition fails to state the cause of action with reasonable certainty.

The petitioner has leave to amend his petition at any time within one week from this date. If the petition is not by that time amended so as to state a cause of action, it will thereupon be dismissed.

## G. RICORDI &amp; CO. v. MASON et al.

(Circuit Court, S. D. New York. December 4, 1911.)

## COPYRIGHTS (§ 60\*)—INFRINGEMENT.

A booklet entitled "Opera Stories," by which the author sought to give a mere fragmentary and superficial idea of the plot and characters of various operas, each scene being covered by a single paragraph and taken from descriptions other than the operas themselves, was not an infringement of the copyrights on the librettos.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 56; Dec. Dig. § 60.\*]

In Equity. Bill by G. Ricordi & Co. against Henry L. Mason and others. On motion for preliminary injunction. Denied.

See, also, 201 Fed. 184.

Nathan Burkan, of New York City, for complainant.

Edwards, Sager & Wooster, of New York City, and Browne & Woodworth, of Boston, Mass. (Alexander P. Browne, of Boston, Mass., of counsel), for defendant Mason.

COXE, Circuit Judge. The complainant, as the owner of copyrights in the operas "Germania" and "Iris," seeks to restrain the defendants from publishing a book called "Opera Stories" which, it asserts, is an infringement of its copyrights.

"Germania" covers 46 printed pages and is divided into three acts. The "story" of this opera as printed by the defendants covers a little more than half a page, each act being described in a paragraph containing about 100 words. The entire situation will be made plain by reproducing the defendants' statement of the first act:

## "Act I—Prologue.

"Scene, a mill near Nuremburg. Students, disguised as millers, are plotting and writing pamphlets. The police arrive; but their coming has been heard of so that when they enter wheels are turning and all are busy. Still they make some arrests, among others, Carlo Worms. Frederico Loewe, his intimate friend, is gone to the wars and has entrusted to him the care of his affianced Rieke. Worms, forgetful of duty and friendship, falls passionately in love with Rieke who succumbs to his overtures. She upbraids him, however, and Frederico shortly returns."

"Iris" need not be discussed, as the legal questions presented are identical in each opera.

It will be observed that the quotation above given is neither an opera, nor, strictly speaking, the story of an opera. The reader gets a vague, fragmentary and superficial idea of the plot and of the characters. One reading it might acquire sufficient information to enable him to decide whether or not he wishes to attend the opera. If he were attracted by so commonplace a plot as that disclosed in the first act he would probably attend, otherwise he would remain at home. I am unable to perceive how such an indeterminate statement infringes the copyright of the opera. It does not use the author's language, it does not appropriate his ideas and it does not reproduce his characters. Indeed, it appears from the defendants' affidavits that the author of the "story" did not prepare it from the copyrighted opera

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

but from a description thereof found in a newspaper. It gives just enough information to put the reader upon inquiry, precisely as the syllabus of a law report, the review of a book or the description of a painting induces the reader to examine further.

It is generally supposed that the proprietors of operas are interested in having them made popular by widespread advertising; but if the doctrine contended for by the complainant is followed to its logical conclusion, the newspaper reporter and the literary and musical critic cannot make their observations public without subjecting the publishers of newspapers and periodicals to suits for infringement. If such "stories" as are involved in this action are prohibited, it will be exceedingly difficult to draw the line of demarcation between legitimate and illegitimate criticism. It is easy to imagine instances where the complainant's contention will make unlawful the published statement of the plot of a drama, the theme of a novel or the review of a history.

It might even lead to the ludicrous result of condemning as an infringer the writer who publishes a laudatory notice of a picture or a poem. The historian who describes the charge of the cuirassiers at Friedland will hardly expect to be sued by the owner of the copyright covering Meissonier's great painting—"1807." The editor who reports the departure of "the captains and the kings" and the dispersion of the navy after a Jubilee celebration will probably be astonished if accused of infringing "The Recessional."

It is said that the same rule should be applied to a copyright as to a patent for a machine. If this proposition be granted, it does not aid the complainant.

No one, for instance, infringes a claim for a machine unless he uses a similar machine operating in substantially the same manner and producing a like result by the same or equivalent means. A model of a machine incapable of producing any practical result does not infringe any more than the brief synopsis of an opera infringes the author's copyright. In the one case the property protected is the right to make, use and vend the machine, in the other it is the right to publish, reproduce in other forms and sell the opera. Neither the model of the machine nor the synopsis of the opera interferes with any of these rights.

If this case involved an *abridgment* as that word is ordinarily understood, I should be inclined to take a different view of this motion. The defendants' "story," however, is not such an abridgment. The abridgments which have been condemned by the courts involve colorable shortening of the original text, where immaterial incidents are omitted and voluminous dissertations are cut down, but where the characters, the plot, the language and the ideas of the author are pirated.

In the case at bar none of these wrongs has been committed. On the contrary, the advertising which the opera has received by thus calling the attention of the public to it cannot fail to have a beneficial effect upon the "market" of the owner of the copyright.

I have been unable to find an authority which goes to the extent

contended for by the complainant. The most favorable view for the complainant is that the question is involved in doubt and in such a case a preliminary injunction should not issue.

The motion is denied.

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G. RICORDI & CO. v. MASON.

(District Court, S. D. New York. October 31, 1912.)

**COPYRIGHTS (§ 60\*)—INFRINGEMENT—OPERAS—"MAKE ANY OTHER VERSION THEREOF."**

Copyright Act March 4, 1909, c. 320, § 1, 35 Stat. 1075 (U. S. Comp. St. Supp. 1911, p. 1472), gives to the owner of a copyright the exclusive right to translate the copyrighted work into other languages or dialects, or to make any other version thereof, if it be a literary work, etc. *Held*, that the words "make any other version thereof" were not to be strictly construed, so as to include mere abridgments or versions of copyrighted plays and operas, and hence a booklet, giving a mere fragmentary description of the various scenes of operas, and entitled "Opera Stories," not taken from the librettos, was not an infringement of the copyrights on the librettos.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 56; Dec. Dig. § 60.\*]

In Equity. Suit by G. Ricordi & Co. against Henry L. Mason. Bill dismissed.

Nathan Burkan, of New York City, for complainant.

George F. Lewis, of New York City (Alexander P. Brown, of counsel), for defendant.

HAZEL, District Judge. This is an action to enjoin the defendant from publishing and selling nondramatic versions of the copyrighted operas "Germania" and "Iris," owned by the complainant, and to recover damages and obtain an accounting of the profits realized by the defendant from the sale of said versions in a publication entitled "Opera Stories." There is no dispute of fact, and the question involved is solely one of statutory construction.

A motion heretofore made by complainant for a preliminary injunction was denied by Judge Coxe, who assigned his reasons therefor in an interesting opinion, which is published in 201 Fed. 182, which counsel have submitted to me. My own views, as intimated on the trial, that the versions of the operas contained in the defendant's publication are not an infringement of complainant's copyrighted librettos or their English translations, are clearly confirmed by Judge Coxe's decision. Although section 1 of the Copyright Act, which went into effect July 1, 1909 (Act March 4, 1909, c. 320, 35 Stat. 1075 [U. S. Comp. St. Supp. 1911, p. 1472]), in broad terms gives complainant the exclusive right "to translate the copyrighted work into other languages or dialects, or make any other version thereof," etc., still the summing up of a libretto by merely outlining the plot or theme, detailing the incidents in such a way as to give in the fewest words pos-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



sible the so-called story, as was done by the defendant with the operas "Germania" and "Iris," does not constitute the making of such a version thereof as was in the contemplation of Congress when the copyright statute was enacted.

A literal definition of the words "make any other version thereof" would not only include the defendant's publication, but also the newspaper publication, after performance, of any reviews or criticisms, even when written by reporters invited by the owner of the play to witness the production. The publication of abridgments or versions of the play or opera being permitted to the newspapers, it makes no difference that another, without dialogue or stage directions, embodies practically the same information in a salable booklet. Indeed, the proofs show that the information as to the theme or plot of the operas in question was not taken by defendant from complainant's copyrighted librettos, but that the version of "Germania" was derived from a newspaper, and that of "Iris" from a German publication. Of course, if the defendant's stories consisted of mere modifications of the copyrighted works, or abridgments thereof, reproducing portions of the dialogue, words, or phrases, the scenes, and characters, a different question would be presented.

As the proofs stand, however, I am convinced, as was Judge Coxe on the motion for preliminary injunction, that the defendant's "Opera Stories" is not an invasion of the copyrights secured to the complainant by statute or an interference therewith.

A decree may be entered dismissing the bill, with costs.

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#### HANSFORD v. STONE-ORDEAN-WELLS CO.

(District Court, D. Montana. December 21, 1912.)

No. 290.

#### 1. STIPULATIONS (§ 5\*)—EXTENSION OF TIME TO ANSWER—OPERATION.

A stipulation extending the time to answer under the laws of Montana is operative *proprio vigore* without an order of court.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 4; Dec. Dig. § 5.\*]

#### 2. REMOVAL OF CAUSES (§ 79\*)—TIME—TIME TO ANSWER—"REQUIRED."

The word "required," as used in the Removal Act (Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 509]), providing that the petition and bond must be served and filed before the expiration of the time defendant is required to answer, has reference to the time when defendant to avoid any default must necessarily answer or plead to the complaint, and hence, where defendant's time to answer was extended by stipulation, a petition and bond for removal filed before the expiration of the time to answer as extended was in time.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 135, 136, 139-160; Dec. Dig. § 79.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6122-6125.]

#### 3. REMOVAL OF CAUSES (§ 84\*)—NOTICE—SUFFICIENCY.

A notice of intention to remove a cause to the federal court, reciting that defendant on the day the notice was dated would file in the state

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

court a petition for and bond on removal, copies of all of which were served before filing and filed on the date specified, was sufficient; the notice being only required to advise plaintiff that the suit and all future proceedings therein were about to be transferred to another tribunal, and to enable him to scrutinize the sufficiency of the petition and bond.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 164; Dec. Dig. § 84.\*]

**4. REMOVAL OF CAUSES (§ 95\*)—PROCEEDINGS TO EFFECT REMOVAL—FILING OF PETITION AND BOND.**

Mere filing in the state court of a sufficient petition and bond to remove the cause to the federal court divests the state court's jurisdiction, and vests jurisdiction in the federal court, without hearing or other order by the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 204, 205; Dec. Dig. § 95.\*]

Action by William A. Hansford against the Stone-Ordean-Wells Company. On motion to remand case to the state court. Denied.

Nichols & Wilson, of Billings, Mont., for plaintiff.

J. H. Johnston, of Billings, Mont., for defendant.

BOURQUIN, District Judge. This suit was removed hither for diverse citizenship, and plaintiff moves to remand (1) for that removal was not timely; (2) for that the statutory notice of contemplated removal is insufficient.

It appears that on September 28, 1912, summons from the state court was served on defendant. On October 17, 1912, and one day before defendant was required to answer or plead to the complaint, the parties by counsel stipulated and agreed in writing that day filed in the state court that defendant could have to and including October 28, 1912, within which to appear and demur, answer, or plead to the complaint. October 26, 1912, defendant served and filed a demurrer to the complaint, a notice that a petition for and bond on removal would that day be filed, and said petition and bond. October 28, 1912, the state court ordered removal to this court. The record was timely filed herein. The removal act provides that in a suit like this at bar the petition for removal may be filed in the state court wherein the suit is brought at the time or any time before the defendant is required by the laws of the state or the rule of the said state court to answer or plead to the complaint.

[1] The laws of Montana and the rule of the said state court authorize stipulations for extension of time like unto that herein. No order of court is necessary to vitalize them. They operate proprio vigore.

[2] Their effect is that the defendant is not "required" to answer or plead to the complaint until at the time when the stipulated time is on the point of expiration, and such is the effect of the stipulation in this case. No default could have been entered against the defendant until after that time. "Required" in the removal act has reference to the time when the defendant to avoid any default must necessarily answer or plead to the complaint. Until that time comes and at it,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

whether fixed by statute, by rule, or by agreement between the parties, whether it is the time originally limited or that time extended, the right of removal continues, and can be exercised. Extending the time to answer or plead, to defend, the principal thing, extends the time for removal, to choose the forum wherein to defend, an included incidental thing. The time to plead is the measure of the time to remove—is the time to remove. The federal law and the state law must be read together. The former prescribes a limitation; the latter the extent of it. From the language of the removal act, all this would seem a necessary conclusion. And it accomplishes the object of the limitation, viz., that all defendant's pleas may necessarily be determined in the federal court. The point is the subject of many cases pro and con, but; as they largely depend on state law, it would little profit to collate them. They may be found in 34 Cyc. 1276. There is dicta contra in this court, but it is only dicta. It will be remembered the time for removal is not jurisdictional, but is a rule of limitation, and, like most limitations, may be subject to waiver and estoppel, express or implied. *Martin v. Railway Co.*, 151 U. S. 688, 14 Sup. Ct. 533, 38 L. Ed. 311, and cases cited.

[3, 4] The stipulation herein, acted on by defendant, is of the nature of both waiver and estoppel, if it were necessary to appeal to them. The removal herein was within the time limited by the removal act. The notice involved recites that defendant will on the day of its date file in the state court the petition for and bond on removal, copies of all of which were served before filing and filed on the date last aforesaid. Whatever the purpose of notice, the removal act seems to require no more. The statutory notice would seem calculated to serve no purpose but to advise the plaintiff that the suit and all future proceedings therein are about to be transferred to another tribunal, to submit to his scrutiny the sufficiency of the petition and bond, and to enable him to speed proceedings if the defendant delays therein; for, since the mere filing in the state court of a sufficient petition and bond divests the jurisdiction of the state court and vests jurisdiction in the federal court, there is no hearing necessary in and no order necessary by the state court. Comity, however, dictates both a request for and a grant of the latter.

The notice herein is sufficient. Remand is denied. Costs to defendant.

## In re COHEN.

(District Court, E. D. New York. December 3, 1912.)

**BANKRUPTCY (§ 415\*)—DISCHARGE—CONCEALED ASSETS.**

A special commissioner, appointed to take testimony on objections to a bankrupt's discharge, recommended a denial thereof on a finding, sustained by sufficient evidence, that the bankrupt had concealed assets by denying ownership of any interest in a store from which he was deriving his living. The commissioner's report was confirmed, with the reservation that, if any court of competent jurisdiction should determine that the property in the store was not that of the bankrupt, then an application for reargument of the motion might be made. *Held* that, neither the creditors nor the trustee having instituted any proceedings thereafter to subject the assets in the store to the debts of the bankrupt on the ground that they in fact belonged to him, and the bankrupt not having established that he had no interest in the store, the commissioner's report would be finally confirmed, and the discharge denied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698-700, 719, 723-728; Dec. Dig. § 415.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Irving Cohen. On application for the bankrupt's discharge. Denied.

Abraham A. Silberberg, of New York City, for objecting creditor.  
Benjamin Rich, of New York City, for bankrupt.

CHATFIELD, District Judge. A special commissioner has previously reported that the bankrupt should be denied a discharge. This was based upon a hearing of the witnesses, and the various specifications of objection were dismissed, except one in which the bankrupt was charged with having concealed his assets by denying ownership "of an interest (amount unknown)" in a store which he was managing, and from which he was deriving his living, on New York avenue, Clifton, Staten Island.

The testimony shows that this crockery store had belonged to the bankrupt's father, and had been taken over by the bankrupt's brother, who had been conducting several stores for a number of years in the same neighborhood. The bankrupt had been in partnership with a man named Phillips, who is said to have sold out the stock of goods (shoes) and to have disappeared, and is claimed by the bankrupt to be considered dead by his relatives.

The bankrupt claimed that he received none of the proceeds from Phillips, that they had no books, and that he never had any accounting; in other words, that he was cheated by Phillips before Phillips disappeared. Shortly after, the brother, who owned these various stores, and who had purchased a horse and wagon by assuming the obligation of paying for them for the bankrupt, says he put the bankrupt in charge of the store about which the question has arisen, and all of the proceeds and benefits from the store were received by the bankrupt, who seems to have deposited money and obtained checks through some other party. The brother's checkbook did not show any plain record with relation to this store. When the report recom-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



mending denial of discharge came up for confirmation, this court made the following memorandum:

"This report should be confirmed, but if it shall be (by any court of competent jurisdiction) determined that the property in the Clifton store is not that of the bankrupt, then an application for reargument of this motion may be made.

"March 5, 1912."

The papers show that since this decision the trustee has been discharged, that the year has elapsed within which creditors might prove claims, and that no creditor, nor the trustee himself, attempted in any way to reduce to possession any assets of the bankrupt or to obtain possession of the property in the store, which the special commissioner considered was really the property of the bankrupt, and was being concealed by him with his brother's help from the trustee in bankruptcy.

It was the intention of the court to safeguard the bankrupt in case any claim against the so-called concealed property should be disposed of in favor of the bankrupt. The creditors who had proved claims had the right, through the trustee or upon application to the court, to endeavor to obtain payment of their claims out of the concealed property. This they have not done, and the trustee has not seen fit to proceed on behalf of these creditors. The bankrupt, therefore, is in the same position in which he was at the time of the previous hearing, and the only thing to be considered is whether or not the report of the special commissioner was based upon any testimony which would justify his decision.

This court should not decide that issue from a consideration of the motives of the creditors or the trustee in deciding not to follow up the so-called concealed assets. If the bankrupt had been denied his discharge, and then been held free from wrongdoing with respect to the "concealed" property, this court might not be able to restore the situation to its previous condition. But nothing has occurred which affects the previous determination of the motion, and, as there was sufficient testimony upon which to base the special commissioner's finding, the report should now be confirmed.

Discharge will be denied.

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#### THE DEFENDER.

(District Court, E. D. New York. December 4, 1912.)

#### SHIPPING (§ 209\*)—LIMITATION OF LIABILITY—RIGHT TO REMEDY.

The right of a vessel owner to maintain a suit for limitation of liability is not defeated by the fact that the only claims on which suit has been brought do not amount to the admitted value of the vessel, where there is a probability that there may be others.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-662; Dec. Dig. § 209.\*

Limitation of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Proceeding by the Lake Champlain Transportation Company, owner of the steam tug Defender, for limitation of liability. On motion to vacate injunction. Denied.

William J. Cleary, of New York City, for petitioner.

Nelson L. Keach, of New York City, for claimants.

CHATFIELD, District Judge. The petitioner is attempting to take advantage of sections 4283, 4284, and 4285, R. S., as amended by Act March 3, 1851, c. 43, 9 Stat. 635 (U. S. Comp. St. 1901, pp. 2943, 2944), and Act June 26, 1884, c. 121, § 18, 23 Stat. 57 (U. S. Comp. St. 1901, p. 2945), by limiting its personal liability for maritime causes of action up to the 1st of July, 1910, to the value of its interest in the tug Defender, against which actions in rem might be brought, for a maritime accident upon that day.

It appears from the papers that on this day the Defender was towing a flotilla of 15 canal boats from Lake Champlain through the Richelieu river, and that some injury resulted to at least 2 boats of this flotilla, while passing through a bridge. An action was brought by two separate individuals in the Municipal Court of the City of New York, in Brooklyn (claiming \$500 damage each), upon the 24th day of June, 1912.

The petitioner has furnished security as claimant of the Defender to the amount of \$2,000, has stated that the value of the petitioner's interest in the boat is not more than \$4,000, and has offered, after appraisal, to give security equal to the value which is fixed as its interest in the boat. The plaintiffs in the actions in the Municipal Court of Brooklyn, having been served with the order in the limitation proceedings, have applied to this court for a modification of the injunction, so as to allow these plaintiffs to proceed with this action, or, in the alternative, that the entire limitation proceedings be dismissed.

The issue can be briefly stated. It is claimed that the greatest possible recovery against the admitted value of the boat, in both of the threatened actions, could not exceed \$1,000, and that therefore the petitioner will obtain no benefit by having the boat released from the possibility of execution, nor by having its own personal liability transferred to the interest in the boat.

The attention of the court has been called by both parties to the case of *The Hoffmans* (D. C.) 171 Fed. 455, 462, in which a single claim, where there was possibility of further claims, and where the total amount of liability might exceed the value of the vessel, was held to bring the case within the statute.

In *The S. A. McCaulley* (D. C.) 99 Fed. 302, and in *The Garden City* (D. C.) 26 Fed. 766, it was held that proceedings to limit liability could be taken at any time, and that the owner of a vessel need not wait until claims in excess of the value of a vessel were filed, nor make sure that the amount of the actual damages would exceed the value of the vessel.

Examination of the statute and consideration of the reason therefor makes it plain that the right to limit liability should not depend

upon the number of claims involved, nor can that right be refused if the claims in suit be less than the admitted value of the boat, provided there is any probability that there may be other claims from which the right to invoke the federal jurisdiction might be maintained. *The Rosa* (D. C.) 53 Fed. 134.

The proceeding is intended for the purpose of *limiting* liability, and this presupposes that the liability to be limited might exceed the limit; that is, that there might be personal liability beyond that of the res involved. If the statute of limitations had run against all possible claims from any cause, the situation on this present application might show plainly that there was no reason for the exercise of jurisdiction by this court. But where an accident, which by its nature, if caused by negligence, affected a flotilla of 15 boats, it would seem that the federal court should exercise its jurisdiction, in order that, if other suits should be brought and the liability amount to more than the value of the boat, the proceeding would not be too late to protect the owner.

Convenience in taking testimony and the general advantages offered by proceeding with a case arising from an alleged maritime tort in the admiralty court are added reasons for a refusal by this court to modify the injunction so as to allow the causes to be tried separately in the Municipal Court.

Motion to vacate injunction denied.

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#### UNITED STATES v. TWELVE BOTTLES OF WHISKY et al.

(District Court, D. Montana. December 12, 1912.)

No. 220.

#### INDIANS (§ 35\*)—INTRODUCTION OF LIQUORS INTO "INDIAN COUNTRY."

Lands to which the Indian title has been extinguished are no longer "Indian country," within the meaning of the general statutes prohibiting the introduction of liquor into the Indian country; and in the absence of some special treaty or statutory provision on the subject the introduction of liquor upon such lands is not unlawful, although they are within the boundaries of a reservation.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.\*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3545-3549.]

Libel of information by the United States against Twelve Bottles of Whisky. H. Coger interposed a claim. Judgment for claimant.

J. W. Freeman, U. S. Atty., of Helena, Mont.

Nichols & Wilson, of Billings, Mont., for defendant and claimant.

BOURQUIN, District Judge. Libel of information, for forfeiture of whisky seized in what is claimed to be "Indian country." Answer, not "Indian country."

From the evidence it appears the seizure was made in the incorporated town of Hardin, within the exterior boundaries of the Crow In-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dian diminished reservation and the state of Montana. The lands upon which said town is located were of said reservation, were allotted to Indians who thereafter died, were sold for the benefit of the deceased allottees' heirs (Act June 25, 1910, c. 431, 36 Stat. 855), were purchased by persons other than Indians, and were patented without restrictions and in fee simple to the vendees.

The treaties with the Crow Indians, and the statutes effectuating them, contain no prohibition of introduction of intoxicants upon any said Indians' lands, and promise none after the Indian title thereto is extinguished. See Act May 7, 1868, 15 Stat. 652; Act April 11, 1882, c. 74, 22 Stat. 43; Act March 3, 1891, c. 543, 26 Stat. 1042; Act April 27, 1904, c. 1624, 33 Stat. 352. The Crow lands are subject to only the general statute prohibiting introduction of intoxicants into the "Indian country"; the term including allotments so long as the legal title is in the United States, and so long as there are restrictions upon alienation. Act July 23, 1892, c. 234, 27 Stat. 260; Act Jan. 30, 1897, c. 109, 29 Stat. 506.

It is settled law that, when the Indian title to lands is extinguished, such lands are no longer "Indian country," that thereafter the general statute prohibiting introduction of intoxicants into the "Indian country" no longer proprio vigore applies to such lands, and that if the treaties or statutes by virtue of which the Indian title to such lands is extinguished do not prohibit introduction of intoxicants thereon, or do not continue the application of the general statute aforesaid, it is lawful to introduce intoxicants there. *Clairmont v. U. S.*, 225 U. S. 558, 32 Sup. Ct. 787, 56 L. Ed. 1201; *U. S. v. Sutton*, 215 U. S. 291, 30 Sup. Ct. 116, 54 L. Ed. 200; *Dick v. U. S.*, 208 U. S. 359, 28 Sup. Ct. 399, 52 L. Ed. 520; *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471; *U. S. v. Whiskey*, 93 U. S. 188, 23 L. Ed. 846. The Indian title to the lands whereon Hardin is located having been extinguished under the circumstances hereinbefore set out, the whisky here involved was lawfully introduced thereon, and so is not subject to forfeiture.

It may be observed that the Constitution vests in Congress the power to make treaties with the Indians and to regulate commerce with them. In exercise thereof it yet could prohibit introduction of intoxicants upon the lands here involved and upon like lands within the boundaries of said reservation. Indeed, it may prohibit intoxicants upon lands near the reservation and upon railroad rights of way through the reservation. See cases supra. And in view of the evils visited upon the Indian by intoxicants, and of the century-old policy to protect the Indian therefrom, it would seem that the omission in that respect in the Crow treaties and statutes was inadvertent and might be cured, even as a like omission in the case of the Flathead and Ft. Peck Indians was. See Act March 3, 1909, c. 263, 35 Stat. 795, 796.

Judgment for claimant.



## WHITMER v. EL PASO &amp; S. W. CO.

(Circuit Court of Appeals, Fifth Circuit. December 17, 1912.)

No. 2,356.

**1. DEATH (§ 31\*)—ACTION FOR WRONGFUL DEATH—STATUTORY PROVISIONS.**

Comp. Laws N. M. 1897, §§ 3214, 3215, authorizing an action for wrongful death in the name of the personal representative of decedent, and providing for the distribution of the recovery among enumerated kindred, and, if no such kindred, to be distributed as personal property of deceased persons is distributed, and sections 2033 and 2036, providing for the distribution of the estates of decedents, confer a right of action for wrongful death on the administrator of decedent, authorize the recovery of damages and for the distribution thereof, and the right of action is not dependent on decedent leaving surviving him a mother, brother, or other kindred.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35-46; Dec. Dig. § 31.\*]

**2. DEATH (§ 49\*)—WRONGFUL DEATH—DAMAGES.**

Where the statute authorizes an action for wrongful death by the administrator of decedent for exemplary and compensatory damages and directs the distribution of the sum recovered, an action may be brought by the administrator without naming the distributees, and alleging their respective rights, and the sum recovered by the administrator is held in trust by him as administrator for distribution as the law directs.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 64-66, 69; Dec. Dig. § 49.\*]

**3. DEATH (§ 86\*)—ACTION FOR DEATH—DAMAGES—QUESTION FOR JURY.**

Comp. Laws N. M. 1897, § 3215, authorizing the jury in an action for wrongful death to give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury resulting from the death and the mitigating or aggravating circumstances, makes the amount of compensatory and exemplary damages such as the jury shall deem fair and just, taking into consideration the pecuniary injury, which includes prospective pecuniary loss resulting from the death, based on circumstances of probability of benefit.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 112-114, 119; Dec. Dig. § 86.\*]

**4. DEATH (§ 93\*)—ACTION FOR WRONGFUL DEATH—STATUTES—OBJECT.**

The statutes allowing damages for death by wrongful act or neglect have for their purpose more than compensation, and it is intended by them to promote safety of life and limb by making negligence causing death costly to the wrongdoer.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 98; Dec. Dig. § 93.\*]

**5. DEATH (§ 77\*)—ACTION FOR WRONGFUL DEATH—DAMAGES.**

Under Comp. Laws N. M. 1897, § 3215, authorizing the jury in an action for wrongful death to give such damages, compensatory and exemplary, as they shall deem just, considering the pecuniary injury resulting from the death to the surviving parties entitled to any interest in the recovery, compensatory damages depend on pecuniary loss; and, where a child is killed, proof of the age, sex, health, habits, and disposition of the child, together with its mode of living and the relatives surviving it, justifies the award of substantial compensatory damages.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 96; Dec. Dig. § 77.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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**6. DEATH (§ 93\*)—WRONGFUL DEATH—DAMAGES—EXEMPLARY DAMAGES.**

Under Comp. Laws N. M. 1897, § 3215, authorizing the jury in an action for wrongful death to award compensatory and exemplary damages, having regard in estimating exemplary damages to the mitigating and aggravating circumstances attending the death, exemplary damages are recoverable only for a willful death, and, where the acts causing the death fall short of willful misconduct, exemplary damages may not be given.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 98; Dec. Dig. § 93.\*]

**7. DAMAGES (§ 91\*)—EXEMPLARY DAMAGES—NEGLIGENCE—"WILLFUL NEGLIGENCE."**

Negligence which shows a reckless indifference to consequences and to the rights and safety of others is the equivalent of willful wrong, and justifies the allowance of exemplary damages, and where a person from his knowledge of existing circumstances is conscious that his conduct will probably result in injury to others, and yet with reckless indifference does the act or fails to do the act and injury results, there is a liability for exemplary damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. § 91.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7483-7484.]

**8. DAMAGES (§ 208\*)—EXEMPLARY DAMAGES—ASSESSMENT—QUESTION FOR COURT AND JURY.**

Whether there is any evidence to justify exemplary damages is for the court, but where there is evidence from which the jury may find that the wrongdoer was guilty of such negligence as justifies exemplary damages, the question is for the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 205, 220, 533, 534; Dec. Dig. § 208.\*]

Death by wrongful act, punitive damages, see note to *McGee v. McCarley*, 44 C. C. A. 259.]

**9. COURTS (§ 96\*)—CONTROLLING DECISIONS—DECISIONS OF COURT OF TERRITORY.**

The decision of the court of last resort of a territory construing a statute of that territory is entitled to respect by a court of the United States, but it is not so controlling as a like decision of a state court of last resort.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 327, 328; Dec. Dig. § 96.\*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank of Memphis v. City of Memphis*, 49 C. C. A. 468.]

**10. DEATH (§ 14\*)—ACTION FOR WRONGFUL DEATH—STATUTES.**

Comp. Laws N. M. 1897, § 3213, authorizing an action for death caused by the negligent management of any locomotive or train, does not apply to an action for the death of a child stepping into a hole in a railroad bridge while walking across it pursuant to a habitual custom of children and adults to walk over the bridge, but an action for his death is governed by section 3214, authorizing an action for negligent death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 16; Dec. Dig. § 14.\*]

In Error to the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

Action by Victoria Whitmer, administratrix, against the El Paso & Southwestern Company. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Waters Davis and James M. Goggin, both of El Paso, Tex., for plaintiff in error.

John Franklin and W. M. Peticolas, both of El Paso, Tex. (W. A. Hawkins, of El Paso, Tex., on the brief), for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge

SHELBY, Circuit Judge. The defendant owned and operated a railroad that extended into New Mexico. On the road near Cloudcroft, in that state, there was a bridge or trestle. The bridge had been used for a long time by adults and children as a passway. Near the bridge were public resorts, and the bridge was attractive to children who constantly used it as a passway, with the knowledge and consent of the defendant. For a long time it was in a safe condition, containing no gaps or pitfalls. Before the 19th of June, 1910, the defendant moved a plank from the bridge, or made a break or hole in the bridge, and left it in that condition. On that day Samuel Wood Whitmer, then 13 years old, walked onto the bridge, as children and adults did habitually, and stepped into the hole or place so left open, fell through to the ground, and lost his life. He left surviving him as next of kin his mother and a brother ten years old. The mother was appointed administratrix of her deceased son by the proper Texas court, and, as administratrix, brought this suit to recover damages for the death. The petition, which copies the statutes of New Mexico allowing suits for wrongful death, contains an elaborate statement of the facts relating to the accident and death, and claims damages for the benefit of the mother and brother of the deceased. Evidence was offered which proved the death as alleged, and which tended to prove the facts constituting defendant's negligence as alleged. We do not elaborate the statement as to the proof of negligence, because we do not understand that it was claimed that there was no evidence on which to go to the jury on that point. The contention of the defendant seems to have been that the evidence showed no right of recovery for the benefit of the mother or the brother.

The mother, Mrs. Victoria Whitmer, testified as follows:

"My boy, who was killed, was a very large boy for his age, and very strong, and I considered him very bright, and, above all this, he was a very good boy, and stayed with me very closely. He was large for his age, heavy, healthy, and intelligent. His habits were good. He was the best child I ever knew, and one of the most affectionate of children to both myself and his brother. He was very industrious. He was not engaged in any employment at the time of his death, but delivered Saturday Evening Posts. I had asked for a Herald route for him, but he had never worked at it. I had asked friends to try and help him to get one the following year. He was affectionate to his brother, and really took care of him. He was of a generous nature, not selfish at all. He gave me a great deal of assistance around home; that is, as far as a little boy of his age can. He assisted me in my household affairs. Both these children lived with me up to the time of my little boy's death, and were supported by me. His little brother never did any work. He depended upon his brother Sam for everything. \* \* \* I always helped them both. He simply helped his brother in one way only. He tried to make him good and like he was. Sam was a very obedient child, and helped me in that way

only. \* \* \* I could not give the particulars as to how Sam helped his younger brother, but can only say he helped him in every way. He just treated him as a little brother, and did everything for him. Of course, I have been away from home, and Sam did everything for him. I was away most of the time attending my classes. The dead boy always looked upon his younger brother as a little bit of brother. The dead boy was physically much the stronger, and perhaps would have made a much stronger man in every way. He was a more reliable boy than the little fellow, and he was superior and more like a grown person. My little boy Alfred seemed like a baby in comparison with him. The other boy assumed the responsibility because I was alone. There was three years difference in their ages. Sam, the deceased boy, did for both of us all the time. He was not of any pecuniary or financial assistance. He gave us physical assistance always. He gave me general assistance in running around the house and taking care of his brother. He cared for me in every way because he knew I relied upon him. \* \* \* I am a school teacher. I have been teaching about seven or eight years. I have one little child. His name is Alfred Whitmer. He is now 11 years old. I had another son whose name was Samuel Wood Whitmer. These two children are the only children I ever had. Samuel Wood Whitmer died on the 19th day of June, 1910. He was 13 years old at the time of his death. He lost his life at Cloudercroft on that day. The 19th was Sunday. I had taken a cottage at Cloudercroft, and was there to spend the summer at Cloudercroft, and had taken the children along with me."

The rulings on the pleadings in the progress of the case were to the effect that there could be no recovery for the benefit of the mother; and, after the evidence of the plaintiff was offered, on motion of the defendant, the jury was instructed to find for the defendant, on the ground that there could be no recovery, upon the record and evidence, for the benefit of the brother of the deceased. That the court directed a verdict for the defendant is assigned as error.

[1] 1. The statutes on which the suit is based, and those which are referred to in the opinion, are found in the Compiled Laws of New Mexico of 1897, and for convenience of reference are copied in a note,<sup>1</sup> the parts to which attention is especially called being put in italics.

Section 3214, on which the action is based, is similar to a provision found in the laws of many of the states, and, in brief, gives an action for damages where death is caused by the wrongful act, neglect, or default of any person or corporation, in cases in which the wrongdoer would have been liable to the party injured if death had not occurred. It prevents the civil right of action from being merged in the felony, if the wrong should be a felony, and preserves the right of action for the wrong, notwithstanding the death from the injury. Section 3215 provides that every action under section 3214 shall be brought by and in the name of the personal representative of the decedent, and that the jury may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment or any interest therein, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default. The section also provides that the recovery shall not be subject to the debts

<sup>1</sup> See note at end of case.



of the decedent, if the decedent leaves surviving him certain kindred, naming, among others, "mother" and "brother." It further provides that the sum recovered shall be distributed among certain named relatives, if there be such, and, if not, then "to be disposed of in the manner authorized by law for the distribution of the personal property of deceased persons." And one of the sections relating to the distribution of estates is as follows:

"If the intestate leave no issue, the whole of his estate shall go to his wife; if he leaves no wife, the portion which would have gone to her shall go to his parents. If one of his parents be dead, the portion which would have gone to such deceased parent, shall go to the surviving parent." Section 2033, Compiled Laws of New Mexico of 1897.

There are other statutes providing for the distribution of the estates of decedents which have no application on the facts of this case; and then section 2036 provides that, in default of all named distributees, the property of the decedent would escheat to the territory. It is therefore plain that the statute confers the right of action on the administrator of the decedent, authorizes the recovery of damages both compensatory and exemplary, and provides for the distribution or disposition of the amount recovered under any state of facts that could exist. The administrator's right of action is not dependent on the decedent's leaving surviving him a mother, brother, or other kindred. This is clear, without referring to other parts of the statute, from the allowance of exemplary damages, and from the provision for disposing of the funds recovered by the personal representative when there is no next of kin.

[2] 2. Under the Texas statutes allowing actions for death, the law requires the amount recovered to be divided by the verdict of the jury among those entitled to it "in such shares as the jury shall find and direct." Under that statute, the failure to apportion the damages, objection being duly made, is reversible error. *Railway Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98. Doubtless the construction of the Texas statute, familiar in that state, led to superfluous averments, and caused the petition to be framed in other respects more in accordance with the Texas statute than the New Mexico statute on which the suit is based. The statute of New Mexico contains no provision requiring the jury to apportion the damages. When the law authorizes suit by the administrator for compensatory and exemplary damages, and directs that the sum recovered be paid to certain relatives, and, if there are no such relatives, that it be distributed under the laws providing for the distribution of estates of intestates, it is obvious that a suit may be brought under the statute by the administrator without naming the distributees and alleging their respective rights. *Budd, Adm'r, v. Meriden Electric R. R. Co.*, 69 Conn. 272, 284, 37 Atl. 683; *Searle v. Railway Co.*, 32 W. Va. 370, 372, 9 S. E. 248; *Harper v. Norfolk & W. R. Co. (C. C.)* 32 Fed. 102, 104; *Roach v. Imperial Mining Co. (C. C.)* 7 Fed. 698; *Columbus & Western Ry. Co. v. Bradford*, 86 Ala. 574, 6 South. 90; *Howard v. Delaware & H. Canal Co. (C. C.)* 40 Fed. 195, 6 L. R. A. 75. Under such stat-

utes, the question primarily to be settled is the right of recovery, and, as indicated in several cases, and said in the last case cited above, "the questions as to who are beneficiaries are left until distribution." In *Wiltse v. Town of Tilden*, 77 Wis. 152, 156, 46 N. W. 234, 236, an action by an administrator to recover for death, the court, after observing that there were allegations in the declaration sufficient to show that the mother was a person entitled to share in the distribution, said: "If there is any one else entitled, such claim can be considered on the distribution of the fund." The fund recovered is held in trust by the plaintiff, as administrator, to be distributed as the law directs (*Tiffany on Death by Wrongful Act*, § 89); and the statute in question here directs its distribution under any circumstances that can arise.

[3] 3. The main controversy in cases like this usually relates to the question of damages—when they are to be allowed, on what evidence, what amount, and whether limited to compensation, and, when so limited, what facts justify such compensation. The language of the statute itself is of first importance. It provides that the jury may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default. That the damages may be both compensatory and exemplary is settled by the statute. The amount is to be such as the jury "shall deem fair and just." The jury fixes the compensatory damages, "taking into consideration the pecuniary injury or injuries resulting from such death." The words "pecuniary injury or injuries" are not used in a limited sense so as to embrace only the loss of money. It includes prospective pecuniary loss resulting from the death, and not more is required to show such loss than a reasonable expectation of pecuniary benefit from the life of the decedent. And this expectation need not be based on legal obligation. It is sufficient if it is based on circumstances showing the probability of such benefit. The prospective damages to the next of kin by the taking of human life are necessarily indefinite, uncertain, and contingent. They cannot be proved with an approach to accuracy, and yet they are to be estimated. This difficulty accounts for the phrase found in this and many other similar statutes, that the jury may allow such damages as they "deem fair and just." Where a child is killed, all the proof that ordinarily can be offered is the age, sex, health, habits, and disposition and temperament of the child, together with its mode of life, and the relatives who survived it, and possibly some little employment, as the selling of newspapers, as in this case.

[4] The statutes allowing damages for wrongful act or neglect causing death have for their purpose more than compensation. It is intended by them, also, to promote safety of life and limb, by making negligence that causes death costly to the wrongdoer.

[5] It would be a mockery to hold that there could be no substan-

tial recovery when children are the victims, because, at the time, they had no earning capacity. *Houghkirk v. President, etc., D. & H. C. Co.*, 92 N. Y. 219, 44 Am. Rep. 370, was an action by her administrator for the death of a girl six years of age. The statute made the compensatory damages depend on the pecuniary loss. There was no proof as to loss except that the child was "about six years old, an only child, bright, intelligent, and healthy, and the daughter of a market gardener." The court said as to this evidence:

"These elements furnish some basis for judgment. That it is slender and inadequate is true; but it is all that is possible, and, while that should be given, more cannot be required."

That evidence was held sufficient to sustain a substantial verdict for damages based on pecuniary loss. See, also, *McIntyre v. New York Central R. R. Co.*, 37 N. Y. 287, 295; *The O. L. Hallenbeck (D. C.)* 119 Fed. 468; *Lockwood v. N. Y. L. E. & W. R. R. Co.*, 98 N. Y. 523, 526; *Pennsylvania Company v. Scofield et al.*, 161 Fed. 911, 88 C. C. A. 602; *Johnson, Adm'r, v. Chicago & Northwestern R. Co.*, 64 Wis. 425, 431, 25 N. W. 223. In *Railroad Company v. Barron*, 5 Wall. 90, 93 (18 L. Ed. 591), the court had before it a suit based on a statute like the one before us, and which allowed the jury "to give such damages as they shall deem fair and just compensation with reference to the pecuniary injuries resulting from such death," etc. The court approved the following charge given by the trial court:

"We do not think it requisite to prove present actual pecuniary loss. It can rarely be done. The attempt to do it would substitute the opinion of witnesses for the conclusions of the jury. The facts proved will enable the jury to decide on the proper measure of responsibility. Some cases are harder than others, and the law intends that the jury shall discriminate in different cases. There is no fixed measure of damages, and no artificial rule by which the damages in a given case can be computed."

The opinion is very instructive, showing that the case on the question of damages must go to the jury, although the evidence is necessarily inadequate and uncertain. The practical result of these cases is that it is incumbent on the jury from such evidence as is offered to estimate as best they can the value of the life to those concerned. If there is evidence of direct pecuniary loss, the verdict may be based on it in whole or in part. If there is no such direct evidence, they may, nevertheless, estimate the prospective pecuniary loss, considering the age, health, condition, etc., of the decedent, together with any other relevant facts and circumstances.

The statute, it will be noted, gives the right to receive the damages to certain named kindred of the decedent, providing the order in which they are respectively preferred. From this provision the Supreme Court of the territory of New Mexico has held that in estimating the compensatory damages the amount would be the same, whether it was to go to one of the named beneficiaries or another.

The court said:

"It must be considered, however, that as our statute gives a right of recovery to any one who is of kin in the same way that it gives it to the wife and children of deceased, merely prescribing who are prior distributees of

what is recovered, the rules for estimating the loss in each case should be the same. Such a rule must be that from the proof as to age, earning capacity, health, habits, and probable duration of life the jury shall say what is the present worth of the life of deceased, with nothing to be added by way of consolation to the parties or party entitled as distributees to the proceeds of recovery, and nothing for suffering or anguish of mind or body by the deceased. It is resolved into a cold question of dollars, with sentiment in no way to be taken into account. Neither does the question of mitigating or aggravating circumstances have any weight so far as the damages denominated by our statute 'compensatory' are concerned. If there should be a recovery, full compensation should be awarded, mitigating or aggravating circumstances having effect only on the question of allowing or not allowing exemplary damages in addition to full compensation." *Cerillos C. R. Co. v. Deserant*, 9 N. M. 49, 67, 49 Pac. 807, 813.

[6] 4. The statute in express terms provides that the jury may give not only compensatory damages, but that they may also give "exemplary" damages. In estimating the amount of the latter they may have regard to the "mitigating or aggravating circumstances attending such wrongful act, neglect or default." Exemplary damages are allowed for a willful injury; that is, where there is design, purpose, and intent to do the injury. Where the acts fall short of willful misconduct, or that entire want of care which would raise a presumption of conscious indifference to consequences, exemplary damages should not be given.

[7] Negligence in the sense of culpable indifference to consequences would be a good ground, not only on general principles, but by the terms of the statute, for the allowance of exemplary damages. Negligence which shows a reckless indifference to consequences and to the rights and safety of others is the equivalent of willful wrong, so far as concerns the allowance of exemplary damages. 1 Sedgwick on Damages (9th Ed.) § 368; *Milwaukee, etc., R. R. Co. v. Arms et al.*, 91 U. S. 489, 23 L. Ed. 374; *United States v. Taylor* (C. C.) 35 Fed. 484; *Mandeville v. Courtright*, 142 Fed. 97, 101, 73 C. C. A. 321, 6 L. R. A. (N. S.) 1003; *Birmingham Railway & Electric Co. v. Bowers*, 110 Ala. 328, 20 South. 345. And this view seems to be sustained in *Cerillos C. R. Co. v. Deserant*, *supra*, in construing the act on which this suit is brought. When a person from his knowledge of existing circumstances and conditions is conscious that his conduct will probably result in injury to others, and yet, with reckless indifference or disregard of the probable consequences, although he may have no intent to injure, does the act, or fails to do the act, and the injury results, there is liability for exemplary damages.

[8] Whether there is any evidence to justify the assessment of exemplary damages is a question for the court. But where there is evidence, direct or circumstantial, from which a jury might find that the defendant had been guilty of negligence of a kind which would justify the assessment of exemplary damages, then the question is for the jury.

[9, 10] 5. The defendant in the District Court and in this court presents a defense based on section 3213 copied in the note. As we understand the contention, it is claimed that the administratrix has no right of action on the facts proved, the right of action against a common carrier being vested by section 3213 in certain named beneficiaries, and



not in the personal representative, and that the statutes in question are so construed in *Romero v. Railroad*, 11 N. M. 679, 72 Pac. 37. We say in passing that a decision of the court of last resort of the Territory of New Mexico, construing a statute of that territory, is entitled to great respect, but it is not altogether so controlling upon the courts of the United States as a like decision of a state court of last resort. *Northern Pacific Railroad v. Hambly*, 154 U. S. 349, 361, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Black's Law of Judicial Precedents*, § 133, p. 457. But, on a careful examination of the opinion in the *Romero Case*, we find nothing in it, necessary to its decision, that is in conflict with our conclusion in this case. What was actually decided is correctly stated in the syllabus, to wit, "for causes of action arising under section 3213, Compiled Laws of 1897, legal representatives are not authorized to bring or maintain suit." *Romero*, as administrator, brought suit for \$5,000 for the death of his intestate, who was run over and killed by a freight car. The decedent died from an injury sustained "by the negligent running and operation of a locomotive and train of cars by the servants" of the defendant. The suit was based on section 3213, which provides that:

"Whenever any person shall die from any injury resulting from, or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employé, whilst running, conducting or managing any locomotive, car, or train of cars, \* \* \* the corporation, individual or individuals, in whose employ any such officer, agent, servant \* \* \* shall be at the time such injury was committed, or who owns any such railroad, locomotive, \* \* \* shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars. \* \* \*"

The section then names the beneficiaries who are authorized to sue for the forfeit of \$5,000, and does not authorize the suit for it by the personal representative. These facts being alleged in the declaration, the trial court sustained a demurrer to it, and the judgment was affirmed by the Supreme Court of the territory.

The plaintiff's intestate in the instant case was not killed under circumstances that would come within section 3213. He was not killed by the negligent running of a locomotive or car, etc., nor was he a passenger. A reading of the section will show that it is not applicable to this case. The suit here is based on a different section, for a violation of which the personal representative is expressly authorized to sue.

We are of the opinion that the District Court erred in directing a verdict for the defendant. The judgment is reversed, and the cause remanded for a new trial.

**NOTE.**—The following are sections of the Compiled Laws of New Mexico 1897:

"Sec. 3214. Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, *the person* who, or *the corporation* which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

"Sec. 3215. Every such action as mentioned in the next preceding section

shall be brought by and in the name or names of *the personal representative or representatives of such deceased person*, and the jury in every such action may give such damages, *compensatory and exemplary*, as they *shall deem fair and just*, taking into consideration *the pecuniary injury or injuries* resulting from such death to *the surviving party or parties* entitled to the judgment, or any interest therein, recovered in such action, and also having regard to *the mitigating or aggravating circumstances attending such wrongful act, neglect or default*. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased: Provided, He or she shall have left a husband, wife, child, father, mother, brother, sister, or child or children of the deceased child, but shall be distributed as follows: First, if there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife and a child or children or grandchildren, then equally to each, the grandchild or grandchildren taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or grandchildren, then to such child or children and grandchild or grandchildren by right of representation; if there be no child or grandchild, then to a surviving brother or sister, or brothers or sisters, if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons."

"Sec. 2033. If the intestate leave no issue, the whole of his estate shall go to his wife; if he leaves no wife, the portion which would have gone to her shall go to his parents. If one of his parents be dead, the portion which would have gone to such deceased parent, *shall go to the surviving parent*."

The defendant cited the following section:

"Sec. 3213. Whenever any person shall die from any injury resulting from, or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employé, *whilst running, conducting or managing any locomotive, car, or train of cars*, or of any driver of any stage coach or other public conveyance, while in charge of the same as driver; and when any *passenger shall die* from any injury resulting from, or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any stage coach, or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employé, engineer or driver, shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stagecoach, or other public conveyance, at the time any injury is received, resulting from, or occasioned by any defect or insufficiency above declared, *shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars*, which may be sued and recovered: First, *by the husband or wife* of the deceased; or, second, if there be no husband or wife, or if he or she fails to sue within six months after such death, *then by the minor child or children of the deceased*; or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In suits instituted *under this section*, it shall be competent for the defendant for his defense to show that the defect or insufficiency named in this section, was not of a negligent defect or insufficiency."

EASTERN OREGON LAND CO. v. WILLOW RIVER LAND &  
IRRIGATION CO.

(Circuit Court of Appeals, Ninth Circuit. November 1, 1912.)

No. 2,007.

**1. INJUNCTION (§ 36\*)—SUIT TO RESTRAIN TRESPASS—EQUITY JURISDICTION—DISPUTED TITLE.**

In a suit to enjoin the building of a dam and the impounding of water from a stream by defendant on land to which complainant claims title through a grant by Congress of agricultural lands and a patent issued thereunder, defendant cannot raise a question of title which will defeat jurisdiction of a court of equity by alleging that the land is mineral, and did not therefore pass under the grant or patent to complainant, where it makes no claim of title in itself, and is seeking to appropriate the land for agricultural, and not mineral, purposes.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 82-84; Dec. Dig. § 36.\*]

**2. INJUNCTION (§ 36\*)—GROUNDS OF RELIEF—TRESPASS.**

A court of equity has jurisdiction to enjoin a trespass, even when the title to the premises is in dispute, where the trespass is of such nature as to destroy the substance of the estate in the character in which it is claimed by complainant, and will work irreparable damage to him if his right should be established.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 82-84; Dec. Dig. § 36.\*]

**3. INJUNCTION (§ 113\*)—ACTION—LACHES.**

A suit to enjoin a trespass on real estate is not barred by laches, where complainant notified defendant of its rights and that it would protect the same at once on learning of defendant's proposed action, and commenced suit within six months thereafter.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 198-201; Dec. Dig. § 113.\*]

**4. WATERS AND WATER COURSES (§ 40\*)—RIPARIAN RIGHTS IN STREAM—OREGON STATUTES—OVERFLOW WATERS.**

A riparian owner of land on a stream in Oregon, a part of which is irrigated by the overflow water each spring and produces annual crops of grass, used by him for pasturage and hay, and which land, without such irrigation, would be valueless for practical use, has a vested right in such water, of which he cannot be deprived by another above him by an appropriation made under the state statutes (L. O. L. § 6525 et seq., or Act Feb. 24, 1909 [Laws 1909, p. 319]), both of which, while authorizing such appropriation, provide that no owner of lands on a stream shall thereby be deprived of vested rights acquired by the prior and continued actual application of water from such stream to beneficial use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 32; Dec. Dig. § 40.\*]

**5. WATERS AND WATER COURSES (§ 40\*)—"NATURAL FLOW OF STREAM"—OVERFLOW WATERS.**

The increased flow of a stream, occurring annually by reason of rainfall and melting snow about its source, is no less the "natural flow of the stream" because it does not remain within the ordinary channel, but overflows adjacent low grounds without well-defined banks, so long as it re-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mains a single body of water and is eventually discharged through the proper channel.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 32; Dec. Dig. § 40.\*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4666, 4667.]  
Gilbert, Circuit Judge, dissenting.

Appeal from the Circuit (District) Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit in equity by the Eastern Oregon Land Company against the Willow River Land & Irrigation Company. Decree for defendant (187 Fed. 466), and complainant appeals. Reversed.

Suit for an injunction to restrain appellee, the Willow River Land & Irrigation Company, from constructing a dam for a reservoir in the canyon of Willow creek, in Malheur county, Or., upon lands claimed by the appellant, from flooding certain adjoining lands of appellant with the waters of such reservoir, and from appropriating, diverting, or taking from the channel of Willow creek any of the waters naturally flowing through lands riparian to said creek and owned by the appellant.

Teal, Minor & Winfree and Huntington & Wilson, all of Portland, Or., for appellant.

Richards & Haga, of Boise City, Idaho, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The appellant was the complainant, and the appellee the defendant, in the court below, and the parties will be so designated in this opinion.

The complainant is a California corporation, which has succeeded to the title and claims to be the owner in fee of all the lands granted to the state of Oregon by the act of Congress entitled "An act granting lands to the state of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia river, to Ft. Boise, on the Snake river," approved February 25, 1867 (14 Stat. L. 409, c. 77), known as "The Dalles Military Road Grant." The Dalles Military Road grant extends across the northern end of Malheur county, in the state of Oregon, and includes the odd-numbered sections to the extent of three sections in width on each side of the line of road. Willow creek is a nonnavigable stream flowing in a general southeasterly direction through the northern portion of Malheur county, and is a tributary to the Malheur river.

It is alleged in the bill of complainant that the channel of Willow creek crosses or intersects a portion of the following sectional tracts included in The Dalles Military Road grant, now claimed as belonging to the complainant: In township 14 S., range 42 E.: The S.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  and the S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of section 21, containing 120 acres, and section 27, containing 640 acres. In township 15 S., range 42 E.: Sections 3 and 11, containing 1,280 acres. In township 15 S., range 43 E.: The N.  $\frac{1}{2}$ , the S. E.  $\frac{1}{4}$ , the N.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ , and S. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 31, containing 600 acres. In township

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



16 S., range 43 E.: The N.  $\frac{1}{2}$ , the S. E.  $\frac{1}{4}$ , and the N. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 5, containing 520 acres; the N. W.  $\frac{1}{4}$  and the E.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  of section 9, containing 240 acres; the S.  $\frac{1}{2}$ , the S.  $\frac{1}{2}$  of N.  $\frac{1}{2}$ , and the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 23, containing 520 acres; and section 25 in same township, containing 640 acres. In township 16 S., range 44 E.: The W.  $\frac{1}{2}$  and the S. E.  $\frac{1}{4}$  of section 31, containing 480 acres. In township 17 S., range 44 E.: The W.  $\frac{1}{2}$ , the W.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$ , and the S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of section 5, containing 440 acres; sections 9 and 15, containing 1,280 acres; the W.  $\frac{1}{2}$  and S. E.  $\frac{1}{4}$  of section 23, containing 480 acres; and section 25, containing 640 acres.

It is alleged that the foregoing sectional tracts, amounting in the aggregate to 7,880 acres, are riparian to Willow creek. Willow creek, from the point where it enters section 21 in township 14 S., range 42 E., down to a point near the northwest corner of section 14, township 15 S., range 42 E., a distance of about 10 miles, flows through a rocky canyon, with bluffs, or steep, high hills, on each side. From the northwest corner of said section 14, township 15 S., range 42 E., the creek enters a wide valley, the lower level of which is from three-quarters of a mile to a mile and a half wide. On the southerly side of the creek the lower level or bottom lands are separated from the foothills by a distinct bench formation a mile or two miles in width, while on the northerly side of the creek the bottom lands slope gradually to the foothills. The bottom lands, in so far as they are subject to annual overflow or are artificially irrigated, produce wild grass and other hay crops. The valley lands, not so irrigated, are arid and unproductive. The channel of the creek, after it enters the valley, is not of sufficient capacity to carry all of the water of the creek during periods of high water, which usually occur in the latter part of winter or early spring, and the lower levels of the valley are consequently subjected to overflow to a greater or less extent. About 3,600 acres of the complainant's land lie in this lower level on both sides of the creek, and about 300 acres are rendered productive of wild grass and other hay crops by the annual overflow.

With the exception of the title to the lands in sections 21 and 27 in township 14 S., range 42 E., there is no serious controversy as to the title to the lands along Willow creek described in the bill of complaint and claimed by the complainant. It is practically conceded that the title to such lands passed from the United States to the state of Oregon by the terms of the grant contained in the act of Congress of February 25, 1867 (14 Stat. 409, c. 77), and the act of June 18, 1874 (18 Stat. 80, c. 305 [U. S. Comp. St. 1901, p. 1517]), and that by mesne conveyances the title to the said lands has become vested in the complainant; nor is there any controversy that the granting act, is by its terms, a grant in præsentī, and that the riparian rights appurtenant to the lands were not reserved or otherwise disposed of by the United States, but passed with the title of the land to the state of Oregon and to its grantees. With respect to the title of sections 21 and 27 in township 14 S., range 42 E., the question is presented whether these lands are within the terms of the grant. They are

within the primary limits of the grant, and patents were issued therefor by the United States to The Dalles Military Road Company, and the title, if any passed by grant or patent, has become vested in the complainant. But it is objected on the part of the defendant that the title to mineral land did not pass by either grant or patent, and that the lands in these two sections are mineral lands.

It is alleged in the bill of complaint that the defendant, without the authority or consent of the complainant, has wrongfully and unlawfully entered upon the W.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 27, township 14 S., range 42 E., and has commenced the construction of a dam, the dimensions of which would be about 337 yards in length and 100 feet in height; that this dam would be constructed for the purpose of obstructing the flow of water in the natural channel of Willow creek, and to create a large reservoir for the storage and retention of waters flowing in Willow creek above said dam, and by means of said dam, it is alleged, defendant intended to and would flood and overflow portions of sections 21 and 27, owned by the complainant, and would divert the waters of Willow creek at and below said dam to nonriparian lands owned by the defendant, and would thereby deprive the complainant of the right to use the waters of Willow creek flowing through its riparian lands, thereby greatly injuring and depreciating the value of said riparian lands, to the irreparable injury and damage of the complainant.

In defendant's answer it is alleged that the lands claimed by the defendant in sections 21 and 27, township 14 S., range 42 E., are mineral lands. It denies that the complainant is the owner of said lands, but admits that defendant proposes to construct a dam of practically the dimensions mentioned in the bill of complaint; that it is the defendant's purpose in the construction of said dam to obstruct the flow of a part of the water in the natural channel of Willow creek, viz., the surplus of flood water thereof; that it will create a large reservoir for the storage and retention of said water, and that by the retention of said water in said reservoir will overflow and flood a small portion of the W.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 27, and a small portion of the S.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  and the S. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 21; but it denies that the construction and maintenance of said dam or the overflow on said land will greatly or irreparably damage complainant, or will cause it any damage whatever. It is alleged that not to exceed 50 acres of said lands will be affected in any way by the construction or maintenance of said dam and reservoir.

Defendant admits that it is its purpose in the construction of said dam and the maintenance thereof, and of the reservoir created thereby, to divert certain of the waters of Willow creek from its natural channel and by means of ditches to convey the same to its own lands and to the lands of other people, a part of which said lands are riparian to Willow creek, and part of same are not. Defendant alleges that its purpose in the construction and maintenance of said dam and reservoir is to create and impound in said reservoir the flood or surplus water of said creek, which as it naturally flows is of no use whatever to said complainant, or to any other person; and its purpose is to use said

water so collected and impounded in the proper and necessary irrigation of adjacent arid land belonging to itself and other parties.

With respect to the ownership of sections 27 and 21, in township 14, range 42 E., the defendant alleges that said land, and particularly that part thereof occupied by said dam and to be occupied by its reservoir, is mining land, and that the same is more valuable for its gold deposits than for any other purpose, and that it is and always has been absolutely valueless for any other purpose, except that of mining for gold; alleges that more than 30 years ago said land was filed upon as placer gold mining claims by the predecessors in interest of the defendant, under and pursuant to the laws of the United States governing the acquiring of placer gold mining claims; that the persons who so filed upon said land as such mining claims held, worked, and occupied the same as mining claims, and that by proper mesne conveyances from said parties said land has been conveyed to the defendant and it was the owner thereof; that defendant's predecessors in interest in said mining claims, for the purpose of working said mining claims, appropriated and used all the waters of Willow creek naturally flowing through said lands during the summer and autumn seasons, and used that quantity of water of said stream during the entire year in and about the working of said claims; that through various sales, transfers, and conveyances of said water rights the same have been sold, transferred, and conveyed to the defendant, and the defendant is the legal owner and holder of said water rights; alleges the incorporation of the defendant under and pursuant to the laws of the state of Oregon for the purpose, among other things, of constructing, maintaining, and operating dams, reservoirs, irrigation ditches, channels, and flumes, together with laterals running therefrom, for the purpose of irrigating lands, and for the purpose of bringing under cultivation desert and unproductive lands; to operate and construct irrigation systems, and the business of furnishing water for irrigation purposes to others under contract of sale, or in any other manner whatsoever; to acquire, build, or operate the business of a power company for itself or for furnishing power to others; to obtain, by purchase, lease, location, or otherwise, water rights and privileges and irrigation rights and privileges, and to maintain and operate a general system of irrigating lands for itself or for others, and to engage in the general business of developing and cultivating lands and handling the produce therefrom for itself or for others; to construct, maintain, improve, control, and superintend canals, reservoirs, water courses, flumes, ditches, and laterals.

It is alleged that, in furtherance of defendant's purpose and in pursuance of the statute of the state of Oregon, the defendant had on the 7th day of April, 1908, duly and regularly posted in conspicuous places at the point of its headgate of the reservoir situated in the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 2, township 15 S., range 42 E., a notice of location and appropriation of the water of Willow creek. It is also alleged that said notice was on the same day posted in a conspicuous place at the headgate of the reservoir situated in the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 27, township 14 S., range 42 E., and said notice was thereafter filed and recorded in the clerk's

office of Malheur county, Or. The notice is in substance that the defendant had located and appropriated 20,000 cubic inches of water by miner's measure, under 6-inch pressure, of and from Willow creek, and of and from the water flowing therein, or a sufficient amount thereof to maintain a continuous flow of 20,000 inches thereof, miner's measure; that there would be two reservoirs used for storage purposes in connection with the operation of said canal and the various laterals therefrom; that the headgate of the upper reservoir was to be constructed in the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 27, township 14 S., range 42 E.; that the headgate of the lower reservoir was to be constructed in the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 2, township 15 S., range 42 E. The general course and direction of the canal from said headgate in a southwesterly direction through sections 2 and 11 in township 15 S., range 42 E., is given through various numbered sections down to section 16 S., range 43 E., the size of the canal is stated, and that the water is located and appropriated for the purpose of beneficial use, and to be used and appropriated for the purpose of irrigation for household, domestic, and power purposes, for watering cattle and live stock. It is further alleged in the answer that defendant had filed for record in the office of the clerk of Malheur county a map showing the general route of the ditches and canals through and by means of which the water so appropriated in and pursuant to said notice was to be distributed and used in compliance with the statute of Oregon.

It is alleged that defendant has since proceeded with the construction of its dam and reservoir for the purposes stated; that complainant had known of the construction of the dam, and the labor and expense incident thereto, and had made no objection to the construction of said dam so far as the same might affect the flow of the water of Willow creek; and that defendant had expended more than \$50,000 in the construction of said dam.

Upon the issues presented by the bill of complaint and answer, testimony was taken, and, upon being submitted to the Circuit Court, an order was entered denying the relief prayed for, and dismissing the bill, for two reasons: (1) That the title to the land upon which defendant was constructing its dam and reservoir was in dispute, and this dispute should be settled by law; (2) the complainant had not shown that it would be substantially injured by the impounding of the flood or waste waters of the stream. Both of these questions are involved in this appeal.

The objection that the title to the land upon which the defendant was constructing its dam and reservoir was in dispute presents two questions, one of law and the other of fact. The dam is located partly on section 28, and partly on section 27, township 14 S., range 42 E., but mainly on section 27, on the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of that section. The complainant has no interest in the land in section 28. The location of one end of the dam upon that section is, therefore, of no interest to the complainant, and is not involved in this suit. The complainant holds a title to section 27 derived from a patent issued by the United States to The Dalles



Military Road Company on the 28th day of May, 1902; and it is contended on behalf of the complainant that the title to the land described in the patent passed to the grantee by proper conveyance and is now vested in the complainant, and that the character of the land is not now open to inquiry, unless it should be made to appear in a proper action that the patent had been procured by fraudulent misrepresentation on the part of the grantee as to the character of the land. No such claim of fraudulent misrepresentation is made in this case, but it is insisted that the grant did not embrace mineral lands, and that the officers of the Land Department had no authority to issue a patent for lands containing mineral, and that such lands were excluded by the terms of the patent.

The patent conveys in township 14 S., range 42 E., certain designated subdivisions of section 21, containing 120 acres, and "all of section 27, containing 640 acres," but provides, "yet excluding and excepting all mineral lands, should any such be found in the tracts aforesaid." It was contended by the complainant in the court below, and the contention is renewed here, that the issuance of the patent by the government of the United States to complainant's predecessor in interest was a conclusive adjudication that the lands described in the patent were nonmineral. It was admitted by the court that this probably was true if the patent contained no reservation; but it was the opinion of the court that the reservation manifested an unmistakable intention on the part of the government not to convey mineral lands, and repelled any inference that the department had adjudicated or intended to adjudicate that no part of the land described in the patent was mineral.

The complainant contends that the issuance of the patent was a final adjudication, by the only authority having jurisdiction to make the adjudication, that the land described in the patent was of the class of lands granted by the act under which the patent was issued. This identical question was before the Circuit Court for the Southern District of California in the case of *Roberts v. Southern Pacific Railroad Co.*, 186 Fed. 934. In that case Judge Ross held that where Congress had provided for the disposition of any portion of the public domain of a particular character, and had authorized the officers of the Land Department to issue a patent for such land on an ascertainment of certain facts, such department had jurisdiction to inquire into and determine the existence of those facts, and in the absence of fraud, imposition, or mistake, its determination was conclusive against collateral attacks. From this decision complainant appealed to this court, and thereupon this court certified the question, in various forms pertinent to that and another case before this court, to the Supreme Court of the United States for instructions as to a proper decision of the questions. The questions are certified under the title of two cases, namely: *Burke v. Southern Pacific Co.* (No. 279) see 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. —, and *Lamprecht v. Southern Pacific Co.* (No. 280) see 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. —. Whether a patent issued under the circumstances disclosed in the present case conveys to the grantee an absolute title

to the land described therein, subject only to direct attack for fraud, misrepresentation, or mistake, or whether the conveyance is subject to the reservation excluding mineral lands, should any such be thereafter found in the tracts conveyed, must therefore await the decision of the Supreme Court upon the questions submitted in the cases referred to.

[1] But, assuming that the patent is open to this collateral attack, we are of the opinion that such an attack is not supported by evidence in this case. The defendant introduced evidence tending to show that its predecessors in interest had located placer mining claims upon certain subdivisions of section 27 and other sections in that neighborhood; but no location appears to have been made upon the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 27, the subdivision in controversy, and the defendant has produced no evidence of any title derived from mining locations made upon that subdivision of section 27. The defendant introduced evidence tending to show that mining operations had been carried on at points on Willow creek above the point where the dam is located, but no evidence that any gold had been taken out at that point or from the subdivision of that section upon which the dam is located. There was no evidence that the boundaries of any claim had been marked upon the ground, so that such boundaries could be readily traced; nor was there any evidence that a notice of such a claim had ever been posted upon the ground or filed in the United States land office, nor was there any evidence tending to show that any steps had been taken under the laws of the United States to obtain title to the ground as mineral ground.

In this state of the evidence we do not think the defendant was in a position to raise the question as to the mineral character of the land in controversy or the general character of the land in the vicinity. The defendant is not a claimant of the land in dispute for its mineral character or its mineral deposits, nor, indeed, is it a claimant there or elsewhere for land on account of its mineral character or its mineral deposits. It has taken possession of the land in dispute, not for the purpose of carrying on mining operations, but to impound waters for irrigation purposes. It was not incorporated to engage in mining operations, or to acquire land for that purpose. It was incorporated—

"to build, establish, and construct, and when established, to maintain and operate, dams, reservoir sites, irrigation ditches, canals, and flumes, together with laterals running therefrom, for the purpose of irrigating lands, and for the purpose of bringing under cultivation desert and unproductive land; to acquire a fee simple title to lands or a lesser interest therein, and to water and irrigate same, and to lease, sell, or dispose of same, either in whole or in part; to operate and construct irrigation system or systems, and the business of furnishing water for irrigation purposes to others under contract of sale or in any other manner whatsoever."

Its object and purpose is to promote agriculture, and the land in dispute is to be used for that object and purpose, and not for the purpose of taking out mineral, or for any mining purposes whatever. That the defendant has taken possession of the land in controversy to maintain and operate a dam for the storage of water for

the purpose of irrigating and bringing under cultivation desert and unproductive lands for agricultural purposes appears to be a sufficient answer to defendant's general claim that the land is mineral land, that it is more valuable for its mineral deposits than for any other purpose, and that therefore it is excluded from the complainant's grant and patent. If the land is more valuable for such agricultural purposes as the defendant proposes than for its mineral deposits, then the land belongs to the complainant under the grant and patent as agricultural land.

[2] It follows that in our opinion there is no actual dispute as to the title to the land upon which defendant is constructing its dam, for the reason that defendant makes no showing of title in itself. But, assuming that there is, the complainant is not in a court of equity without right. While the general rule is that a suit to enjoin a trespass cannot be used and substituted for a proceeding to try the legal title to real property, nevertheless the equitable doctrine is well established that when the nature of the trespass is such as must necessarily go to the destruction of the estate in the character in which it is enjoyed, or the trespass cannot be adequately compensated in damages and the remedy at law is inadequate, a court of equity in such or like cases is authorized to interfere and grant relief by injunction. *Hume v. Burns*, 50 Or. 124, 127, 90 Pac. 1009.

In *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116, the Supreme Court of the United States held that:

"It is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extraction of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation."

In *Northern Pac. R. Co. v. Hussey*, 61 Fed. 231, 9 C. C. A. 463, the complainant was a land grant railroad, but the lands opposite to the completed line had not been surveyed, so as to render the odd-numbered sections belonging to the company distinguishable from the even-numbered sections reserved to the United States. It was charged in the bill of complainant that the defendant had entered upon the unsurveyed lands within the limits of the grant and was cutting down the timber therein; but because the complainant could not show title to the land in the complaint, and such title was denied, the Circuit Court dismissed the bill. This court, upon the authority of *Erhardt v. Boaro*, supra, held that the defendant was engaged in destroying the substance of the estate, and that the interest of the complainant was such that a court of equity would protect the estate by injunction.

In *Oolagah Coal Co. v. McCaleb*, 68 Fed. 86, 15 C. C. A. 270, the action was for an injunction to restrain trespass upon certain mining ground in the Indian Territory. There was a question of right as between the parties to the action under a license from the Cherokee Nation. The defendant resisted the action on the ground that the complainant had a plain, adequate, and complete remedy at law. The lower court dismissed the bill. The Court of Appeals held that the complainant was not without right to equitable relief, even if it were

true, as the defendant contended, that the bill disclosed a controversy between parties as to who had the superior right to mine coal on the lands in question, which could only be appropriately determined by a court of law. "If such was the fact," said the court, "it would nevertheless be competent for a court of equity to restrain the commission of such trespasses as are charged in the bill, until the controversy existing between the parties is settled by the proper tribunal."

In this case the erection of a dam and the formation of a reservoir by the defendant on the land in dispute is manifestly a destruction of the estate in the character in which it was being used and enjoyed by the complainant. That such a destruction will be an irreparable injury is established by the fact that the defendant does not claim to be able to respond in damages in the event it should finally be determined that the title to the land is in the complainant, and, as a matter of fact, it could not establish its ability to so respond. Its solvency was questioned when the case was argued in this court, and the defendant has since filed its petition in bankruptcy in the United States District Court for the District of Oregon, showing a hopeless state of insolvency. It cannot, therefore, respond in damages in the event the title to the land should be found to be in the complainant.

[3] The objection that the complainant had not been diligent in protecting its alleged rights against the defendant's intrusion upon the land upon which the dam was being constructed cannot be maintained. The evidence shows that the defendant made its appropriation of water from Willow creek by posting notice on April 7, 1908; that on May 19, 1908, the complainant wrote to Leonard Cole, advising him that the complainant held United States patent to lands in sections 21 and 27, township 14 S., range 42 E., which he was undertaking to sell to D. M. Brogan; that complainant intended to assert its right to the same, and would resist any attempt to flood the land, or otherwise enter upon it, by injunction suit. On May 20, 1908, Leonard Cole and others conveyed to the defendant their interest in the mining claims and mining water rights on Willow creek. On June 18, 1908, complainant wrote to the defendant that complainant objected and protested against any occupancy or work theretofore or thereafter done or to be done by the defendant or by any other person upon sections 21 and 27, township 14 S., range 42 E., or any other of its lands, without its consent, and would hold all parties acting contrary to the notice responsible for the consequences. No attention was paid to these notices, either by Leonard Cole or by the defendant, and in October, 1908, this suit was commenced against the defendant. We think this evidence shows that the complainant acted with reasonable diligence in notifying the defendant of its ownership of the land upon which the dam was being constructed and its rights in respect thereto.

[4] We are of opinion that the Circuit Court was also in error in withholding an injunction in this case on the ground that the impounding of the flood waters of Willow creek caused no substantial injury to the complainant. The complainant is the owner of lands riparian to both banks of Willow creek, below the point where the defendant claims the right to divert from the waters of the creek a continuous



flow to the extent of 20,000 cubic inches of water, by miner's measure, under 6 inches of pressure. It will not be necessary to enter into a discussion of the statutes and various decisions of the Supreme Court of Oregon defining riparian rights in that state. We will accept the opinion of the learned District Judge in this case upon that question that:

"The riparian proprietor is entitled to the ordinary and usual flow of a stream as long as it is of any beneficial use to him, and this may, under some circumstances, include flood or overflow waters reasonably to be anticipated during ordinary seasons."

But we do not agree with him that it did not appear from the evidence that the complainant would suffer any substantial injury by the diversion of 20,000 cubic inches of the continuous flow of Willow creek. The creek has its source in the Blue Mountains, where it is fed mainly by the melting snow of that region. The quantity of water flowing in the creek is therefore largely dependent in quantity and duration upon the extent of the snowfall and its melting period in the mountains. In 1904 officers of the government measured the flow of water in Willow creek at a point about 6 miles above the post office at Dell and about 5 miles below defendant's proposed point of diversion. The reported measurements determined the monthly flow of water in the creek in acre feet for the period of a year as follows:

January, 1904.....	615	acre	feet
February, " .....	12,710	"	"
March, " .....	48,140	"	"
April, " .....	37,130	"	"
May, " .....	10,020	"	"
June, " .....	1,886	"	"
July, " .....	422	"	"
August, " .....	31	"	"
September, " .....	116	"	"
October, " .....	579	"	"
November, " .....	530	"	"
December, " .....	750	"	"

Total for the year 1904.....112,929 acre feet

Emory Cole, a witness called for the defendant, had resided in the vicinity of Willow creek for 40 years and assisted the government officers in taking the measurements. He testified that the flow of the creek in the year 1904 was about the average.

In *Whited v. Cavin*, 55 Or. 98, 109, 105 Pac. 396, 400, the Supreme Court of Oregon found that one inch of water, under 6-inch pressure, miner's measurement, is one-fortieth of a second foot, and furnished a flow of 675 gallons per hour, which in 30 days would furnish  $11\frac{1}{2}$  acre feet. By this measurement defendant's right of diversion of 20,000 cubic inches of the continuous flow of Willow creek would be for one month of 30 days the equivalent of 30,000 acre feet of water. Comparing this quantity of water with the average flow of Willow creek as ascertained by the government officers, and we find that such a right of diversion is largely in excess of the average flow of the creek, except during the months of March and April. During the re-

maintaining 10 months of the year defendant would have the right to divert every drop of water flowing in the creek, leaving no water for the settlers below on lands riparian to the creek, no water for the overflow of complainant's bottom lands during that part of the season when most needed, no water for seepage from the creek through complainant's riparian lands during the late spring and early summer, and no water for stock or for domestic purposes for the tenants on complainant's riparian lands after April or May in each year, a part of the season when most required for the growth of grass for pasture of horses and cattle, and for hay for the remainder of the year when pastured is not available, and for the supply of water in wells for family and other domestic purposes.

Complainant's right to object to this diversion is based upon the fact that it is the owner of 7,120 acres of land in Willow creek valley below the point of diversion, and this ownership is derived through mesne conveyances from the grant of the act of Congress of February 25, 1867. Of this land 3,600 acres lie in the lower level of the creek valley in tracts adjacent to and riparian to the creek, and of these lower tracts about 300 acres are rendered productive of wild grass and other hay crops by the natural overflow of the creek. There is some question as to the quantity of this overflowed land owned by the complainant. Defendant admits in its answer that it amounts to 50 acres. We think that the evidence shows that it amounts to about 300 acres, as claimed by the complainant. The court below did not find that the water of the creek had been applied to a beneficial use by the complainant upon any of its lands, and under recent enactments of the state of Oregon, modifying the law of riparian rights in that state, the court held that complainant was not injured by defendant's diversion of the water of the creek to its nonriparian land.

The evidence shows that part of this overflowed land owned by the complainant had been occupied by tenants; that of this land 134 acres had been inclosed by fence, and the grass grown upon the land had been mowed by the tenants and stacked for hay, and other parts of the overflowed land had been used for pasture; that if this land was deprived of the water flowing in from the creek during the spring and early summer, no grass could be grown for hay, and no pasture grown for stock; that the wells would go dry, and the land become worthless for any purpose; that, on the other hand, with the natural flow of water in the creek, the value of the land as estimated by one of the defendant's witnesses is from \$1.25 to \$10 per acre, and by one of complainant's witnesses from \$30 to \$50 per acre, and that the annual rental was about \$2 per acre.

The right of the defendant to appropriate from the water of Willow creek a sufficient amount to maintain a continuous flow of 20,000 cubic inches is based upon the law of appropriation, as provided by the laws of Oregon, and the proceedings taken by the defendant thereunder in making such appropriation. These proceedings were not in all respects in accordance with the requirements of the statute. There were several errors and omissions in the notice and other proceedings, but it is claimed by the defendant that these defects have been cured

and the proceedings validated by subdivision 7 of section 70, c. 216 (Act Feb. 24, 1909) Laws of Oregon 1909, which provides as follows:

"7. And where appropriations of water heretofore attempted have been undertaken in good faith, and the work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in proceedings under this act, because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording, or publication thereof."

Conceding for the purpose of this case the validity of the proceedings incident to the appropriation, it does not follow that the appropriation divested the complainant of its prior right to water upon its riparian lands. The act of February 18, 1891 (Laws of Oregon 1891, p. 52), as amended by Act February 25, 1901 (Laws of Oregon 1901, p. 137; Lord's Oregon Laws, § 6525 et seq.), providing for the appropriation of water for general use and irrigation and for the condemnation of lands for right of way, makes this exception in section 8:

"But no person owning lands lying contiguous to any natural stream shall, without his consent, be deprived of water for household or domestic use, or for the purpose of watering his stock, or of water necessary to irrigate crops growing upon such lands, and actually used therefor."

In the later act of February 24, 1909, *supra*, it is provided that:

"1. Nothing in this act contained shall impair the vested right of any person, association or corporation to the use of water.

"2. Actual application of water to beneficial use prior to the passage of this act by or under authority of any riparian proprietor, or by or under authority of his or its predecessors in interest, shall be deemed to create in such riparian proprietor a vested right to the extent of the actual application to beneficial use: Provided such use has not been abandoned for a continuous period of two years." Paragraphs 1 and 2 of section 70.

Whether complainant's riparian rights attached to the larger sectional areas of its land, aggregating 3,600 acres, containing the overflowed land, we do not stop to consider. It will be sufficient to determine whether the complainant had any vested right to the flow of water in Willow creek by reason of its ownership of the overflowed land. We think the evidence shows beyond any question that at least the bottom lands belonging to the complainant immediately adjoining the creek, and amounting to about 300 acres, would be damaged and the value of the land destroyed for any practical use by defendant's diversion of 20,000 cubic inches of the continuous flow of Willow creek. We are of the opinion, therefore, that the complainant has a prior right in the natural flow of the creek to the extent of its accustomed beneficial use of the water upon this land, and we find that this prior right is not only a vested right under the law, but that it is practically conceded by the admissions contained in defendant's answer in this action. It alleges that:

"It is not, and never has been, its purpose or intention in the construction or maintenance of said dam and said reservoir, and the collection and impounding and use of said water, to so obstruct or interfere with the natural flow of the water of said creek as to interfere in any way with the rights of any person in or to the use of any of the waters of said stream, and it alleges that its proposed system of irrigation by means of said dam and said reservoir can and will be carried out without injury or damage to the complainant or to any other person."

[5] What the natural flow of a stream is was determined by Judge Bean, when Chief Justice of the Supreme Court of Oregon, in the case of *Price v. Oregon Railroad Co.*, 47 Or. 350, 358, 83 Pac. 843, 846. Speaking of the flood waters of a natural stream, the learned judge said:

"When such water has found its way into a natural stream or water course, and mingles with the waters thereof, it becomes as much a part of the stream as any other particle of water in it, and ceases to possess any of the qualities of surface water. And the mere fact that for the time being the channel of the stream is not sufficient to carry all the water does not change the rule, so long as the water forms one continuous body and flows in the course of the ordinary channel of the stream. As said in *Crawford v. Rambo*, 44 Ohio St. 282, 7 N. E. 429: 'It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time; and the land over which its current flows must be regarded as its channel, so that, when swollen by rains and melting snows, it extends and flows over the bottoms along its course, that is its flood channel, as when, by droughts, it is reduced to its minimum, it is then in its low-water channel.' If in times of flood any part of the waters of a stream become separated or disassociated from the main body and spreads out over the adjoining country without following any definite water course or channel, it ceases to be a part of the stream and may be regarded as surface water [citing cases]. But, so long as the waters form one continuous body, flowing in the ordinary course of the stream and returning to the natural channel as they recede, they are, properly speaking, waters of a water course, although not confined to the banks of the stream."

In *Miller & Lux v. Madera Canal Co.*, 155 Cal. 59, 99 Pac. 502, 507, 22 L. R. A. (N. S.) 391, the Supreme Court of California had before it the question whether a riparian owner on Fresno river was entitled to restrain an appropriator on the stream above from diverting the increased flow of the river following the annually recurring fall of rain and melting of snow in the region about the head of the stream, when such diversion would deprive the riparian owner of the customary flow of water which was or might be beneficial to his land. The court held that the riparian owner was entitled to have the appropriator restrained from such a diversion. The court in bank, affirming the decision of the court in department, said:

"There is no good reason for saying that the greatly increased flow following the annually recurring fall of rain and melting of snow in the region about the head of the stream is any less usual or ordinary than the much diminished flow which comes after the rains and the melted snows have run off."

In department the court had referred to the flow of the Fresno river and the showing that had been made that practically every year during the winter and early spring months, on account of rainfall and the melting of the snows in the watershed of the stream, the Fresno river carried a large volume of water; that at the highest stages of the flow the water overflowed the main and branch channels of the river at various points and spread over the low-lying lands adjacent thereto, and so continued until the volume of water coming down the stream commenced to lower, when the overflow waters would recede back into the main channel of the river and flow on with the rest of the water;



that this overflow was practically of an annual occurrence, and might be and was anticipated in every season of ordinary rainfall within the watershed of the Fresno river, and failed to occur only in seasons of drouth or exceptionally light rainfall. With respect to this overflow the court said:

"Upon this showing it cannot be said that a flow of water, occurring as these waters are shown to occur, constitutes an extraordinary and unusual flow. In fact, their occurrence is usual and ordinary. It appears that they occur practically every year, and are reasonably expected to do so, and an extraordinary condition of the seasons is presented when they do not occur. They are practically of annual occurrence and last for several months. They are not waters gathered into the stream as the result of occasional and unusual freshets, but are waters which, on account of climatic conditions prevailing in the region where the Fresno river has its source, are usually expected to occur, do occur, and only fail to do so when ordinary climatic conditions are extraordinary—when a season of drouth prevails. As to such waters, it is said in *Gould on Waters*, § 211: 'Ordinary rainfalls are such as are not unprecedented or extraordinary; and hence floods and freshets which habitually occur and recur again, though at irregular and infrequent intervals, are not extraordinary and unprecedented. It has been well said that "freshets are regarded as ordinary which are well known to occur in the stream occasionally through a period of years though at no regular intervals."' And when such usually recurring floods or freshets are accustomed to swell the banks of a river beyond the low-water mark of dry seasons, and overflow them, but such waters flow in a continuous body with the rest of the water in the stream and along well-defined boundaries, they constitute a single natural water course. \* \* \* It is well determined by the authorities that waters flowing under circumstances such as these, notwithstanding they may consist of a large expanse of water on either side of the main channel, constitute but a single water course and that riparian rights pertain to the whole of it."

The court then refers to the decision of the Supreme Court of Ohio in *Crawford v. Rambo*, 44 Ohio St. 279, 282, 7 N. E. 429, 431, cited by Judge Bean in *Price v. Oregon Railroad Co.*, *supra*, and continues:

"So in *O'Connell v. East Tennessee Ry. Co.*, 87 Ga. 246, 13 S. E. 489, 491, [13 L. R. A. 394], 27 Am. St. Rep. 246: 'If the flood water forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, as by the recession of the waters, it is to be regarded as still a part of the river. \* \* \* The surplus waters do not cease to be a part of the river when they spread over the adjacent low grounds without well-defined banks or channels, so long as they form with it one body of water eventually to be discharged through the proper channel.' To the same effect are *Chicago, etc., Ry. Co. v. Emmert*, 53 Neb. 237, 73 N. W. 540, 68 Am. St. Rep. 602; *Fordham v. Northern Pacific Ry. Co.*, 30 Mont. 421, 76 Pac. 1040 [66 L. R. A. 556] 104 Am. St. Rep. 729; *Jones v. Seaboard, etc., Ry. Co.*, 67 S. C. 181, 45 S. E. 188; *New York, etc., Ry. Co. v. Hamlet Hay Co.*, 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; *Cairo, etc., Ry. Co. v. Brevoort (C. C.)* 62 Fed. 129 [25 L. R. A. 527]. And where the stream usually flows in a continuous current, the fact that the water of the stream, on account of the level character of the land, spreads over a large area without apparent banks, does not affect its character as a watercourse. *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349; *West v. Taylor*, 16 Or. 165, 13 Pac. 665."

These cases refer to conditions similar to those on Willow creek, and under the law of Oregon applicable thereto we think the complainant clearly established its right to the natural flow of the water of

that stream to the extent of the overflowed land, and this right should have been protected by the court.

The act of February 24, 1909 (Laws of Oregon, 1909, pp. 319-343, c. 216 [Lord's Oregon Laws, §§ 6594 to 6672]), provides a system for the regulation, control, distribution, use, and right to the use of water, and for the determination of existing rights thereto within the state of Oregon, and provides for a board of control, of which the state engineer and the superintendents of the two water divisions, into which the state is divided, are made constituent members. This board of control is given authority by the act to determine the relative rights of the various claimants to the waters of a stream; and in case suit is brought in the state court for the determination of rights to the use of water, the case may, in the discretion of the court, be transferred to the board of control for determination as in the act provided. The determination of the board of control, as confirmed or modified as provided by the act, is made conclusive as to all prior rights and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination.

The decree of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion, and subject to such proceedings as may be had by the state board of control within its jurisdiction with respect to the rights of the parties herein to the waters of Willow creek.

ROSS, Circuit Judge (concurring). In the case of *Roberts v. Southern Pacific Co.* (C. C.) 186 Fed. 934, I had occasion to say:

"Can a citizen of the United States, or one having declared his intention to become such, lawfully enter upon and claim as mineral ground land theretofore patented by the government to a railroad company under a congressional grant; such patents, after describing the land thereby conveyed, containing the clause: 'Yet excluding and excepting "all mineral lands," should any such be found in the tracts aforesaid. But this exclusion and exception according to the terms of the statute, shall not be construed to include "coal and iron lands."' The complainants' alleged rights to the lands in question in this suit were, according to their express allegation, not acquired until 15 years after the issuance of patents to the Southern Pacific Railroad Company therefor, at which time they claim to have made mineral locations upon them, and by this suit, the nature of which is variously characterized by their counsel, they ask the court to protect their alleged rights as such mineral locators by some sort of injunctive process by 'controlling' the patents which were issued by the government and which they expressly allege conveyed the legal title to the land to the grantee therein named. If the above-quoted clause inserted in the patents had the effect of excepting from the lands described in the granting clause thereof all of such lands in which mineral might thereafter be found, the discovery of mineral in the lands in suit by the complainants, if such has been made as alleged, 15 years after the issuance of the patents, would undoubtedly defeat the grant under which the defendants hold, for the reason that the clause is without limitation as to time, and a determination by a court or jury, as the case might be, at any subsequent date, however remote, that any of the land described in the granting clause of the patents had turned out to be mineral land, would thereby necessarily determine that such land was never within the terms of the railroad grant made by Congress, notwithstanding the fact that the officers of the government charged with the duty of inquiring into and determining the question and of issuing the government patent for the lands granted had issued such conveyance. A

mere statement of the necessary consequence of the complainants' contention is enough to show that it cannot be sound. It would make of the patents a delusion and a snare, instead of a muniment of title designed for the peace and security of those holding under them. Undoubtedly, if the lands in suit were known to be mineral lands at the time they were applied for by the railroad company under the congressional grant to it, and if the patenting of them was, as alleged by the complainants, procured by means of the false affidavit of its land agent, or through any other fraud on its part, the government, or any one in privity with the government, could justly complain, and by suit brought within the time fixed by Congress for that purpose procure a cancellation of such patents. But this is not such a suit. Neither the government nor any one in privity with the government title is here complaining. The suit is by strangers to that title, for by the express averments of the bill the complainants' alleged rights were not initiated until years after the issuance of the patents which they expressly allege conveyed to the railroad company the legal title to the lands. That the complainants cannot be heard to complain of the alleged frauds upon the government is thoroughly settled by decisions so numerous as to make their citation unnecessary. They must be familiar to all lawyers at all acquainted with the law in respect to the public lands. The only real question, therefore, in the case, is whether the lands in suit are excluded from the patents by reason of the alleged subsequent discovery of mineral therein by the complainants under the exception clause inserted in the patents, already quoted, but which I here repeat: 'Yet excluding and excepting "all mineral lands" should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include "coal and iron lands."' Where did the officers of the government charged with the duty of issuing patents for lands granted by Congress get authority to cast upon courts or juries the duty or power of ascertaining and determining the character of the public lands applied for under the grant which Congress devolved upon the land department of the government as a prerequisite to the issuance of a patent therefor? The statutes of the United States will be searched in vain for any such authority, unless it can be deduced from the joint resolution of Congress of June 28, 1870 (No. 87, 16 Stat. 382), relating to the grant to the Southern Pacific Railroad Company made by its preceding act of July 27, 1866 (14 Stat. 292, c. 278)."

The grant under which the patent in the present case was issued was not a railroad grant, and, of course, there was no such joint resolution of Congress—the grant in this case being a wagon road grant. But the cases are entirely similar, and the decision there made precisely in point. I am entirely satisfied of the correctness of that decision, and therefore consider it perfectly clear that the appellant in the present case has shown legal title to the land upon which the appellee entered and undertook to build the large reservoir referred to in the opinion; and for the reasons stated in the opinion I agree that the appellant was entitled to an injunction to prevent such invasion of its rights. And under the laws of the state of Oregon I agree that the appellant as riparian owner upon the creek in question is at least entitled to the reasonable use of such portion of the waters of the stream as have been applied by nature, or its own efforts, to a beneficial use.

GILBERT, Circuit Judge (dissenting). The appellee was engaged in constructing a dam across Willow creek for the purpose of impounding the winter flood waters of that creek, and diverting the same for use in irrigation. The appellant brought the present suit to en-

join the construction of the dam, claiming equitable relief on two grounds: First, that the dam was being constructed upon, and when completed would flood, certain lands belonging to the appellant; and, second, that by impounding the flood waters of the creek the appellee would prevent the occasional flooding of 3,600 acres of lands of the appellant lying at a considerable distance below the dam, which lands were alleged to be subject to annual overflow from the waters of said creek and capable of irrigation therefrom. There was no tenable ground for demurring to the complaint on the ground that the appellant had an adequate remedy at law for the recovery of the possession of the ground occupied by the dam or flooded thereby, for the relief sought as to such lands was coupled with a prayer for an injunction against preventing the annual overflow of the 3,600 acres of land of the appellant so alleged to be annually irrigated thereby. Upon the issues and the testimony, the court below reached the conclusion that, as to the lands actually occupied by the dam and to be flooded thereby, the appellant's remedy was at law, and that no ground was shown for an injunction against the diversion of the winter flood waters from the lands of the appellant lying below the dam, for the reason that the evidence showed that no substantial injury would result to the appellant therefrom. It is now held by the majority of this court that the decree of the court below should be reversed.

One member of this court is of the opinion that the decree should be reversed on the ground that the lands which the appellee will occupy for its dam and reservoir are included within the boundaries of a patent from the United States to the appellant, and that, although said lands are mineral lands, the exception in the patent whereby mineral lands are reserved is void. With that view I am not in accord. The patent was issued under the act of February 25, 1867, which provided that the grant should not embrace mineral lands of the United States. The patent was issued May 28, 1902, and it repeats the exception which was contained in the act in these words:

"Yet excluding and excepting all mineral lands if any such be found in the tract aforesaid."

It is clear from the language of the patent that no investigation whatever was made by the officers of the land office as to the mineral character of the lands, for it grants lands which—

"have been listed by the duly authorized land agent of said company, as shown by its original lists approved by the local officers and now on file in the General Land Office."

As was said by the court below, the patent when read in connection with the act—

"manifests an unmistakable intention on the part of the government not to convey mineral lands, and repels any inference that the department adjudicated or intended to adjudicate that no part of the land described in the patent was mineral."

The appellee acquired the title of the mining claimants to the lands so to be occupied by the dam and reservoir. Those lands lie in the creek bed in a canyon, and have been occupied as mining claims, some



of them since 1862, and the most thereof since 1869. On April 25, 1908, one of the appellant's agents wrote to another of its agents that the land—

"involves about seven miles of creek bed, which has been mined over more or less for the last 35 years."

In another letter he wrote:

"We understand this land along Willow creek has been mined off and on ever since 1862."

In my opinion these mineral lands were excluded from the patent and never passed to the appellant.

The view of the other member of this court is that, conceding that known mineral lands are excluded from the patent, there is, notwithstanding, one tract of 10 acres, the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 27, included in the lands to be occupied as a reservoir, upon which no mining location has been made, since no mining location filed in the county clerk's office describes that particular portion of the section, and that therefore that tract of land passed to the appellant, and that the use to which the appellee proposes to put it affords ground for injunction for the reasons: (1) That the threatened trespass will operate to the destruction of the estate of the appellant in that 10 acres; (2) that the appellant has no adequate remedy at law, for the reason that the appellee is insolvent and unable to respond in damages—and that, in any view of the case, the appellant is entitled to an injunction against the diversion of the flood waters which occasionally irrigate the lands of the appellant lying below the dam.

These grounds for reversing the decree, I submit, are not sustained by the evidence. The evidence, I think, fully justifies the conclusion of the court below that all the lands which are to be occupied by the dam and reservoir are mineral lands, are in the possession of the appellee, and have been in the adverse possession of the appellee and its predecessors in interest for more than 10 years prior to the commencement of the suit. The fact that a certain tract of 10 acres in section 27 is not included in any mining location as the locations appear on file in the county clerk's office should not be held to overcome the testimony of witnesses that it has actually been occupied for mining purposes. Mining locations as they have been marked upon the ground prevail over the calls and distances of the recorded notices thereof. But, even if no mining location had actually been placed upon that particular tract, it is nevertheless mineral land, situated in a mineral country, and surrounded by mining claims. This 10 acres of mineral land was in the actual possession of the appellee under a claim of title. The threatened acts of the appellee could cause no destruction thereof or injury thereto. It is undisputed that the land is of no value for agricultural purposes, and that its sole value is in the mineral which it may contain. A complainant out of possession may obtain an injunction against trespass upon real estate only to prevent destruction of the property, and only in cases where it is sought in aid of an action at law, which is pending or is contemplated. *Buchanan Co. v. Adkins*, 99 C. C. A. 246, 175 Fed. 692; *Erhardt v. Boaro*,

113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873.

The only proof of the insolvency of the appellee as ground for the appellant's resort to equity for relief is found in a copy of certain proceedings in bankruptcy filed in this court since the submission of the case herein, which shows that the appellee has become insolvent. There was no allegation of its insolvency in the pleadings in this case, and no suggestion thereof was made in the court below or in the record which is presented to us. I submit that the proceedings in bankruptcy have no proper place in the case which is before us, and that we have no right to consider them. The question before us is whether the court erred in the decree which was rendered upon the pleadings and proofs which were before it.

Nor do I think that the trial court erred in its conclusion that the impounding of the winter flood waters of Willow creek would result in no injury to the appellant's lands lying below the dam. The appellant in its bill alleged that 3,600 acres of such lands which it owned were subject to the annual overflow of the waters of the creek and capable of irrigation therefrom. There is no evidence even tending to show that more than one-tenth part of the 3,600 acres has ever been reached at any flood of the creek. On the contrary, the evidence fully sustains the conclusion of the court below that the lands of the appellant which were subject to the occasional and irregular winter overflows consisted of five or six small low-lying parcels of unimproved, uncultivated, and uninclosed land, whose sole crop is wild grass, the total quantity of which does not exceed 40 or 50 acres. The evidence shows that the winter flood does not occur every year, and that it floods these lands but two or three days, and at a time when they are either already saturated with rain and snow, or are frozen so that the water merely passes over their surface. There is credible evidence, also, that these winter floods are an injury rather than a benefit to these lands.

Upon reading the whole of the evidence in this case, no unbiased mind can reach any other conclusion but that the real object of the suit is, not to prevent injury to the appellant's lands, but to checkmate the scheme of the appellee to impound the flood waters of Willow creek, in order that the appellant itself might have the opportunity to organize a scheme to do the very thing which the appellee was engaged in doing. This is fully shown by the correspondence that passed between the appellant and its agents during the 17 months preceding the commencement of the suit. As early as December, 1907, the appellant's agent at Vale, Or., received written instructions to keep close watch upon the operations of the appellee. Said the letter:

"It may become necessary to organize the bench owners and the present water users who have sold, to resist the monopoly of the main flow of the creek."

On December 23, 1907, the general agents at Portland wrote to the appellant at San Francisco, suggesting a combination of landowners to bind themselves together to refuse to take any water from any one—"thereby making it impossible for the company seeking to supply them to do any business, which would cause a lapse of their rights."

The letter recommends that Clagett, the agent at Vale, be instructed to encourage the organization of the landowners in a scheme to oppose the plans of the appellee's predecessors in interest, and suggests that he become a member of the landowners' committee, so that he might obtain inside information concerning developments. The letter suggested that he would be in a position to "checkmate" the landowners' organization. In that letter it was further said:

"Mr. Clagett's view that you have no defined water rights in connection with your Willow creek lands means, we think, at the normal flow. We suppose, as riparian owners of several tracts, you have certain legal rights which could be asserted against the monopoly of the flood waters."

On January 6, 1908, the same agents wrote concerning the efforts of the appellee to obtain control of the reservoir site and of the strategic points along the creek by purchase, and said that if they did so—

"they will probably have the bench landowners at a serious disadvantage. The latter must anticipate their obtaining this control. They should insist in a forceful way on a declaration by the syndicate of their plans. If no satisfaction is obtained, then action should be taken, with the assistance of skilled lawyers and engineers, to prevent the syndicate from getting detrimental control. Your position is the same as that of the individual bench landowners. Your lands will be deferred in their development if some way of bringing water to them is not opened up before the syndicate has obtained the control the methods they employ indicate."

On January 10, 1908, the same agents wrote to the appellant as follows:

"In their present state, your lands in this district are practically only nominally valuable. An irrigation undertaking will make them very valuable, if precaution is taken to bring them in or keep them out, as the shrewdest policy will dictate."

On April 1, 1908, Clagett wrote to the general agents at Portland:

"Must confess we have misgivings in regard to the present situation. We have felt all the time that the Eastern Oregon Land Company was making a mistake in not adopting an active programme in regard to Willow creek, and if we were confident that these people only contemplated a small undertaking, would advise a consideration of steps to secure options upon a portion of Willow creek lands which control vested rights."

When Clagett, on the witness stand, was asked what was the intended purpose of taking options on lands along the creek, he answered:

"It was desired to checkmate them."

The word "checkmate" appears more than once in the correspondence, and to checkmate the scheme of the appellee, Clagett testified, was "undoubtedly" the purpose for which the present suit was brought. In all of the correspondence, and in the notices which were served upon the appellee, there is nowhere a suggestion that the construction of the dam and reservoir and the impounding of the flood waters will cause any actual injury to the appellant's lands, either above or be-

low the dam, or deprive the appellant of flood waters for the irrigation of any portion of the lands, or that it had ever applied any of those waters to a beneficial use.

I submit that the case as it comes to this court should be determined upon the issues that were framed in the court below, and that upon those issues and the evidence the decree of that court was correct, and should be affirmed.

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**JOHN II ESTATE, Limited, et al. v. BROWN et al.**  
(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 1,996.

**1. WILLS (§ 471\*)—CONSTRUCTION—TRANSLATION OF WILL WRITTEN IN HAWAIIAN LANGUAGE.**

Where a clause in a will written in the Hawaiian language was capable of two admissible translations into English, one of which made it harmonize with the other provisions of the will, while the other rendered the will contradictory in terms and inconsistent in purpose, the court properly adopted the former.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 989; Dec. Dig. § 471.\*]

**2. WILLS (§ 614\*)—CONSTRUCTION—ESTATE DEVISED.**

A will written in the Hawaiian language, as translated, contained the following provisions: "All my property, both real and personal, shall descend to my heirs who are mentioned below as follows: First. Irene Haalou II, my own daughter, is the first heir as follows: [Here follows description of certain real estate] and one-half of all my personal property. \* \* \* Fifth. \* \* \* By this will I have appointed and I do hereby appoint, \* \* \* they both to be executors and guardians of the person and property of my daughter, the first devisee mentioned in this will. All the income from the lands that are leased and all other receipts from all the lands of my daughter they two alone shall have the sole care of it until she becomes of age, and in the event of her giving birth to children they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes expressed in this will. \* \* \* And further, if my daughter should die having borne children, then the property shall descend to her children, and if she should die without having had any children the property shall descend to her own mother. \* \* \*" The daughter married after the testator's death and had children. *Held*, that the will gave her a life estate only in the lands, with remainder in fee to her children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393-1416; Dec. Dig. § 614.\*]

**3. WILLS (§ 471\*)—CONSTRUCTION—ESTATE DEVISED.**

If the granting clause in a devise of real estate in clear, certain, and definite terms devises an estate in fee, it cannot be qualified by subsequent provisions, unless the intention to do so appears in equally clear and unmistakable terms; but if the granting clause is indefinite and uncertain as to the estate devised, subsequent provisions may be referred to for the purpose of determining it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 989; Dec. Dig. § 471.\*]

**4. WILLS (§ 450\*)—RULES OF CONSTRUCTION.**

It is a fundamental rule in the construction of wills that, if possible, effect be given to every word and every clause, and the several clauses

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



should be made to harmonize with the general intent of the testator, as it may be gathered from a consideration of the whole instrument.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 966; Dec. Dig. § 450.\*]

**5. COURTS (§ 387\*)—COURTS OF REPUBLIC OF HAWAII—CONSTRUCTION OF STATUTE—POWER TO RESERVE QUESTIONS FOR SUPREME COURT.**

Laws Hawaii 1892-93, c. 57, § 72, which provides that, whenever any question of law shall arise in any trial before a circuit court, the presiding judge may reserve it for the consideration of the Supreme Court, did not authorize a circuit judge to reserve the question of the construction of a will, to ascertain the intention of the testator with respect to a trust created by the will, which was one of fact, and not of law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1032-1037; Dec. Dig. § 387.\*]

**6. JUDGES (§ 27\*)—POWERS AT CHAMBERS—HAWAIIAN STATUTE.**

Such authority, not being vested in the court, but in the presiding judge, might lawfully be exercised by him while sitting in equity in chambers.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 109-139; Dec. Dig. § 27.\*]

**7. INFANTS (§ 113\*)—JUDGMENT—SUIT TO CONSTRUCT WILL—MINORS UNREPRESENTED BY COUNSEL.**

A decree, which either directly or incidentally determined the respective interests of a mother and her minor children under a will, which were necessarily adverse, is not binding on the minors, where they were represented only by the counsel who also represented their mother.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 321; Dec. Dig. § 113.\*]

**8. JUDGMENT (§ 574\*)—NECESSITY FOR ENTRY.**

Where an appellate court filed an opinion, answering certain questions, which had been reserved for its determination in an equity suit by the judge of a lower court, as authorized by statute, but neither entered a decree nor remanded the cause, and no decree was ever entered by the lower court, there was no adjudication binding on the parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1021; Dec. Dig. § 574.\*]

**9. JUDGMENT (§ 572\*)—MATTERS CONCLUDED—SCOPE OF DECREE ON DEMURRER.**

A decree dismissing a bill in equity on demurrer on specific grounds set forth in the opinion of the court, referred to therein, is conclusive only on the specific questions so determined; and where they do not go to the merits, the opinion of an appellate court, which affirms such decree, cannot enlarge its scope to cover the merits, and bar a subsequent suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1041, 1047-1049; Dec. Dig. § 572.\*]

**10. JUDGMENT (§ 489\*)—COLLATERAL ATTACK—WANT OF JURISDICTION.**

Where an appellate court was without jurisdiction to answer a question reserved for its decision by a lower court, its decision of such question was absolutely void, and subject to collateral attack in any other court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 924, 925; Dec. Dig. § 489.\*]

In Error to the District Court of the United States for the Territory of Hawaii.

Petition by the United States to condemn certain real estate at Pearl

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
201 F.—15

Harbor, on the Island of Oahu, in the territory and district of Hawaii, for the uses and purposes of the United States. Award of \$10,000 to the owners of the land. Answer was filed by the John Ii Estate, Limited, a Hawaiian corporation, by Charles A. Brown and John A. Magoon, directors, claiming the entire award, and by George Ii Brown, and Francis Hyde Ii Brown, a minor, by A. A. Wilder, as guardian ad litem, claiming an interest therein. Decree in favor of the latter named defendants, and the John Ii Estate, Limited, brings error. Affirmed.

This cause comes before this court upon a writ of error to the United States District Court for the Territory of Hawaii to review the action of the court in determining the claims of contesting claimants to a fund of \$10,000 paid into the registry of the court by the United States for a tract of land, containing 50 acres, taken under condemnation proceedings.

On February 10, 1906, the United States filed its petition in condemnation proceedings in the United States District Court for the Territory of Hawaii for a tract of land having an area of 50 acres on Pearl Harbor, in the Island of Oahu, in the territory and district of Hawaii. The land described in the petition is a portion of the ahupaa (or tract) of Waipio, which was the property of one John Ii at the time of his death in 1870. The defendants and respondents named in the petition in condemnation were the John Ii Estate, Limited, a Hawaiian corporation, Carl S. Holloway, Irene Ii Holloway, Francis Hyde Ii Brown, George Ii Brown, Irene Ii Holloway, as guardian of the persons and estate of Francis Hyde Ii Brown and George Ii Brown, and Charles A. Brown, John A. Magoon, Alfred W. Carter, Sidney M. Ballou, and Irene Ii Holloway, directors of the John Ii Estate, Limited.

Answers were filed by Francis Hyde Ii Brown, a minor, and George Ii Brown, a minor, by A. G. M. Robertson, their guardian ad litem, and by the John Ii Estate, Limited, by Charles A. Brown and J. Alfred Magoon, directors. The only material issue raised in the answers was contained in the answer of the two minors, by their guardian ad litem, in which it was alleged that their claims in and to said parcel of land were adverse to and in conflict with the claims of the other defendants, and that it would be necessary for the court, in the event of the prayer of the petition being granted, to decide said respective claims, and to apportion the money that might be adjudged to be paid by said petitioner for said land. The petition was heard by the court, and on August 24, 1909, judgment was entered, wherein it was adjudged that the land described in the petition should be condemned for the uses and purposes of the United States as in said petition alleged. The value of the tract of land condemned was fixed and determined to be the sum of \$10,000, and this sum it was adjudged should be paid as compensation for said land to the defendants and respondents, or such of them as might thereafter be adjudged entitled thereto. The contesting claimants to this award were the John Ii Estate, Limited, claiming the whole of the award, and Francis Hyde Ii Brown, a minor, and George Ii Brown, each claiming an interest in said award.

The John Ii Estate, Limited, claimed the whole of the award upon the ground that the land for which the \$10,000 was paid belonged to the John Ii Estate, Limited, in fee simple; that the land was by John Ii devised in fee to Irene Ii by will; that said will was admitted to probate in the Supreme Court of the Hawaiian Islands on the 10th day of June, 1870, and confirmed to her by the decision of the Supreme Court of the Hawaiian Islands rendered May 4, 1897 (11 Hawaii, 47), and by said Irene Ii and her husband, Charles A. Brown, conveyed to Henry Holmes, as trustee, by deed dated July 2, 1897, and by Holmes conveyed to said John Ii Estate, Limited, by deed of July 9, 1897, and confirmed to said estate by decision of the Supreme Court of the Territory of Hawaii rendered November 21, 1903 (15 Hawaii, 308); that the right of the John Ii Estate, Limited, to the money was res judicata; that all the other defendants were estopped to claim the same; that no person had any interest, right, or claim in said money.

In the claim of Francis Hyde II Brown it was alleged that the land was formerly owned in fee by John II, since deceased; that it was devised by will to his daughter Irene for life, and upon her death to her children, or, in the event of her not having borne children, then to her mother, Maraea II, if then living, and, if not, then to the testator's brother J. Komoikehuehu; that thereafter Irene II became the wife of C. A. Brown, and at the time of filing the claim was then the wife of C. A. Holloway; that as a result of Irene II's marriage with C. A. Brown there were three children, namely, the claimant, Francis Hyde II Brown, George II Brown, one of the respondents, and Bernice II Brown, who died in infancy; that by reason of these facts claimant became the owner of an undivided interest in said land in fee simple, and was entitled to a one-third share or interest in said fund, subject to the life interest therein of Irene Holloway, or the John II Estate, as the assignee of her life interest. And, further answering the claim of the John II Estate, claimant alleged that the opinion of the Supreme Court of Hawaii, rendered on May 4, 1897 (11 Hawaii, 47), was not binding upon claimant and did not affect his title to said land nor his right or claim in or to said fund for the following, among other, reasons: (1) That the cause in which said opinion was rendered was a suit in equity, and the opinion was rendered upon questions reserved in said suit by the circuit judge before whom the suit came on for hearing; but the said circuit judge was without authority of law or jurisdiction to so reserve said questions in said suit. (2) That the said Supreme Court had no jurisdiction or authority to hear, determine, or otherwise pass on the questions so reserved as aforesaid. (3) That the said Supreme Court, at the time of the rendition of said opinion, was composed or constituted of Associate Justice Whiting, of the court, and two members of the bar of the court, who sat as substitute justices in the cause at the request of the said associate justice; but that the request was made without any right or authority of law, the court as so composed and constituted was not a legally constituted court, and its opinion was without legal effect. (4) That the claimant was not a party to said suit. (5) That the purported attempt of A. F. Judd to represent the claimant in said suit as his next friend was illegal, null, and void, in that said Judd was at the same time acting, or purporting to act, as the next friend of claimant's mother, whose interests in said suit were adverse to claimant's interests therein on the question as to the nature of the estate in said land devised to her by said will. (6) That the jurisdiction of the Supreme Court, if it ever acquired jurisdiction, in said suit, was, under the pleadings, limited to the determination of the question whether any trust was then in existence concerning the property devised by the will, and that its jurisdiction ended upon its determining that no such trust existed. (7) That no judgment, order, or decree was ever made in any of the aforesaid proceedings in said suit in equity, pursuant to the opinion of the Supreme Court, or otherwise, adjudicating or determining the rights of claimant under said will in any of the property therein devised.

Further answering the claim of the John II Estate, Limited, the claimant alleged that the opinion of the Supreme Court of the Territory of Hawaii, rendered on November 21, 1903 (15 Hawaii, 308), did not adjudicate or determine claimant's right or title in any of the property devised by the will of said John, deceased, and did not affect the claimant's right of claim in or to said fund in court.

In the statement of claim of George II Brown, impleaded as a minor, it was alleged that he arrived at the age of majority October 18, 1907, and, alleging the prior proceedings substantially as did Francis Hyde II Brown, claimed an undivided interest in the land in fee simple, and entitled to a one-third share or interest in the fund, subject to the life interest therein of Irene II Holloway.

To fully understand the questions at issue between these claimants as to their alleged right to the fund in court, it will be necessary to state some of the material facts in the case in their chronological order. In doing so we will abbreviate names, as was done by the court below. The Estate of John II, Limited, will be referred to as the "Estate"; the person named

as Irene H Brown, and subsequently as Irene H Holloway, will be referred to as "Irene"; the person named George H Brown will be referred to as "George"; the person named as Francis Hyde H Brown will be referred to as "Francis"; and these two, when mentioned collectively, will be referred to as "the children."

On May 2, 1870, John H, a Hawaiian, a resident of the Island of Oahu, Hawaiian Islands, died leaving a large estate in real and personal property, situated on the Island of Oahu and elsewhere in the Hawaiian Islands, which he devised by will (the original of which is in the Hawaiian language) duly admitted to probate in the Supreme Court of the Hawaiian Islands on the 10th of June, 1870. A translation of the will was agreed upon by the parties to the action, the material portions of which are:

"\* \* \* All my property, both real and personal, shall descend to my heirs who are mentioned below, as follows:

"First. Irene Haalou H, my own daughter, is the first heir as follows: [Here follows a description of certain lands, including the land condemned in this case.] And one-half of all my personal property.

"Second. My wife, Maraea H, is my second heir. [Here follows description of certain lands.] And one-half of all my personal property; and in case my wife marries again this land shall descend to my daughter; she cannot bequeath to any one.

"Third. My brother, J. Komolkehuehu, is the third heir. [Here follows a description of certain lands.] Those are the lands I bequeath to him.

"Fourth. My interest in the land of G. Naahelu, my deceased younger brother, is for his widow Kamealani.

"Fifth. My land [here follows a description of certain lands] is for A. F. Judd, and that is his land that I bequeath to him.

"By this will I have appointed and I do hereby appoint J. Komolkehuehu, A. F. Judd, they both to be the executors and guardians of the person and property of my daughter the first devisee mentioned in this will.

"All the income from the lands that are leased and all other receipts from all the lands of my daughter, they two alone shall have the sole care of it until she becomes of age or has children of her own; they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes as expressed in this will, and they shall receive compensation, the same as provided by law. \* \* \*

"And the first fruits received from the lands of my daughter, that is, the money received, there shall be taken therefrom ten cents from each dollar which is set apart as an offering to God's kingdom, the same as I have done, and my executors are to carry out this request of mine.

"And further, if my daughter should die having borne children, then the property shall descend to her children, and if she should die without having had any children the property shall descend to her own mother, and if she should be dead then the property shall descend to my brother, J. Komolkehuehu."

Irene H Holloway is the daughter of John H, deceased, and is the Irene Haalou H named in John H's will. Irene married Charles A. Brown September 30, 1886, and three children were born of the marriage—George H Brown, of full legal age on October 18, 1907; Francis Hyde H Brown, a minor; and Bernice H Brown, who died in infancy in 1894. Irene had no other children. In 1898 a divorce separated Irene and Charles A. Brown, and Irene afterward married Carl S. Holloway.

On July 2, 1897, Irene and Charles A. Brown conveyed their interest in the lands to Henry Holmes, as trustee, who, in the same month, conveyed to a corporation, the John H Estate, Limited, the plaintiff in error here. The stock of this corporation was issued, one-third to Irene, one-third to Charles A. Brown, and one-third to Henry Holmes, trustee for George H Brown and Francis Hyde H Brown, the surviving Brown children, in equal shares. The shares held by Henry Holmes as trustee for George H Brown have been turned over to him since he attained his majority; and he has, since his majority, received and accepted the monthly dividends paid upon his shares.



We come now to the first case in the courts of Hawaii where this estate has been a subject of controversy.

On April 7, 1894, after the marriage of said Irene with C. A. Brown, and the birth of her three children, A. F. Judd, one of the executors of the last will of John H, deceased, and one of Irene's guardians, after being discharged as such guardian, brought a bill in equity before a circuit judge in the circuit court of the First judicial circuit, territory of Hawaii, for himself and as next friend of the said Irene and her surviving children, against C. A. Brown, to declare and execute a trust and for an accounting, upon the proper construction of the will of John H, deceased.

The bill included a prayer that the court construe and determine the relative rights of Irene and her children and her husband, C. A. Brown, in and to said estate under said will. The defendant Brown did not plead to this bill, but appeared specially for the purpose of asking the court to dismiss the bill, on the ground that the plaintiff Irene had filed her discontinuance of the suit. The bill appears not to have been satisfactory to Irene, and by her attorneys, Hatch & Magoon, she asked leave of the court by motion to discontinue all proceedings in the cause. After some controversy, an amended bill was substituted for the original bill on August 10, 1894, with the same parties as plaintiffs and defendant, except that Sanford B. Dole, administrator with the will annexed and guardian, was joined therein as an additional party plaintiff.

In the original bill it was alleged, in substance, that John H died in 1870, leaving a large estate in the Islands, which he devised by a will duly admitted to probate, a copy of which was attached; that Judd and J. Komoikehuehu were duly appointed executors of the will and guardians of the personal property of Irene, then aged about nine months, and duly qualified as such executors and guardians; that in 1875 said J. Komoikehuehu resigned his trust, and Sanford B. Dole was duly appointed in his place; that thereafter, and until November 13, 1886, Judd and Dole performed their duties as such executors and guardians, and on that date applied to the court for their discharge as guardians, on the ground that their powers had ceased to be operative because of the marriage of Irene to C. A. Brown; that they were never discharged as executors of the will; that Judd, upon being appointed executor and guardian, received from the court an instrument purporting to be a true and correct copy of the will of John H, upon which he exclusively relied in determining his powers and duties; that in the copy of the will the words, "O lana no na hooko kaohia i ka wa e ola ana kuu kalamahine a i kana mau keiki," meaning, "They two shall be the executors during the lifetime of my daughter and her children," were omitted; that Judd and Dole were, therefore, not fully advised of the true intent of the will, and supposed that no trust was created by said will that would not terminate when Irene attained her majority or married; that upon their discharge the guardians delivered to Irene and her husband all the property devised by the will to her; that by the terms of the original will Judd and Komoikehuehu were constituted the trustees of the property during the life of Irene, whether married or not. Judd, as sole surviving trustee named in the will, submitted the construction of the will to the adjudication of the court, and asked that his duties and obligations as surviving trustee be authoritatively defined; that C. A. Brown had possession of the property and claimed the personal right to all rents, issues, and profits, and the exclusive control and management thereof; that Brown denied the existence of any trust, refused to allow Judd to take possession of the property, and refused to account to any one for the rents, issues, or profits; that Brown had wasted, squandered, and mismanaged the estate, and had incurred large liabilities, which he illegally sought to make a charge upon the estate; that Brown, at the time of his marriage with Irene, had full knowledge of the contents of the will; that he had failed to make any settlement upon his wife, and failed to make adequate or proper provision for her; that, unless restrained, Brown would further waste and squander the estate, and do irreparable injury thereto; that said Irene desired the court to set apart a reasonable allowance for her out of the income of the estate to support herself and two children; that

under the will provision was made for the children of Irene, and for the support of Irene; that it was important to obtain a construction of such provisions, and the relative rights under the will of such children and Irene, and Brown, in and to the estate, and to the income thereof; and to that end complainants prayed that the terms and provisions of said will and the duties and obligations imposed thereunder upon the said A. F. Judd as aforesaid be defined and determined, and that the said Judd be reinstated as trustee.

The amended bill followed in the main the original bill, but omitted the allegations that Brown had wasted, squandered, and mismanaged the estate, and incurred liabilities which he illegally sought to make a charge on the estate; that, at the time of his marriage with Irene, Brown had full knowledge of the contents of the will; that Brown had failed to make any settlement upon his wife, or to make other adequate provision for her; that, unless restrained, he would further waste the estate; and that Irene desired an allowance for the support of herself and her children.

The prayer of the original bill that the court construe and determine the relative rights of the children, George and Francis, and the mother, Irene, and her husband, in and to the estate, was omitted, and in place of it was the prayer "that the terms and provisions of said will, and the duties and obligations imposed thereunder upon the said A. F. Judd and S. B. Dole as aforesaid, be defined and determined, \* \* \* and that the said A. F. Judd and S. B. Dole be reinstated as executors and trustees of said will and estate." The amended bill was signed by A. F. Judd and Sanford B. Dole, with the name of counsel typewritten as before.

To the amended bill Brown answered that he had possession, management, and control of the estate "in accordance with the rights and obligations imposed upon him as her [Irene's] husband," and he pleaded that Irene had an estate in fee simple to the lands in controversy, denied the existence of the alleged trust, other than one of guardianship during the minority of Irene, and denied that the will made any provision for the children, except in the contingency of the death of Irene prior to the death of the testator.

On October 24, 1895, a hearing was had before Circuit Judge Cooper, who resigned his office before reaching a decision, and on April 16, 1896, the matter came up before Judge Perry, of the same circuit, who on the 16th of April, 1896, reserved certain questions for the consideration of the Hawaiian Supreme Court as follows: (1) Was a trust created in the property devised to Irene II by the will of her father, John II? (2) If such a trust was created, is the trust still in force, Irene having married, attained majority, and had issue of such marriage, which issue still survives? (3) If such a trust still exists, is the interest of Irene II Brown under the same absolute, or for life only? (4) If such a trust still exists, is it such a trust that the court will, upon the proper motion, order an immediate conveyance of the property to Irene II Brown? (5) Has Irene II Brown a fee-simple title in said property, or is her estate one for life only? (6) Was an estate in perpetuity created by said will, and, if so, was its effect to vest the estate absolutely in Irene Brown? (7) If there are any remainders in said property, are they vested or contingent, and in what person? (8) What legal and adequate estates have the several parties plaintiff and defendant under the will of John II and the circumstances shown by the pleadings and evidence?

Chief Justice Judd and Justice Frear being disqualified to sit in the case, Justice Whiting, the remaining justice of the Supreme Court, requested W. R. Castle and L. A. Thurston, members of the bar, to sit with him in hearing and determining the case. Thurston being compelled to leave the Islands, Mr. Paul Neumann, another member of the bar, was substituted in his place, and after a hearing wrote the opinion of the Supreme Court.

The court answered the first question in the affirmative, holding that a trust in the property devised to his daughter was created by the will of the testator; that as to the second question, upon the marriage and attaining majority of the devisee, the trust became extinct; and that, as to the fifth question, the devisee, Irene, had an estate in fee simple in the property devised to her by her father's will. It was considered by the court that it was unnecessary to decide the other questions, in view of the rulings upon the

questions answered. No further proceedings appear to have been taken in the case. The case was not remanded to the circuit court, and no decree was entered in either court.

We come now to the second case where this estate has been a subject of controversy in the Hawaiian courts.

On the 27th of January, 1903, a bill in equity to declare a trust and for relief was filed in the same circuit court by A. F. Judd, as next friend of George and Francis, minors, against C. A. Brown, John A. Magoon, and Irene. The bill, after alleging the death of John II on the 2d day of May, 1870, possessed of an estate in fee of certain lands and personal property, alleged that he left a last will and testament, which was admitted to probate on the 10th day of June, 1870, and that the said will directed that if Irene should die, having borne children, the property should descend to her children, but that she should be the first heir, meaning and intending thereby that during her life she should have the use and benefit of the said property, and that her children, by virtue of the will, were the absolute owners in fee of the same, subject only to their mother's life estate; alleged the marriage of Irene to Charles A. Brown, and the proceedings in court hereinbefore referred to, relating to the estate of John II, deceased, the execution of a deed of conveyance on July 2, 1897, by Irene and Charles A. Brown of the said property, in trust, for the organization of a corporation to hold the same and to deliver one-third of the shares thereof to Irene, one-third to Brown, and a third to plaintiffs, which corporation was organized under the name of the John II Estate, Limited, and delivery of shares made accordingly, except that one share of those to be issued to Brown was caused by him to be issued in the name of J. A. Magoon, one of the defendants thereto. It is alleged that the defendants held such shares subject to a trust that upon Irene's death the same should be assigned to plaintiffs. It is alleged that on the 27th day of May, 1898, the said Irene was granted an absolute divorce from the defendant Charles A. Brown. The bill recites the proceedings in the first case, but alleges, among other things, that no decree had been made or entered in that case; that in none of the proceedings in that case, although plaintiffs had interests conflicting with their mother, did they have separate counsel; that the same attorneys represented them, and also their mother; that there had been no legal adjudication of the questions involved; that no court organized as required by the Constitution of the Republic of Hawaii had obtained appellate jurisdiction of any of the reserved questions in that case; that the jurisdiction of the Supreme Court concerning the construction of said will (if it ever existed) ended upon its determining that no trust was in existence concerning said property; that there was no statutory or other authority to reserve questions of law in said cause for the Supreme Court, and that the Supreme Court had no jurisdiction of said cause. The bill prayed, among other things, for an order restraining the defendants from selling, pledging, or otherwise disposing of the shares held by them as aforesaid, and that they be decreed to assign the shares held by them to a trustee in trust during the life of Irene, to pay the income thereof to those entitled thereto, and at her death to assign all of the said shares to the plaintiffs absolutely, and for general relief.

To this bill Irene Holloway answered, admitting the material allegations of the bill, except the allegation that the said John II meant and intended by his said last will that the defendant Irene should have the use and benefit of said property during her lifetime only, and she alleged that she was given in and by said will the said property in fee simple. The defendant Magoon demurred to the bill generally. The defendant Brown demurred on general and special grounds—among others, on the ground that there was another suit pending, in which all necessary proceedings had been taken, save alone the formal entry of a decree, and that it did not appear that any of the property or estate of the plaintiffs was conveyed to said corporation, either by Irene or C. A. Brown, or by any persons purporting to act in their behalf. The demurrers were sustained, on the ground that the deed of conveyance referred to, which was made a part of the bill, did not convey, or purport to convey, the estate of the plaintiffs in the property.

The plaintiffs thereupon amended their bill by adding averments of inten-



tion on the part of the grantors of the said deed of conveyance to convey to trustee for the organization of a corporation the fee simple of the lands devised by the will to the plaintiffs, and that the ownership in fee simple in such lands was claimed and exercised by the corporation by virtue thereof; that the defendants claimed that the proceedings and decision of the Supreme Court were conclusive upon the plaintiffs, and forever barred them from setting up any title under the will to the lands, and that by reason of the decision of the Supreme Court they have been deprived of trustees as provided by the will for the protection of their interests as remaindermen; and that unless the invalidity of said proceedings and decisions, and also the plaintiff's titles therein claimed, be declared by the court, a cloud will rest upon their title, and their rights as such remaindermen may be subject to costly and difficult litigation. The prayer of the amended bill was for such other, further, and appropriate relief, orders, and decrees as the nature of the case may require, and, specifically, that a declaratory decree be made declaring that the proceedings, decision, and conveyance herein mentioned are invalid and of no effect as against the plaintiffs.

The bill as amended was answered by Irene Holloway and demurred to by Magoon and Brown on substantially the same grounds as before, and the demurrers were sustained—the court holding that the new allegations did not take the case out of the rules set out in the former decision, unless the bill was good as a bill *quia timet*; that, it being apparent from the pleadings that the plaintiffs were not in possession of the land, they had their remedy in the statutory action to quiet title. A decree was made dismissing the bill and giving costs to the defendants. The plaintiffs appealed to the Supreme Court, where the decree was affirmed and the case remanded to the circuit judge.

On the trial of the present case in the court below the proceedings in these two cases in the courts of Hawaii were introduced in evidence and constituted substantially an agreed statement of facts, upon which the court was called upon to determine the rights of the claimants to the fund in court. In passing upon the questions involved the court rendered an elaborate opinion upon the terms of the will, the character of the devise and rule of property, and the effect of the proceedings in the courts of Hawaii upon the distribution of the estate in controversy, and thereupon it entered its judgment and decree that the land condemned was owned in fee simple by one John II; that said land was devised by the last will and testament of said John II to his daughter, Irene II, for her life, remainder in fee to her children; that said Irene II married C. A. Brown, and had three children born to her, namely, George II Brown, Francis Hyde II Brown, and Bernice II Brown; that said Bernice II Brown died in infancy; that said Irene II Brown and C. A. Brown thereupon inherited all of the property of said Bernice II Brown; that Irene II Brown and C. A. Brown thereafter conveyed all their interests in said land to said John II Estate, Limited; that said Irene II Brown and C. A. Brown were thereafter divorced, and said Irene II Brown thereafter married C. S. Holloway; that said John II Estate, Limited, is entitled during the life of said Irene II Holloway to the net annual income from said sum of \$10,000; that after the death of said Irene II Holloway said sum of \$10,000 belongs absolutely in equal shares to said George II Brown, his heirs or assigns, and Francis Hyde II Brown, his heirs or assigns, said John II Estate, Limited, as the assignee of the heirs of said Bernice II Brown, and any other child or children that may hereafter be born to said Irene II Holloway.

From this decree the present appeal has been prosecuted.

Ruben D. Silliman, of New York City, Thomas G. Crothers and George E. Crothers, both of San Francisco, Cal., and Philip L. Weaver, of Honolulu, Hawaii (Choate & Larocque, of New York City, and John Alfred Magoon, of Honolulu, Hawaii, of counsel), for plaintiffs in error.

F. E. Thompson and E. M. Watson, both of Honolulu, Hawaii, for defendants in error.



Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The plaintiff in error, the John II Estate, Limited, claims the whole fund in court: (1) By deed through Irene, who was the daughter of John II, deceased, and was named as a devisee in her father's will, and who, claiming an estate in fee simple under the will, deeded the lands condemned to the John II Estate, Limited; (2) by prior adjudication in the Hawaiian courts. The defendants in error, Francis and George, children of Irene, denying the fee-simple estate of their mother, and admitting only a life estate in her, claim an interest in the fund by way of remainder under the will of John II deceased. The court below held that the devise to Irene was for life, that the children had an interest in the fund as claimed by them, and that there had been no adjudication in the courts of Hawaii foreclosing that interest. The court entered judgment accordingly. Was the court in error in entering this judgment?

The primary question is whether the devise to Irene was in fee simple or for life. To determine this question it will be necessary to carefully examine the provisions of the will of John II. The original of this will is in the Hawaiian language, and for convenience the material parts as translated and agreed to by the parties will be restated. The controversy as to the intention of the testator with respect to the devise made to his daughter, Irene, turns upon the construction of the clauses and paragraphs in the will which for the purpose of easy reference are placed in italics, and one clause where the agreed translation is in dispute is placed in small capitals:

*"All my property, both real and personal, shall descend to my heirs who are mentioned below, as follows:*

*"First. Irene Haalou II, my own daughter, is the first heir as follows: [Here follows a description of certain lands, including the land condemned in this case.] And one-half of all my personal property.*

*"Second. My wife, Maraea II, is my second heir. [Here follows a description of certain lands.] And one-half of all my personal property; and in case my wife marries again this land shall descend to my daughter; she cannot bequeath to any one.*

*"Third. My brother, J. Komolkehuehu, is the third heir. [Here follows a description of certain lands.] Those are the lands I bequeath to him.*

*"Fourth. My interest in the land of G. Naahelu, my deceased younger brother, is for his widow Kamealani.*

*"Fifth. My land [here follows a description of certain lands] is for A. F. Judd, and that is his land that I bequeath to him.*

*"By this will I have appointed and I do hereby appoint J. Komolkehuehu, A. F. Judd, they both to be the executors and guardians of the person and property of my daughter, the first devisee mentioned in this will.*

*"All the income from the lands that are leased, and all other receipts from all the lands of my daughter, they two alone shall have the sole care of it until she becomes of age OR HAS CHILDREN OF HER OWN; they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes as expressed in this will, and they shall receive compensation the same as provided by law. \* \* \**

*"And the first fruits received from the lands of my daughter, that is, the money received, there shall be taken therefrom ten cents from each dollar which is set apart as an offering to God's kingdom, the same as I have done. And my executors are to carry out this request of mine.*

*"And further, if my daughter should die having borne children, then the*

*property shall descend to her children, and if she should die without having had any children the property shall descend to her own mother, and if she should be dead then the property shall descend to my brother, J. Komoike-huchu."*

This will is dated the 28th day of April, 1870. The testator died on the 2d day of May, 1870. The daughter, Irene, was then aged about nine months.

[1] The disputed clause in the will is indicated by the words in small capitals in the paragraph reading as follows:

"All the income from the lands that are leased, and all other receipts from all the lands of my daughter, they two alone shall have the sole care of it until she becomes of age OR HAS CHILDREN OF HER OWN; they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes as expressed in this will."

These words, "OR HAS CHILDREN OF HER OWN," had been translated from the original words, "a hanau paha kana mau keiki." Judge Dole, presiding in the court below, who is himself familiar with the Hawaiian language, did not consider himself bound by the agreed translation of these words, and with the consent of counsel on both sides heard the testimony of a number of experts in the Hawaiian language as to the meaning of these words, and while several of the experts approved the translation, "OR HAS CHILDREN OF HER OWN," two of these experts, who appear to have had superior knowledge of the Hawaiian language and its construction, translated the words into English as follows: "*And in the event of her giving birth to children.*" And a majority of the experts admitted that the words in the relation in which they stood in the paragraphs were capable of such translation, and such a translation was required to make the clause harmonize with the remaining clauses of the paragraph. Judge Dole accordingly found that with the translation, "and in the event of her giving birth to children," the repugnance and inconsistency in the terms of this clause, taken in connection with the preceding and succeeding clauses of the paragraph, were removed, and the whole paragraph made to harmonize with the obvious and untechnical meaning of the final provision of the will. This translation was therefore accepted. The whole paragraph, with this new translation, reads as follows:

"All the income from the lands that are leased, and all other receipts from all the lands of my daughter, they two alone shall have the sole care of it until she becomes of age, and in the event of her giving birth to children they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes expressed in this will."

The final provision of the will, referred to by Judge Dole, is as follows:

"And further, if my daughter should die having borne children, then the property shall descend to her children."

The original translation rendered the whole paragraph contradictory in terms and inconsistent in purpose. By its terms the testator appointed two executors, to have the sole care of the income from the lands devised to the daughter until she should become of age, or al-

ternately until she had children of her own. Then it would follow as a legal consequence that their care of the estate of the daughter would cease; but this was not the intention of the testator, for he immediately proceeded to provide otherwise, and in the very next clause he provided that the executors should be the executors during the lifetime of his daughter and also of her children. It will not be presumed that the testator contemplated or proposed such a contradictory situation in the care and control of his daughter's estate, and this apparent repugnance and inconsistency should be avoided, if it can be done with due regard to the proper construction of the language contained in the will. This repugnance and inconsistency is avoided by a translation which appears to be not only admissible, but perfectly reasonable, and wholly consistent with the other language of the will and the plain purpose and intent of the testator.

In view of the fact that the judge of the court below is himself a Hawaiian scholar, that he heard the expert witnesses, and was able to judge of their knowledge and skill as experts in the use of the Hawaiian language, we shall accept the translation of the clause in question adopted by the court below as the correct translation, and as expressing the true purpose and intent of the testator.

[2] We come now to the question: What estate in the land condemned in this case did the testator devise to Irene?

Plainly, if we are to be guided by the provisions of the will we have been considering, it was a life estate; that is to say, she was to have the income from the lands mentioned in the will during her lifetime, and if she had children then the property should descend to her children, and if she should die without having had any children then the property should descend to her own mother, and if she should be dead then the property should descend to the testator's brother. This is the positive direction of the last clause of the will. Now, while the writer of this will had evidently but little technical skill in the construction of its provisions, it is clear that the instrument was intended to provide for the devise of a life estate to Irene, and not an estate in fee simple.

[3] But the plaintiff in error contends that this construction of the will is inadmissible; that the devise to Irene as the "first heir" was a gift in fee under the Hawaiian law, and that when a fee is once given it cannot be taken away, except by language that shows an unmistakable intention on the part of the testator so to do. It may be conceded that if there had been in the first part of the will a clear, certain, and definite devise to Irene of an absolute estate in fee simple, it could not afterwards be taken away from her in the same instrument, except by language showing in at least as clear and unmistakable terms the intention of the testator so to do; but has the testator in the first part of this will granted to Irene an estate in fee simple in such clear, certain, and definite terms as to override the subsequent provisions describing a life estate? We think not. The first mention of a devise to Irene is plainly uncertain and indefinite as to the character of the estate devised to her, and it is only by reference to the subsequent provisions of the will that we find the

estate described in such clear and definite terms that we can understand its character and quality. The designation of Irene as the "first heir" does not necessarily mean that the devise to her is of an estate in fee simple, and it is evident that the testator did not intend that his will should be so understood. The first declaration is:

"All my property, both real and personal, shall descend to my heirs who are mentioned below."

The word "heirs" as here used is manifestly without legal significance in describing the estate devised. This is apparent from the terms of the other devises. The testator's wife is designated as his "second heir"; but she is clearly not given an estate in fee simple in land, since the estate is specifically limited by the provision:

"In case my wife marries again the land shall descend to my daughter; she cannot bequeath to any one."

On the other hand, while A. F. Judd is not designated in the body of the will as an "heir," he is plainly given land in absolute fee simple in the provision:

"My land [describing it] is for A. F. Judd, and that is the land I bequeath to him."

Moreover, as pointed out by the court below, the original Hawaiian word "hooilina," which is translated "heir" in the first, second, and third bequests, is translated "devisee" in the clause appointing the executors and guardians of the daughter, who is referred to as the first "devisee mentioned in the will," thus making the word "heir" and "devisee" in the translation synonymous. The word "heir" could not, therefore, have been intended as descriptive of the estate devised, but of the person to whom the devise was made; and, being thus indefinite and uncertain as to the estate devised, resort must be had to other portions of the will to ascertain the intention of the testator.

The plaintiff in error cites the late case of *Simerson v. Simerson*, 20 Hawaii, 57, as declaring a rule of construction applicable to this case. In that case the grant was by deed, and the granting clause was as follows:

"I do make, and by this give, sell, and convey absolutely unto Mary Nanea Simerson aforesaid, and her heirs, forever, that certain piece of land," etc.

In a subsequent paragraph in the deed it was provided:

"This conveyance is under the conditions mentioned below, viz.: (1) That Mary Nanea Simerson aforesaid cannot sell this land nor mortgage it. (2) She is to pay the mortgage existing upon the said land, and all expenses pertaining to the release of said mortgage. To have and to hold the said piece of land, with all rights and benefits thereon, to Mary Nanea Simerson aforesaid immediately after our death; and after her death the said land is to descend to her child now being . . . and other children which she may have hereafter, and to their heirs and assigns, forever."

Here is a deed conveying land absolutely to the grantee and her heirs, forever, in the common-law form of a grant in fee simple. There is nothing uncertain or indefinite about the estate granted. On the contrary, it is perfectly certain, clear, and definite as the grant of an absolute fee-simple title, and if subsequent conditions in the



deed are found in conflict with this grant the latter must yield to the former; but the court found that the last condition in the original Hawaiian language was not so much in conflict with the absolute grant as appeared by the English translation. The court, referring to the original deed and to the last condition in the deed, said:

"This is not a remainder, but an expression of the grantor's wish or intention that the inheritance which he had given to his daughter should descend from her to his grandchildren. There is no Hawaiian word which is the exact equivalent of 'condition'; the word 'kumu,' translated 'conditions,' used in the version, meaning 'grounds' or 'considerations.' Moreover, the Hawaiian language does not distinguish between the imperative mood and the future tense. The deed, then, would readily mean to the Hawaiian mind that the grantor gives the land to his daughter absolutely, and to her heirs and assigns, forever, considering that she will [or shall] not sell or mortgage it, and will pay off its mortgage, and that at her death it will [or shall] descend to her children."

What the court did in this case was what the court below did in the present case. It gave a critical examination to the translation of important words, and then, looking at the whole instrument, without reference to formal divisions, ascertained the intention of the testator, following a rule in cases cited by the court in *Bodine's Administrators v. Arthur*, 91 Ky. 53, 14 S. W. 904, 34 Am. St. Rep. 162; *Beecher v. Hicks*, 75 Tenn. 207; *Fogarty v. Stack*, 86 Tenn. 610, 8 S. W. 846; *Horn v. Broyles* (Tenn. Ch.) 62 S. W. 297; *Prior v. Quackenbush*, 29 Ind. 475; *Clapp v. Byrnes*, 3 App. Div. 284, 38 N. Y. Supp. 1063; *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049; *Flagg v. Eames*, 40 Vt. 16, 94 Am. Dec. 363; *Rines v. Mansfield*, 96 Mo. 394, 9 S. W. 798. This was the rule followed by the court below in the present case, and is the generally accepted rule in this country, and has been followed in the Hawaiian courts.

[4] It is a fundamental rule in the construction of wills that, if possible, effect be given to every word and every clause in a will, and the several clauses should be made to harmonize with the general intent of the testator, as it may be gathered from a consideration of the whole instrument. *Zupplein v. Austin*, 6 Hawaii, 8, 10; *Paaluhi v. Keliiahaleole*, 11 Hawaii, 101, 103; *Fitchie v. Brown*, 18 Hawaii, 52, 71; 30 Am. & Eng. Ency. 644. The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322; *Adams v. Cowen*, 177 U. S. 471, 475, 20 Sup. Ct. 668, 44 L. Ed. 851; *Anderson v. Messinger*, 146 Fed. 929, 938, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094; 30 Am. & Eng. Ency. 661.

In *King v. King*, 215 Ill. 100, 110, 74 N. E. 89, 92, the question in the construction of a will was almost identical with the question under consideration. The court said:

"If an estate is devised to a person without the use of such words of inheritance, the devisee will take in fee simple, unless a less estate is limited by express words in a subsequent part of the will, or by construction or operation of law. [Citing cases.] The question then arises whether the fee-simple estate thus devised to the plaintiff in error was reduced to an estate less than a fee by any of the clauses of the will following and sub-

sequent to the first clause. \* \* \* By the use of the words, 'and in case of the death of daughter, and she left one or more children, then the property goes to them when of age,' it was clearly the intention of the testator that the daughter, the present plaintiff in error, should have the life estate only in the property, and that the remainder, after the expiration of the life estate, should go to her children."

Under this rule, supported by numerous authorities in addition to those cited, we are of the opinion that the terms of the will in this case show that it was the intention of the testator to devise the land in question to his daughter, Irene, for life, with the remainder in fee to her children.

It is next contended by the plaintiff in error that this controversy is *res judicata*; that in two prior Hawaiian cases—*Brown v. Brown*, 11 Hawaii, 47, and *Brown v. Brown*, 15 Hawaii, 308—the question involved in this case was litigated and determined adversely to the defendants in error.

The first case was a suit in equity brought in the circuit court of the First circuit of the Republic of Hawaii in 1894 by Irene Haalou Ii Brown, a married woman, and George Ii Brown and Francis Hyde Ii Brown, minors, by their next friend, A. D. Judd and A. F. Judd, against Charles Brown, to declare and execute a trust and for an accounting. The bill was signed by "A. F. Judd," and in the margin were typewritten the names of "Carter & Carter" and "W. A. Kenney" as attorneys for plaintiffs. The suit had its origin in this situation: In the will of John Ii, A. F. Judd and J. Komoikehuehu were named as executors and guardians of the person and property of the daughter, Irene. John Ii died in 1870, leaving a large estate and the daughter surviving. The will was admitted to probate, and Judd and Komoikehuehu appointed executors of the will and guardians of Irene. In 1875 Komoikehuehu resigned, and Sanford B. Dole was appointed in his place, and thereafter performed their duties under the will until 1886, when Irene married C. A. Brown. Thereupon Judd and Dole applied to the court to be discharged as guardians, on the ground that their powers as guardians of Irene had ceased upon her marriage to Brown. They were, however, never discharged as executors of the will. When Judd was appointed executor and guardian, he received from the court what purported to be a true and correct copy of the will, upon which he states he exclusively relied in determining his powers and duties. In the the copy of the will furnished Judd the following words in the Hawaiian language were omitted:

"O laua no nā hooko kauoha i ka wa e ola ana kuu kaihamahe, a i kana mau keiki."

These words are translated:

"They shall be the executors during the lifetime of my daughter and her children."

By the omission of these words it is alleged that Judd and Dole were not fully advised of the true nature and intent of the will, and supposed that no trust was created by the will that would not terminate when Irene reached her majority or was married. Learning

of this omission, and believing that the original will created a trust during the lifetime of Irene and her children, Judd, as sole surviving trustee, brought the first suit against Brown in 1894 for the purpose of submitting the construction of the will to the adjudication of the court. The suit was brought against Brown, because it was alleged he had secured possession of the property and claimed the right to all of its rents, issues, and profits, and its exclusive control and management. The bill included a prayer that the court construe and determine the relative rights of Irene and her children and her husband in and to said estate under the will. The defendant Brown did not plead to the bill, but appeared specially for the purpose of asking the court to dismiss the bill, on the ground that the plaintiff, Irene, had filed her discontinuance of the suit. The bill appears not to have been satisfactory to Irene, for she asked leave of the court to discontinue all proceedings in the cause. After some controversy, an amended bill was substituted for the original bill on August 10, 1894, when the same parties plaintiff and defendant, except that Sanford B. Dole was joined as an additional party plaintiff, and the prayer of the original bill that the court construe and determine the relative rights of the children, George and Francis, and the mother, Irene, and her husband, and the defendant Brown in and to the estate, were omitted, and in place of it was the prayer that the terms and provisions of said will and the duties and obligations imposed thereunder upon the said A. F. Judd and S. B. Dole be defined and determined. The answer of Brown in substance denied the trust, other than guardianship during the minority of Irene.

After proceedings before the circuit court of the Hawaiian Islands, Judge Perry, who at the time was judge of the court, reserved certain questions for the consideration of the Hawaiian Supreme Court. These questions have been set forth in the statement of facts and need not be restated. In brief, they included the question at issue under the amended bill; that is to say, whether a trust was created by the will of John II in the property devised to his daughter, Irene, and, if such a trust was created, was the trust still in force, Irene having married and had issue of the marriage, which still survived? The questions also included in different forms of statement the question contained in the original bill, and which had been omitted from the amended bill; that is to say, what were the relative rights and interests of the parties plaintiff and defendant in the estate of John II under his will?

[5] It is objected that there was no authority for the reservation of these questions for the consideration of the Supreme Court; but, assuming that there was such authority, they were not reserved in the manner provided by law. The statute of Hawaii under which the judge assumed to act provides:

"Whenever any question of law shall arise in any trial or other proceeding before a circuit court the presiding judge may reserve the same for the consideration of the Supreme Court." Laws of 1892-93, c. 57, § 72.

The authority to reserve questions for the consideration of the Supreme Court is limited by this statute to questions of law. It ap-

pears from the pleadings in the case that the only question that had arisen in the case, and which it was proposed to submit to the Supreme Court, was a question of fact. The question was: What was the intention of the testator with respect to the trust he had created in the property he had devised to his daughter, Irene? The answer to this question was to be found, not in the determination of a question of law, but from an inspection of the original will ascertain whether the words, alleged to have been omitted from the copy of the will furnished the guardian, Judd, were in fact contained in the original will. It was then the duty of the court to construe the whole will etymologically and grammatically for the purpose of ascertaining the true intent and purpose of the testator in creating a trust for his daughter's estate. This was a question of fact, which, being found, enabled the court to define and determine the duties and obligations imposed thereunder upon the trustees, Judd and Dole. There was no statute providing for the reservation of such a question, and in our opinion the court had no jurisdiction to reserve such a question, for the consideration of the Supreme Court.

[6] The next objection, which was that the questions were not reserved in the manner provided by law, turns upon the authority of the judge of the circuit court to reserve questions in chambers, as was done in this case. Under section 72 of the Laws of 1892, *supra*, the presiding judge of the circuit court is authorized to reserve questions of law for the consideration of the Supreme Court. The questions were reserved by the presiding judge of the circuit court, and, had they been questions of law, instead of questions of fact, we would have had no hesitation in holding that the judge had jurisdiction to reserve such questions for the consideration of the Supreme Court. The dictum of the Supreme Court in *Booth v. Baker*, 10 Hawaii, 543, 546, that there is no authority, statutory or otherwise, for the reservation of questions to that court by a circuit judge sitting in equity at chambers, is not sufficient, in our opinion, to justify this court in holding that the judge had no authority to reserve questions in chambers for the consideration of the Supreme Court, if they were otherwise within the jurisdiction of the court for such action.

The next objection relates to the question whether the Supreme Court was legally constituted for the hearing and determination of the case. The Supreme Court of Hawaii, under article 83 of the Constitution of the republic, adopted in 1894, consisted of a Chief Justice and two Associate Justices. When these questions reached the Supreme Court, it was found that the Chief Justice and one of the Associate Justices were disqualified to sit in the case. The law at that time provided that, if any Justice of the Supreme Court should be disqualified from sitting in any cause pending before the Supreme Court, his place for the trial and determination of such cause should be filled by one of the circuit judges, who had no connection with said cause, either as counsel or in his official capacity, or by any competent and disinterested member of the bar of the Supreme Court thereunto authorized by the written request of the remaining Justices. In this case, two of the Justices being disqualified, the remaining Jus-



tice requested two members of the bar to sit with him in hearing and determining the case. The question was then argued and submitted; but one of the members of the bar, who had been requested to sit in the case, being compelled to leave the Islands, another member of the bar was substituted in his place. An opinion answering the reserved questions was written by this last substituted member, was signed by the other members of the court, and filed, but no further proceedings taken in the case.

It is strenuously objected that this was not a legally constituted court, that at the time the reserved questions were certified to the Supreme Court the law provided for the filling of one vacancy only for the hearing of a cause, and that the addition of a second substituted member was in violation of the statute. The court below did not deem it necessary to pass upon this question, in view of its position on the question as to the authority of the court to reserve the questions it did for the consideration of the Supreme Court. For the same reason we do not deem it necessary for this court to pass upon this question.

[7] The next objection is that the defendants in error were not represented by counsel in the case. In the original bill the plaintiffs were Irene, the mother, the two children, represented by A. F. Judd, their next friend, and A. F. Judd. The bill was signed and verified by "A. F. Judd." The names of "Carter & Carter" and "W. A. Kinney" were appended, typewritten, as "attorneys for plaintiffs." In the amended bill Sanford B. Dole was added as one of the plaintiffs. The bill was signed by "A. F. Judd" and "Sanford B. Dole," and was verified by "A. F. Judd." The name of "W. A. Kinney" was appended, typewritten, as attorney for plaintiffs. Subsequently Carter & Carter appeared with W. A. Kinney as attorneys for plaintiffs in the case. Strictly speaking, the original bill was that of A. F. Judd, and the amended bill that of A. F. Judd and Sanford B. Dole; but, passing that objection, there was but one set of attorneys for all the plaintiffs named in each of the bills, and there was but one defendant. Were the interests of all the plaintiffs named in the bills in such accord, as against the defendant, that they could be represented by the same attorneys?

In the original bill the prayer was that Judd be reinstated as trustee, his duties and obligations defined and determined, and the relative rights of Irene and her children and her husband under the will determined. It may be assumed that the interests of all the plaintiffs were in accord with respect to the first two clauses of the prayer of the bill; but it cannot be assumed that they were in accord with respect to the last clause. The relative rights of Irene under the will were manifestly in conflict with those of her children. This bill was not satisfactory to Irene, and she asked that proceedings under it should be discontinued, and the bill dismissed. The reason for such dissatisfaction is not disclosed in the record, unless it is found in the differences in the framework and prayers of the original as compared with the amended bill.

In the amended bill the prayer is that Judd and Dole be reinstated as executors and trustees of the will and estate and that their duties and obligations under the will be defined and determined. The prayer of the original bill that the relative rights of Irene and her children and her husband be determined was omitted from the amended bill. As thus presented to the court, it might be assumed that the interests of all the plaintiffs were in accord and that they could be represented by the same attorneys; but when the circuit judge, by consent of counsel, returned to the prayer of the original bill, and brought forward the question omitted from the amended bill as to the relative rights and interests of Irene and her children, as between themselves in the estate of John Li, deceased, and incorporated this question in different forms in the statement of reserved questions for the consideration of the Supreme Court, the case assumed an aspect in which the interests of the children were distinctly in conflict with the interests of their mother. And when the Supreme Court undertook to decide, as it did, in answer to the reserved questions, that Irene had an estate in fee simple in the property devised to her in her father's will, and that there was no vested or contingent remainder in that estate for Irene's children, the court assumed to determine a controversy between those two parties, where such conflicting interests had been represented by the same counsel. As this determination was against the interests of the children, we must hold that they were not represented by counsel, and for that reason the court never had jurisdiction over their interests in the estate.

But it may be said that the court could not determine the duties and obligations of the executors during the lifetime of Irene, without ascertaining what her estate was under the will. If this is true, and we are inclined to think it is, it determines conclusively that, in whatever aspect we view the case, the children were entitled to be represented by counsel, and, not having been so represented, they have not had their day in court, and the case is in no sense binding upon them.

[8] The next objection to the case is, we think, final and conclusive, and entirely eliminates the first case from the controversy as a judgment, and as the basis of a judgment in the second case, to which we will refer presently. The objection is that, after the opinion was filed in the Supreme Court, answering the reserved questions, no further proceedings were taken in the case. The answers to the questions were not returned to the court below, and no directions given to that court as to further proceedings, and no decree has been entered in either court in the case. The case is still pending undetermined in the circuit court, without force or binding effect upon the defendants in error. In the absence of a decree, the decision of the court is not binding. *Oklahoma v. McMaster*, 196 U. S. 529; 533, 25 Sup. Ct. 324, 49 L. Ed. 587; *Bouldin v. Phelps* (C. C.) 30 Fed. 547, 578; *Springer v. Bien*, 128 N. Y. 99, 27 N. E. 1076; *Detroit v. R. R.*, 134 Mich. 11, 95 N. W. 992, 99 N. W. 411, 104 Am. St. Rep. 600; *Wilson v. Hubbard*, 39 Wash. 671, 82 Pac. 154; *Hart v. Brierley*, 189 Mass. 598, 604, 76 N. E. 286; *Chicago v. Goodwillie*,

208 Ill. 252, 70 N. E. 228; Child v. Morgan, 51 Minn. 116, 121, 52 N. W. 1127.

Our conclusion with respect to the first case is that neither the circuit nor the Supreme Court of Hawaii had jurisdiction over the defendants in error or the subject-matter in controversy, so far as the same related to or affected their interests in the estate, and that there has been no adjudication with respect to the same.

[9] We come, now, to the second case. That was a suit in equity, brought on the 27th day of January, 1903, in the circuit court of Hawaii, by A. F. Judd, as next friend of George and Francis, minors, against C. A. Brown, John A. Magoon, and Irene Holloway, to declare a trust and for relief. In effect, it was a suit on the part of Irene's children to establish their rights as remaindermen in the estate of John II, which, the theory was, had not been determined in the first case. The particulars relating to the will and estate of John II and the devises mentioned in said will were set forth in the bill as in the first case, together with an allegation that the devise to Irene was intended and meant for life; that her children (the plaintiffs) were the absolute owners in fee of said property, subject only to the mother's life interest. The previous litigation is referred to, and the proceedings in the first case in the Circuit and Supreme Courts of Hawaii are recited; but it is alleged that the Supreme Court was without jurisdiction to determine the rights of the plaintiffs in that case, alleging the particulars in which such jurisdiction was lacking, and that no decree was entered in the case. The bill prayed, among other things, for an order restraining the defendants from selling, pledging, or otherwise disposing of certain shares of stock held by them in the John II Estate, Limited, and that they be decreed to assign the shares held by them to a trustee, in trust, during the life of Irene, to pay the income thereof to those entitled thereto, and, at her death, to assign all of the said shares to the plaintiffs absolutely.

To this bill Irene Holloway answered, admitting the several allegations of the bill, except the allegation that the said John II meant and intended by his said last will that the defendant should have the use and benefit of said property during her lifetime only, and she alleged that by the will she was given the property in fee simple. The defendants Brown and Magoon demurred, the former on general and special grounds—among others, on the ground that there was another suit pending, referring to the first case, and alleging that all necessary proceedings had been taken, save alone the formal entry of a decree, and that it did not appear that any of the property or estate of the plaintiffs had been conveyed to said corporation, either by the plaintiffs or any person purporting to act in their behalf. The court sustained the demurrer, on the ground that the deed of conveyance referred to in the bill did not convey, or purport to convey, the estate of the plaintiffs in the property conveyed. A decree was accordingly entered, dismissing the bill, but allowing plaintiffs leave to amend.

The bill was thereupon amended, by the addition of a paragraph to the bill alleging that it was the intention and the declaration of the grantors in said deed of conveyance to convey to trustees for the

organization of a corporation the fee simple of the lands devised by the will to the plaintiffs, and that the ownership in fee simple in such lands was claimed and exercised by the corporation under and by virtue of said conveyance; that it was claimed by the defendants that the proceedings and decision of the Supreme Court in the first case were conclusive upon the plaintiffs, and forever barred them from setting up any title under said will to the lands mentioned in the will; that in consequence of said decision of the Supreme Court the plaintiffs had been deprived of trustees, as provided by said will, whose duty it would have been to preserve the plaintiffs' rights as remaindermen in said land, and to see to it that no waste was committed upon the same, or other injury done thereto, to plaintiffs' detriment as remaindermen, and otherwise protect the plaintiffs' interests in the premises; that unless the invalidity of the proceedings and the decision of the court, and also the plaintiffs' title to the property, be declared by the court, a cloud would rest upon the plaintiffs' title, and their rights in said land as such remaindermen might be made subject to costly and difficult litigation. A paragraph was also added to the prayer of the bill that a declaratory decree be made, declaring that the proceedings, decision, and conveyances mentioned were invalid and of no effect as against the plaintiffs.

The bill as amended was demurred to by the defendants Brown and Magoon on substantially the same grounds as before. The court sustained the demurrer in a written opinion, in which the court said:

"The allegations in the amendment do not take the case out of the rules set out in the former decision rendered in this case upon demurrer to the original bill, unless the bill is now good as a bill quia timet. It has been held that the equity action of quia timet still lies, and that the jurisdiction of this action in equity has not been taken away by the statutory action to quiet title. \* \* \* But plaintiffs are not in possession of the land in question; at least, it is not so alleged in the bill, and the allegation of the amendment as to the possibility of waste being committed would lead the court to infer that plaintiffs are out of, and the defendants or their grantees in, possession of the land. The demurrer should have been sustained, as it was, because the bill did not show that plaintiff was in possession"—citing the case of *Ahmi v. Ashford*, 12 Hawaii, 13.

A decree was thereupon entered dismissing the bill. From the decree the plaintiffs appealed to the Supreme Court, where the decree of the circuit court was affirmed. The Supreme Court agreed with the circuit judge that the bill was not maintainable on the ground that it was immaterial whether Irene took only a life estate or an estate in fee simple, inasmuch as she and her then husband purported in their deed to convey only the lands belonging to them, and their right, title, and interest by curtesy, dower, or otherwise in the lands of each other, and did not attempt to convey any lands belonging to their children, the plaintiffs, even if the latter had the remainder in fee in the lands in question.

The Supreme Court also concurred in the opinion of the circuit judge with respect to the bill as amended, holding that the amendments to the bill did not alter the result, in so far as the bill might be considered to declare a trust; and, considered as a bill to remove a



cloud, the Supreme Court agreed with the circuit judge that the court could not declare invalid as against a remainderman conveyances that on their face purported to convey the unquestioned interest, and only the interests, of the life tenants.

The court then proceeded to consider whether the suit could be maintained to remove a cloud by reason of the prior decisions. The court held with respect to the constitution of the court that the decision in the first case was by a *de facto* court, and that a decision of a *de facto* court was not void, and could not be questioned collaterally; that, granting that the Supreme Court did not have jurisdiction of reserved questions in equity, still it was not such a defect as rendered the decision absolutely void, and with respect to the jurisdiction of the court to construe the will, after deciding that there was no longer a trust in existence, the court held that the circuit court should have declined to construe the will, after it had decided that there was no trust. "Still," says the court, "the decision would not be wholly void. \* \* \* If the decision was erroneous in these respects, it was mainly because there was an adequate remedy at law. But that was a matter that could be waived. \* \* \* And this as well as the other alleged defects above mentioned could be waived on behalf of the plaintiffs, notwithstanding they are minors, at least, so as to preclude a collateral attack by the minors." The decree of the circuit court was accordingly affirmed.

The fact that no decree was entered in the first case was not mentioned by the Supreme Court in the second case, and the effect of the absence of a decree in the first case was therefore a question, and, as we view it, an important question, not passed upon or in any way adjudicated in the second case. What the Supreme Court did in the second case was to affirm the decree of the circuit court. That decree had been entered upon the specific grounds set forth in the decree, referring to the "decision in writing herein sustaining the demurrers of the defendants." The decision in writing to which reference was made sustained the demurrers to the bill of complaint on the ground already stated, that the bill did not state a case entitling the plaintiffs to relief in equity: (1) Because the deed of conveyance executed by Irene and her husband, referred to in the bill of complaint, did not purport to convey lands belonging to the plaintiffs; and (2) the bill did not show that plaintiffs were in possession of the land in controversy.

These objections went only to the framework of the bill under certain well-known rules of procedure, and not to the merits of the case. A more imperative rule requires that the merits of a case shall not be sacrificed to formal defects in practice or pleadings, and hence it is that such a decision is limited to the actual questions involved. Where a decree refers to the "opinion of the trial judge in terms that make it clear that the object was to refer to it, to explain what was determined, and the reasons therefor, then such opinion becomes legitimately a part of the record, and must be looked to, to explain what was in issue, and what was determined by the judgment or decree in question." *Legrand v. Rickey's Adm'r*, 83 Va. 862, 877, 3 S. E. 864,

871. It follows, from the rule, that the opinion of the appellate court affirming such a decree is inadmissible to show that the question determined by the trial court was different from that embraced in its decision. *Robinson v. N. Y. Co.*, 64 Hun, 41, 18 N. Y. Supp. 728, 730; *Penouilh v. Abraham et al.*, 43 La. Ann. 214, 9 South. 36; *Ohio River R. Co. v. Fisher*, 115 Fed. 929, 935, 53 C. C. A. 411; *Russell v. Russell*, 134 Fed. 840, 841, 67 C. C. A. 436.

Where a demurrer is sustained for want of equity, "the estoppel extends only to the precise point presented by the pleadings and decided by the ruling upon the demurrer." *Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.*, 121 Fed. 313, 318, 57 C. C. A. 9; *Wiggins Ferry Co. v. Ohio & Miss. Ry. Co.*, 142 U. S. 396, 410, 12 Sup. Ct. 188, 35 L. Ed. 1055. A decree sustaining a demurrer is no bar to subsequent proceedings upon facts and questions of law not litigated or passed upon by such decree. *Detrick v. Sharrar*, 95 Pa. 521, 525. "If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." *Hughes v. United States*, 71 U. S. 232, 237, 18 L. Ed. 303; *Converse v. Davis*, 90 Tex. 462, 466, 39 S. W. 277.

If the decision of the Supreme Court in the second case be thus limited to the questions considered and determined in the trial court, as it must be so limited under the authority of these cases, what were the questions left open for consideration and determination in any subsequent case? Manifestly, any question involving the merits of the case, and, primarily, whether the absence of a decree in the first case in either the Circuit Court or Supreme Court of Hawaii leaves the questions involved in that case open for adjudication in this case. In considering the record in the first case, we were of the opinion that it did, and, since we find nothing in the second case to change that opinion, we might hold upon this fact alone that plaintiffs' claims in this case are open to consideration and determination upon the merits; but, the plaintiff in error contending for the bar of the second case upon the broad grounds that the questions there decided constituted in and of themselves an adjudication upon the questions decided, we will consider briefly the remaining questions in the second case.

[10] (1) Whether in the first case the Supreme Court had jurisdiction to answer the reserved questions of fact as to the intention of the testator, John Ii, in devising an estate to his daughter Irene and to her children.

In the second case the Supreme Court conceded that the Supreme Court in the first case had no such jurisdiction—citing *Booth v. Baker*, 10 Hawaii, 543, 546—but held that the defect was not such as to make the decision absolutely void. This decision is clearly not binding upon the federal court. If the Supreme Court had no jurisdiction to answer a reserved question of fact, its answer to such a question was absolutely void. *County Commissioners of Hampshire*, 140 Mass. 181, 182, 5 N. E. 490; *Bearce v. Bowker*, 115 Mass. 129;

**Terry v. Brightman**, 129 Mass. 535. The effect of lack of jurisdiction in a court is a question open for the determination of any competent court. It is a "well-settled rule in jurisprudence that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings." *Williamson v. Berry*, 8 How. 495, 12 L. Ed. 1170; *Guaranty Trust Co. v. Green Cove Railroad Co.*, 139 U. S. 137, 147, 11 Sup. Ct. 512, 35 L. Ed. 116; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 194, 24 Sup. Ct. 63, 48 L. Ed. 140.

(2) Whether the Supreme Court in the first case had jurisdiction to construe the will after having decided that there was no longer any trust in existence.

The Supreme Court in the second case conceded that the court in the first case, after having decided that there was no longer a trust, should have declined to construe the will. The reason for this concession is not stated. But the only possible reason that could be stated was that the court did not have jurisdiction to decide that question; but the court held that this was an error that did not make the decision void, and that it "as well as other alleged defects above mentioned," was a matter that might be waived by the plaintiff minors, so as to preclude a collateral attack by them. The answer to this proposition is the answer to the next question. The third and last question was whether the circuit court or the Supreme Court had jurisdiction over the persons of the plaintiffs, notwithstanding they were not represented by separate counsel in a controversy in which their interests were in conflict with the interests of their mother Irene. We are of the opinion that neither the Circuit nor Supreme Court obtained jurisdiction over the plaintiffs in the first case, and we do not find from the record that they waived the lack of such jurisdiction.

It therefore appears that in the second case the Supreme Court held that the court in the first case was without jurisdiction to determine the questions involved in the merits of the case. The opinion of the court that this lack of jurisdiction did not render the decision of the court upon those questions absolutely void is not an opinion binding upon the federal courts, and we do not concur in that opinion. If a court "act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a remedy sought in opposition to them, even prior to a reversal. They constitute no jurisdiction; and all persons concerned in executing such judgments, or sentences, are considered, in law, as trespassers." *Elliott v. Peirson*, 26 U. S. 328, 340, 7 L. Ed. 164; *Williamson v. Berry*, 8 How. 495, 555, 12 L. Ed. 1170; *Lewers & Cooke v. Redhouse*, 14 Hawaii, 290, 294.

It follows, from these considerations, that we do not find that there has been an adjudication in either of the Hawaiian cases foreclosing the rights of the plaintiffs in the property condemned in this case; and we do find, as did the court below, that each of the defendants in error under the will of John II, deceased, was the owner of an undivided interest in said land in fee simple, and is now entitled to a

one-third share or interest in the fund in court, subject to the life interest therein of their mother, Irene, or the said John I Estate, Limited, as the assignee of her life interest.

The decree of the District Court is affirmed

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KRAMER v. KRAMER.

SAME v. KRAMER et al.

(Circuit Court of Appeals, Fifth Circuit. November 23, 1912.)

No. 2,416.

1. WILLS (§ 764\*)—LEGACIES—"ADEMPTION."

Ademption of a specific legacy is the extinction or withdrawal of it, in consequence of some act of the testator equivalent to its revocation, or clearly indicative of an intention to revoke. Ademption is effected by the extinction of the thing or fund bequeathed, or by disposition of it subsequent to the will from which an intention that the legacy should fail is presumed. The term "ademption" is sometimes used as synonymous with satisfaction, but such use is inaccurate, as ademption operates independently of intention in case the specific thing given is, at the testator's death, no longer owned by him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1978; Dec. Dig. § 764.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 179-181.]

2. WILLS (§ 765\*)—LEGACIES—ADEMPTION—STATUTES.

Code Ga. 1910, § 3908, provides that a legacy is adeemed or destroyed, wholly or in part, whenever the testator, after making his will during his life, delivers the property or pays the money bequeathed to the legatee, either expressly or by implication, in lieu of the legacy given, or when the testator conveys to another the specific property bequeathed, and does not afterward become possessed of the same, or otherwise places it out of the power of the executor to deliver over the legacy. *Held* that, under such section, ademption is confined to specific legacies.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1979; Dec. Dig. § 765.\*]

3. WILLS (§ 756\*)—"GENERAL LEGACY."

A "general legacy" is a bequest chargeable on the general estate, and not so given as to be distinguishable from other parts of the estate of the same kind, or one of a quantity merely including all bequests which are neither demonstrative nor specific.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1949-1955; Dec. Dig. § 756.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3071-3073; vol. 8, p. 7670.]

4. WILLS (§ 755\*)—LEGACIES—"DEMONSTRATIVE LEGACY."

A "demonstrative legacy" is a bequest of a thing or money not specified or distinguished from all others of the same kind, but payable out of a designated fund.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1947, 1948; Dec. Dig. § 755.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1980, 1981; vol. 8, p. 7633.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



**5. WILLS (§ 753\*)—"SPECIFIC LEGACY."**

A "specific legacy" is a bequest of a particular thing or money specified and distinguished from all others of the same kind.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1939-1944; Dec. Dig. § 753.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6600-6604; vol. 8, p. 7803.]

**6. WILLS (§ 755\*)—DEMONSTRATIVE LEGACY—ADEMPTION.**

Testator bequeathed to his wife \$10,000, to be realized out of the proceeds of such life insurance as might be in force on his life at the time of his death. Prior to his death he changed a benefit certificate so as to make it payable to his wife, and died leaving policies amounting to \$15,000 and an estate valued at \$200,000. *Held*, that such legacy was demonstrative, and not subject to ademption, and was not therefore adeemed to the extent of the value of the certificate given to the wife in testator's lifetime.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1947, 1948; Dec. Dig. § 755.\*]

**7. WILLS (§ 772\*)—LEGACIES—SATISFACTION—LOCO PARENTIS.**

The giving of a portion by testator to a legatee subsequent to the execution of the will operates as a satisfaction of the legacy, or pro tanto, if the gift be less than the legacy, provided the testator is the father of the legatee or stands in loco parentis to him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1978-1994; Dec. Dig. § 772.\*]

**8. WILLS (§ 772\*)—LEGACIES—SATISFACTION—GIFT DURING TESTATOR'S LIFE.**

Testator bequeathed to his wife \$10,000, to be realized out of the proceeds of such life insurance as might be in force at the time of his death. Subsequently he caused the beneficiary of a certificate to be changed, so as to make it payable to her, and died leaving life insurance amounting to \$15,000 and an estate of over \$200,000. He bequeathed the residue to his wife and son, but provided that his son should account for all advancements made to him after the date of the will. There was no provision, however, with reference to any future gift that he might make to his wife, his other legatee. *Held* that, in the absence of parol evidence that he intended that the policy given to her should be deducted from her legacy, such gift did not operate as a pro tanto satisfaction of her legacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1978-1994; Dec. Dig. § 772.\*]

Appeal and Cross-Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Controversy between Ruth Kramer and Ernest W. Kramer and Charles A. Lyle, as executor of the will of Ernest G. Kramer, deceased, concerning the construction of the will. From a decree construing the will (*Kramer v. Lyle*, 197 Fed. 618) Ruth Kramer appeals, and Ernest W. Kramer prosecutes a cross-appeal. Reversed in part.

P. H. Brewster, of Atlanta, Ga., and Sidney Holderness, of Carrollton, Ga., for appellant and cross-appellee.

Edgar Watkins, of Atlanta, Ga. (Watkins & Latimer, of Atlanta, Ga., on the brief), for appellee and cross-appellant.

Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SHELBY, Circuit Judge. This is an appeal and cross-appeal from a decree of the District Court construing the will of Ernest G. Kramer. The controversy is between Ruth Kramer, the widow and a legatee of the testator, and Ernest W. Kramer, the only child and also a legatee of the testator. There are many assignments of error on the appeal and cross-appeal, but we are of the opinion that none of them is well taken, except the first assignment on the appeal. For convenience of reference, the will is copied in the margin.<sup>1</sup>

<sup>1</sup> "State of Georgia, Carroll County.

"I, E. G. Kramer, of said state and county, being of sound and disposing mind and memory, do make this my last will and testament, by it revoking all others previously made.

"Item 1. I will and bequeath unto my beloved wife, Ruth, the following described property, to-wit, my home place, situated on the south side of South street, in the city of Carrollton, said state and county. Said place containing twenty-two acres of land, more or less. On which is situated the residence now occupied by me. Also all furniture, furnishings and household goods of every kind, character and description that might be in said house at the time of my decease, including books, prints, pictures, bric-a-brac, silver and gold plate, wearing apparel, ornaments, also such provisions, cooking utensils, kitchen and dining-room furniture as may be in said residence at the time of my decease. Also all horses, mules, cattle, swine, buggies, wagons, carriages, harness, farming implements, garden implements and other things that might be on said place at the time of my decease. Also that lot in said city of Carrollton, said county, situated on the north side of said South street, bounded on the north by the Central of Georgia Railway right of way, on the east by a lot owned by said railway, on the south by said South street, and on the west by an alley which runs between said property and what is known as the 'Marchman Place.' Also a lot on the south side of said South street in said city and county, fronting said street one hundred feet and running back same width, south, five hundred feet, bounded on the east by the 'Meadows Place,' now in possession of Fullilove. Also two hundred shares of the capital stock of the Mandeville Mills, a corporation of said state and county, said stock being of the par value of one hundred dollars per share. Also one hundred shares of the capital stock of the First National Bank of Carrollton, a banking corporation of said county, said stock being of the par value of one hundred dollars per share. Also the sum of ten thousand dollars to be realized out of the proceeds of such life insurance as may be of force on my life at the time of my death. Also all notes, accounts and judgments that might be owing me at the time of my death, together with all lands, wherever situated, of which I may die seized and possessed, which said lands have been sold by me and bond for titles given to the purchasers and the purchase money or any part thereof due me at the time of my death; my purpose being to convey such purchase money notes to my said wife together with the security I might hold therefor and give her full power and authority to execute to the purchaser deeds in accordance with such bonds as I may have given, in case of payments to her or in case she elects to sue, to give her full authority either to bring suit for the land or to sue upon the purchase money notes and execute to the purchaser and have the same recorded in the office of the clerk of the superior court, where the land may lie, a deed for the purpose of levy and sale as per the requirements of the law in such cases made and provided.

"Item 2. I will and bequeath unto my beloved wife, Ruth, in addition to what is bequeathed here in item one, the sum of five thousand dollars, which is expressly in lieu of years support, in case she accepts this legacy in lieu of years support, she will make it known in writing to the executor of this my last will and testament within ninety days of the date of his qualification.

"Item 3. I will and bequeath to my son, Ernest, the following described property, to wit: All real estate of which I may die seized and possessed, situated in the city of Carrollton, not disposed of in item one of this my last

By the first item of his will the testator bequeathed to his wife, Ruth Kramer, real estate and many articles of personal property, and the item contains the following words:

"Also the sum of ten thousand dollars to be realized out of the proceeds of such life insurance as may be of force on my life at the time of my death."

It appears from the record that there were, at the time the will was made and at the time the testator died, policies on his life to the amount of \$15,000. One of these policies was in the Royal Arcanum, a fraternal insurance order, for the sum of \$3,000. After the making of the will, the testator had the beneficiary named in the \$3,000 policy changed, making it payable to his wife, Ruth Kramer; and after the death of the testator she collected on this policy \$2,630.49. The other policies, amounting to more than \$10,000, which, it is as-

will and testament. Also two hundred shares of the capital stock of the Mandeville Mills, a corporation of said state and county, said stock being of the par value of one hundred dollars per share. Also one hundred shares of the capital stock of the First National Bank of Carrollton, a banking corporation of said county, said stock being of the par value of one hundred dollars per share.

"Item 4. It is my will that the residue of my estate be divided equally between my wife, Ruth, and my son, Ernest, share and share alike. My said son, Ernest, to account for all advancement that I may make him after this date, which are charged to him on the back of this my last will and testament.

"Item 5. I nominate and appoint my friend, C. A. Lyle, executor of this my last will and testament. My executor shall not be required to make returns to any court, except, when my estate shall have been fully administered, he shall file with the ordinary a report showing all receipts and disbursements on account of my said estate. My executor will give bond, conditioned for the faithful performance of his trust, in the sum of fifty thousand dollars; said bond to be made by a bond or surety company, engaged in such business in the state of Georgia, and whose financial standing has been approved by the proper authorities of said state of Georgia; the premium on said bond to be paid out of my estate at the expense of my estate.

"In testimony whereof, I have hereunto set my hand this the 9th day of February, 1910.

"Signed and published by E. G. Kramer as his last will and testament in presence of the undersigned, who subscribe our names hereto as witnesses at the instance and request of said testator, and in his presence and in the presence of each other.

"This the 9th day of February, 1910.

"[Signed]

E. G. Kramer.

"Witnesses:

"W. J. Stewart.

"L. C. Mandeville.

"C. B. Simonton.

"Look on back of cover for amounts advanced on this to my son.

"[Signed]

E. G. Kramer."

(Advancements on Back of Cover.)

"I this day charge to my son, Ernest, an advancement of five thousand dollars, as per item 4 of my will. February 19, 1910.

"[Signed]

E. G. Kramer."

"I this day charge to my son, Ernest, an advancement of five thousand dollars, as per item 4 of my will. March 4, 1910.

"[Signed]

E. G. Kramer."

"I this day charge to my son, Ernest, an advance of one thousand dollars, as per item 4 of my will.

"[Signed]

E. G. Kramer."

sumed, were payable to the estate of the testator, have been collected, and the proceeds are held by Charles A. Lyle, the executor named in the will. Ernest W. Kramer, the testator's son, contends that the \$10,000 legacy should be credited by the \$2,630.49 which Ruth Kramer collected on the Royal Arcanum policy, and that the executor should be allowed to pay her on account of the legacy only \$7,369.51. Ruth Kramer contends that the \$3,000 policy was a gift from her husband, while in life, to her, and that the legacy is unaffected by the gift, and she is entitled to receive the whole of it.

The question raised by these contentions was decided in the District Court against Ruth Kramer, the court holding that she was entitled only to the remainder of the legacy, after deducting the sum she received on the Royal Arcanum policy. The first assignment of error on the appeal assails the correctness of this ruling.

Ordinarily, a testator who has by his will given his wife \$10,000, will not deprive her of any part of the legacy by making gifts to her during his life. If a testator bequeathed to his wife \$10,000, and subsequently, before his death, gave her \$3,000, on those facts standing alone, no one would assert that her legacy was adeemed or satisfied pro tanto and that she could not claim all of it from her husband's executor.

On the other hand, if a husband bequeaths to his wife "\$10,000 in United States bonds, numbered from 1 to 50, inclusive, now in my bank box," and subsequently, before his death, gives the bonds to his wife, the legacy, on these facts standing alone, is adeemed, and she has no claim against the estate on account of it. It would be the same if he gave the bonds to some one else after making the will and before his death. If no bonds were found in the box or owned by the estate, they could not pass to her by the will. The legacy would be adeemed. It would be adeemed pro tanto, if only a part of the bonds were disposed of in like manner.

In the first instance, the legacy of \$10,000 was general, and, the subsequent gift being not at all inconsistent with the legacy, there could be no presumption, from it alone, of ademption or satisfaction pro tanto.

In the second instance, the legacy of the bonds was specific, and the subsequent disposal of them was inconsistent with the legacy. If he gave them to her in life, she could not take them by the will; if he gave them to some one else or disposed of them otherwise before he died, they could not pass to her by the will when it took effect at his death.

In the case at bar, outside of the will itself and the fact of the gift of the testator to his wife, there is no evidence to show with what intent the bequest was made, or with what intent the subsequent gift was made. As the testator did not stand in loco parentis to the legatee (*Bennet v. Bennet*, 10 Ch. Div. 474, 1 Am. & Eng. Ency. of Law, 615), it is contended by the appellant that there can be no presumption that the testator, by giving his wife \$3,000, intended to lessen the amount given her by his will.

The result of deducting the amount of the gift from the legacy can



be reached logically and legally only by holding that: (a) As matter of law, ademption has occurred pro tanto; (b) or that the equitable doctrine of satisfaction is applicable; (c) or that the record and the will, properly construed, show that it was the intention of the testator that the subsequent gift should be a payment pro tanto of the legacy.

[1, 2] Ademption of a specific legacy is the extinction or withdrawal of it in consequence of some act of the testator equivalent to its revocation, or clearly indicative of an intention to revoke. The ademption is effected by the extinction of the thing or fund bequeathed, or by a disposition of it subsequent to the will, which prevents its passing by the will, from which an intention that the legacy should fail is presumed. *Kenaday v. Sinnott*, 179 U. S. 606, 617, 21 Sup. Ct. 233, 45 L. Ed. 339; *Ford v. Ford*, 23 N. H. (3 Foster) 212. The Georgia statute differs but little, if at all, from the general law on the subject:

"A legacy is adeemed or destroyed, wholly or in part, whenever the testator, after making his will during his life, delivers over the property or pays the money bequeathed to the legatee, either expressly or by implication, in lieu of the legacy given; or when the testator conveys to another the specific property bequeathed, and does not afterward become possessed of the same, or otherwise places it out of the power of the executor to deliver over the legacy." Code of Georgia (1910) § 3908.

The language of this section strongly indicates that by it ademption is confined to specific legacies. The words, "delivers over the property or pays the money," indicate that the legacy designated certain property or certain money; so, also, the words, "when the testator conveys to another the specific property," and "places it out of the power of the executor to deliver the legacy."

[3-5] Usually, in states where the common law prevails, in the absence of a statute to the contrary, legacies are either general, demonstrative, or specific. Without attempting all-embracing definitions, which are difficult and often unsatisfactory, it may be said that: (1) A general legacy is a bequest chargeable upon the general estate, and not so given as to be distinguishable from other parts of the estate of the same kind; or it is one of a quantity merely, and includes all bequests not demonstrative or specific. *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785. (2) A demonstrative legacy is a bequest of a thing or money not specified or distinguished from all others of the same kind, but payable out of a designated fund. *Myers' Ex'rs v. Myers*, 33 Ala. 85; *Kenaday v. Sinnott*, 179 U. S. 606, 618, 21 Sup. Ct. 233, 45 L. Ed. 339. (3) A specific legacy is a bequest of a particular thing or money specified and distinguished from all others of the same kind. *Gilmer v. Gilmer*, 42 Ala. 9, 16; *Kenaday v. Sinnott*, supra. Each of the three kinds of legacies is distinguished from the others by the incidents which attach to them respectively.

[6] We are at present concerned only with ascertaining to which of the three classes of legacies the one in question belongs, and whether or not it is subject to the doctrine of ademption. It is a bequest of "the sum of ten thousand dollars to be realized out of the proceeds of such life insurance as may be of force on my life at the time of my death." It is a legacy of a certain sum, to be paid out of, and made

a charge on, the proceeds of life insurance policies. A bequest of a certain sum, with direction that it be paid out of a particular fund, is a demonstrative legacy. *Merriam v. Merriam*, 80 Minn. 254, 83 N. W. 162; *Harper v. Bibb*, 47 Ala. 547; *Kelly v. Richardson*, *supra*; *Blair v. Scribner*, 67 N. J. Eq. 583, 60 Atl. 211; *Ives v. Canby* (C. C.) 48 Fed. 718. This view seems to be recognized as correct by the Supreme Court, for it quotes with approval:

"If a legacy be given, with reference to a particular fund only, as pointing out a convenient mode of payment, it is to be construed as demonstrative, and the legatee will not be disappointed, though the fund wholly fail." *Kenaday v. Sinnott*, *supra*, 179 U. S. 619, 21 Sup. Ct. 238, 45 L. Ed. 339.

In some of the cases, general and demonstrative legacies are referred to, without noticing a distinction between them. In such cases, as in the instant case, the important question being whether or not the legacy considered is a specific legacy, the usually recognized difference between general and demonstrative legacies is of no great importance.

In *Byrne v. Hume*, 86 Mich. 546, 49 N. W. 576, it was held that a bequest to the father and mother of the testator of a legacy, to be paid out of the testator's life insurance as soon as collected, is "a general legacy," payable out of the general assets of the estate, if the insurance is not collected. And in *Re Snyder*, 217 Pa. 71, 66 Atl. 157, 11 L. R. A. (N. S.) 49, 118 Am. St. Rep. 900, 10 Ann. Cas. 488, it is held that a bequest of a certain number of shares of stock, of a kind of which the testator owns a larger number, is "a general legacy," and not adeemed by a substitution, during the testator's lifetime, of other stock for that owned at the execution of the will. In each of these cases it was only important to ascertain whether or not the legacy was specific. It seems clear that the legacy in question here is not specific. According to the current of authority on the subject, preserving a proper and sometimes necessary distinction, it would be defined as a demonstrative legacy. It is a bequest of a fixed sum to be paid out of named assets. The sum is \$10,000, while the assets on which it is charged amount to not less than \$15,000. Such a legacy is not a specific, but a demonstrative, legacy, or a general legacy, according to some of the decisions, and as defined by the statutes in some states. Cases *supra*. See, also, *Wilcox v. Wilcox*, 13 Allen (Mass.) 256; *Gelbach v. Shively*, 67 Md. 498, 10 Atl. 247; *In re Snyder*, 217 Pa. 71, 66 Atl. 157, 11 L. R. A. (N. S.) 49, and note, 118 Am. St. Rep. 900, 10 Ann. Cas. 488; *Johnson v. Conover*, 54 N. J. Eq. 333, 35 Atl. 291.

The Georgia Code provides that legacies may be either general or specific. While it does not mention demonstrative legacies, it adheres to the usual rule that a legacy like the one in question here is not specific; the same section which divides legacies into "general or specific" providing that:

"A gift of money to be paid from a specified fund is nevertheless a general legacy." Code of Georgia (1910) § 3902.

The legacy in question not being specific, it is not subject to the doctrine of ademption, which is not applicable to either general or demonstrative legacies. In *Kenaday v. Sinnott*, *supra*, at page 621, the

court, having concluded that the legacy in question "should be regarded as in its nature a demonstrative legacy," held that it was not adeemed. The case indicates clearly an adherence to the view that the doctrine of ademption is applicable only to specific legacies. In *Ives v. Canby* (C. C.) 48 Fed. 718, there was a bequest of "\$2,000 of the South Ward Loan of Chester, Pennsylvania," by a testator owning \$10,000 worth of bonds, and the court held that it was a demonstrative legacy and refused to apply the doctrine of ademption. In *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456, Chancellor Kent cites approvingly cases in which certain acts of the testator were held to be "no ademption, because the legacies were considered as pecuniary, and not specific, notwithstanding a reference was made to a particular part of the estate as the part out of which the testator thought it most convenient they should be paid." In *Balliet's Appeal*, 14 Pa. 451, 461, the court said:

"Ademption does not apply to demonstrative legacies; i. e., to legacies of so much money with reference merely to a particular fund for payment."

In 2 *Redfield on Wills* (3d Ed.) p. 150, § 16, a case is quoted approvingly, which holds that "a specific legacy is liable to ademption, but a demonstrative one is not." A legacy of \$1,200, "contained in a bond and mortgage," was, in *Giddings v. Seward*, 16 N. Y. 367, held to be a demonstrative legacy. The court said it was "general, in the sense that it would not have been regarded as adeemed by the assignment of the bond and mortgage, or its extinction, in the lifetime of the testator." In *Tipton v. Tipton*, 1 Cold. (Tenn.) 252, it is held that the doctrine of ademption is not applicable to general or demonstrative legacies. The same principle is announced in other cases. *Boykin v. Boykin*, 21 S. C. 513, 532; *Hood v. Haden*, 82 Va. 588, 599; *Gelbach v. Shively*, *supra*.

The term "ademption" is sometimes used as a synonym of "satisfaction"; but this is inaccurate and leads to confusion. Ademption, properly so called, is applicable only to specific legacies, and operates independently of intention in case the specific thing given is, at the testator's death, no longer owned by him. Ademption of legacies depends on a rule of law. But the doctrine of satisfaction, it has been said, rests wholly upon intention, and may be applied to the extinction of general or demonstrative legacies. It is of equitable origin, and may be defined to be:

"The giving of a thing with the intention on the part of the donor, but not of necessity on the part of the donee, that it shall be taken, either wholly or in part, in extinguishment of some existing claim of the donee on the donor." 1 *Underhill on Wills*, § 437.

[7] The giving of a portion by the testator to a legatee subsequent to the will may operate as satisfaction of the entire legacy, or pro tanto, if the gift be less than the legacy. But the application of this rule to will cases is subject to the limitation that the testator must be the father of the legatee or stand in loco parentis to the legatee. *Wallace v. Du Bois*, 65 Md. 153, 4 Atl. 402; *Carmichael v. Lathrop*, 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232; 1 *Underhill on Wills*, §

444; 2 Redfield on Wills (3d Ed.) 446, 447. When such is the relation between the donor and donee, a presumption may arise, which, however, is subject to be rebutted, that the gift is in satisfaction of the legacy. In the instant case, it not appearing from the record that the testator was a parent of the legatee, or stood in loco parentis, no presumption arises that the subsequent gift was in part satisfaction of the legacy.

It seems clear that there is no rule based on the doctrine of ademption, or the equitable doctrine of satisfaction, that will justify the conclusion that the subsequent gift in the instant case can be treated as an extinction pro tanto of the legacy.

It remains to be considered whether or not it appears from the will, the circumstances surrounding the testator, and the subsequent act of the testator in making the gift, that it was his intention to satisfy in part the legacy to his wife.

[8] The authorities are innumerable which hold that a will is to be construed in accord with the intention of the testator, and that the construction of it depends, not so much upon any rigid technical rules, as it does on what appears by the will itself to have been the testator's intention. This rule is recognized in Georgia by statute. Code of Georgia (1910) § 3900. This intention is ascertained by an examination, not alone of a clause in question, but of the whole will.

The clause in question has been quoted, and it is a clear, unqualified bequest of \$10,000, "to be realized out of the proceeds of such life insurance as may be of force on my life at the time of my death." The legacy is made a charge on a designated fund. The effect of this is not to imperil the legacy, if that fund should be exhausted or cease to exist. In that event, the legacy would have been paid out of the other assets of the estate; for a demonstrative legacy is not defeated by a failure of the fund out of which it is payable, but the deficiency is made up out of the personal estate not specifically bequeathed. Page on Wills, § 774; *Lake v. Copeland*, 82 Tex. 464, 17 S. W. 786; *Smith v. Fellows*, 131 Mass. 20. The effect, therefore, of the words used was to give to his wife the legacy in a way that she would receive it out of the insurance policies, if practicable, but, if they failed or lapsed, it would be paid to her out of his general estate. The legacy not being specific, if he had disposed of all the policies, or if they had all been forfeited for failure to pay premiums, the legacy would have been payable out of the general estate. The only effect of the language creating this bequest that took it out of the category of a general legacy is that it is made, first, a charge on a designated fund. It is required by law that it be paid, even if the fund fails. Should we construe words intended to secure payment so as to make them imperil complete payment? The testator uses words that make a demonstrative legacy, adding security to what would otherwise be a general legacy. We cannot construe those words to be less effective than a general legacy, without defeating the testator's manifest intention.

There is nothing in the record to show that the testator wrote any line or said any word that indicates an intention that the subsequent



gift to his wife should lessen the amount of the legacy. Are we authorized to presume, without proof, an intention in conflict with the legal effect of the will? We find nothing in the language of other parts of the will to create a presumption of such intention. Other property is devised and bequeathed to her, both real and personal, which shows an intention to provide for her liberally. The will also makes liberal provision for his son and only child. The will and record show the possession of a valuable estate, estimated to be worth about \$200,000, and that he was amply able pecuniarily, without seeming injustice to any one, to give to his wife \$3,000 in addition to the provision he had made for her in his will. Nothing in the record shows that, by word or deed, he indicated, when he gave her the life policy, that it was to be deducted from the legacy. Such fact, if it existed, was susceptible of proof even by parol. 1 Underhill on Wills, p. 599, § 448; *May's Heirs v. May's Adm'r*, 28 Ala. 141.

In item 4 of the will—the residuary clause in favor of his wife and his son—he provides that his son is to account for all advancements made to him after the date of the will, which are charged to him on the back of the will. There is no provision in reference to any future gift that he might make to his wife, his other legatee. Failure to mention his wife in that connection at least left him free to make gifts to her not in satisfaction of her legacy. Provisions that subsequent gifts shall or shall not be charged are frequent, and, when made in the will, they are, of course, controlling. *Adams v. Cowen*, 177 U. S. 471, 20 Sup. Ct. 668, 44 L. Ed. 851; 1 Underhill on Wills, § 447. When the will is silent on the subject, it, of course, stands for enforcement as written and properly construed.

There being no proof in the record of the value of the specific property devised and bequeathed to the wife and son, respectively, it cannot be assumed, for the purpose of arriving at his intention on the question at issue, that he intended to provide for the wife and son in equal portions. Besides, it is alleged in the bill that the bequests to the wife are of the value of about \$125,000, and that the bequests to the son are of the value of about \$75,000. This averment of values is neither denied nor admitted by the answer, and there is no evidence in the record on the subject.

It is insisted that the case of *Beermann v. De Give*, 112 Ga. 614, 37 S. E. 883, is a controlling authority in the instant case. *Beermann*, by his will, gave his wife \$10,000 insurance carried by him, or, in default of such insurance, she was to have \$10,000 out of his estate. There was, in fact, a policy on his life for that sum, but it was not payable to his estate. One half of it was payable to his wife, and the other half to his son. He had no right whatever to dispose of it in his will. After the testator's death, the wife received one-half of the proceeds of the policy. She claimed that she should receive under the will \$10,000 in addition. The court held as follows:

"Looking to the whole will for the intention of the testator, it is clear that his purpose was to give his wife \$10,000 in addition to one-fifth of the residuum of his estate. It is equally certain that he was under the impression that he had the right to make a testamentary disposition of the proceeds of an insurance policy on his life, and upon which he paid the premiums, although

it was not payable to his legal representative, and, in making his will, that he intended to deal with any such policy that might exist then, or at the time of his death, as his property. The will shows that it was his desire that his wife should have \$10,000 of insurance money, and, 'in its absence, that a like amount should be paid her by his executor from other sources. It is therefore our opinion that, in order to carry out the testamentary scheme, the \$5,000 paid to Mrs. Beermann upon the life insurance policy should be treated as a part of the testator's estate, and that the executor should pay her, from the general funds of the estate, an additional sum of \$5,000, thus enabling her to obtain the \$10,000 legacy which the testator obviously intended that she should receive."

The will, it will be noted, gave her only \$10,000. She was to have it out of the insurance, if there was that sum of insurance money; otherwise, she was to have it out of the estate. As a matter of fact, no insurance existed which the testator had a right to bequeath. One-half of the policy was owned by Mrs. Beerman. The rule is that, if a testator disposes of property owned by a beneficiary under the will, such beneficiary must either relinquish his right to such property, or he must relinquish his rights under the will. He must accept the will as a whole, or not at all; that is, if he claims under the will, he must recognize the testator's right to dispose of the property, although he, the beneficiary, in fact owned it. *Smithsonian Institution v. Meech*, 169 U. S. 398, 414, 18 Sup. Ct. 396, 42 L. Ed. 793; *Utermehle v. Norment*, 197 U. S. 40, 25 Sup. Ct. 291, 49 L. Ed. 655, 3 Ann. Cas. 520; *Van Schaack v. Leonard*, 164 Ill. 602, 45 N. E. 982; 2 *Underhill on Wills*, § 726; *Page on Wills*, § 714. The Georgia Code recognizes this equitable doctrine of election. Code of Georgia (1910) § 3910. The effect of the decision in *Beermann v. De Give*, supra, was to enforce this rule. Mrs. Beermann was forced by it, in effect, to recognize the testator's right to devise the \$5,000 interest in the policy which she owned, and it was treated as a part of the testator's estate, and as part of the \$10,000 bequeathed to her; the court allowing her \$5,000 more, which made the \$10,000 legacy bequeathed to her. The case did not, as in the instant case, involve any question of ademption or satisfaction arising from a payment made subsequent to the will by the testator to the legatee; nor did it involve any question of the intention with which such payment was made, for in the *Beermann Case* the testator made no such payment. Nor does the instant case involve any question arising from the testator's bequeathing property that did not belong to him, but that was owned by a beneficiary under the will, which was the controlling fact in the *Beermann Case*.

Considering the record before us, we are of the opinion that it does not present a case for the application of ademption or satisfaction pro tanto, and that it does not appear that it was the intention of the testator that his subsequent gift to his wife was to extinguish in part the legacy to her.

On the appeal the decree is reversed, in so far as it decreases the legacy of \$10,000 to the appellant, and in all other respects it is affirmed. On the cross-appeal, as to errors therein assigned, the decree is affirmed. The appellee is taxed with the costs of the appeal, and the cross-appellant with the costs of the cross-appeal. And it is so ordered.

PHILLIPS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1912.)

No. 3,700.

**1. CRIMINAL LAW (§ 101\*)—COUNTS—JURISDICTION.**

Under Enabling Act Okl. June 16, 1906, c. 3335, § 16, 34 Stat. 276, as amended by Act March 4, 1907, c. 2911, § 1, 34 Stat. 1286, providing that prosecutions, pending in the district courts of the territory of Oklahoma or in the United States courts in the Indian Territory on the admission of Oklahoma as a state, shall be transferred to the proper United States District Court and proceeded with, the record of a criminal prosecution pending in the United States court for a district of the Indian Territory at the time of the admission of Oklahoma as a state is properly certified to the District Court of the United States by the clerk of the state district court as successor of the United States court, where the indictment, subpoena, petition for transfer, and order of transfer are certified and transmitted to the proper District Court, and it has jurisdiction of the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 190-205; Dec. Dig. § 101.\*]

**2. JURY (§ 47\*)—SUMMONING JURY—DISTRICT.**

Under Enabling Act Okl. June 16, 1906, c. 3335, § 16, 34 Stat. 276, as amended by Act March 4, 1907, c. 2911, § 1, 34 Stat. 1286, authorizing the transfer to the United States District Court of prosecutions pending on the admission of Oklahoma as a state, to be proceeded with in the District Court as if originally brought therein, one indicted in the United States court for a district of the Indian Territory may not complain on the transfer of the prosecution to the District Court for the Eastern District of Oklahoma, that the jurors, with the exception of one, were drawn from that portion of the Eastern District of Oklahoma which did not include any part of the old district of the Indian Territory.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 254; Dec. Dig. § 47.\*]

**3. CRIMINAL LAW (§ 576\*)—PRIVILEGES OF ACCUSED—SPEEDY TRIAL.**

One may not acquiesce in the postponement of his trial for crime from time to time, and then insist on the dismissal of the prosecution, because he has not been given a speedy trial, as guaranteed by Const. U. S. Amend. 6.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.\*]

**4. CRIMINAL LAW (§§ 301, 1149\*)—LEAVE TO WITHDRAW PLEA OF NOT GUILTY AND FILE DEMURRER—DISCRETION OF TRIAL COURT.**

The refusal of the trial court to allow accused to withdraw his plea of not guilty and file a demurrer to the indictment is within the sound discretion of the trial court, and will not be disturbed in the absence of an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 687, 3014, 3015, 3020, 3022, 3023; Dec. Dig. §§ 301, 1149.\*]

**5. BANKS AND BANKING (§ 257\*)—FALSE ENTRY IN REPORT TO COMPTROLLER OF CURRENCY—INDICTMENT—SUFFICIENCY.**

An indictment alleging that accused made a false entry in a report to the Comptroller of the Currency of the condition of a national bank at the close of business on a designated date, and that the report showed that the balance due to the bank from another bank on that date was \$21,007.97, when in truth and in fact the balance was only \$14,895.97, sufficiently charges a violation of Rev. St. § 5209 (U. S. Comp. St. 1901,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

p. 3497), punishing the making of false reports, when attacked by motion in arrest.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 966, 970-976; Dec. Dig. § 257.\*]

**6. BANKS AND BANKING (§ 257\*)—"FALSE ENTRY" IN REPORT TO COMPTROLLER OF CURRENCY—INDICTMENT—ISSUES, PROOF, AND VARIANCE.**

The variance between an indictment, alleging that accused made a false entry in a report to the Comptroller of the Currency of the condition of a national bank, so as to show the balance due the bank from another bank as \$21,007.97, when in truth and in fact the balance was only \$14,895.97, and the proof that the true balance due was \$14,947.68, is immaterial; the gist of the offense being the making of a "false entry" knowingly and with intent to deceive, and the exact amount of the balance stated to be due not being material.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 966, 970-976; Dec. Dig. § 257.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2656, 2657; vol. 8, p. 7660.]

**7. BANKS AND BANKING (§ 257\*)—FALSE ENTRY IN REPORT TO COMPTROLLER OF CURRENCY OF CONDITION OF NATIONAL BANK—CRIMINAL PROSECUTION—EVIDENCE—ADMISSIBILITY.**

On a trial for having made on September 4, 1906, a false entry in a report to the Comptroller of the Currency of the condition of a national bank at the close of business on that date, so as to falsely show the balance due it from another bank, the admission of evidence that accused in October following admitted a shortage in his accounts, and that he thought that most of it was in the account of such bank, to throw light on the question as to whether accused knowingly made the false entry, was not erroneous.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 966, 970-976; Dec. Dig. § 257.\*]

**8. CRIMINAL LAW (§ 434\*)—EVIDENCE—PRIVATE RECORDS.**

On a trial for making a false entry in a report to the Comptroller of the Currency of the condition of a national bank by showing a false balance due the bank from another bank, the books of the latter bank are inadmissible in evidence, in absence of the testimony of some person who either has some knowledge of the correctness of the entries made in the books, or some knowledge of the original transaction on which the entries were founded; and the mere fact that the laws of the United States make it a crime to make false entries in the books of a national bank does not make the books *prima facie* evidence of their contents, simply on their being identified as bank books, but their admissibility is determined by the rule governing the admission of entries in private books of account.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1023; Dec. Dig. § 434.\*]

**9. CRIMINAL LAW (§ 402\*)—EVIDENCE—CONDITION OF BOOKS OF ACCOUNT—EXPERT TESTIMONY.**

Expert testimony of a summary of books of account and documents is admissible, where the items are multifarious and voluminous, and of a character to render it difficult for the jury to comprehend material facts; but, before such expert testimony may be given, the books or documents must be public records, or, if private books of account or documents, sufficient evidence must first be given to admit the books or documents themselves in evidence, unless the books or documents are admitted to be correct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 887, 888; Dec. Dig. § 402.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

W. P. Phillips was convicted of crime and he brings error. Reversed and remanded for new trial.

B. T. Hainer, of Tulsa, Okl., and William P. Thompson, of Vinita, Okl., for plaintiff in error.

William J. Gregg, U. S. Atty., of Tulsa, Okl.

Before SANBORN and CARLAND, Circuit Judges, and W. H. MUNGER, District Judge.

CARLAND, Circuit Judge. Phillips was indicted on June 12, 1907, in the United States Court for the Northern District of the Indian Territory, held at Vinita, for a violation of section 5209, Rev. Stat. (U. S. Comp. St. 1901, p. 3497). In substance, the indictment charged him with having made a false entry in a report to the Comptroller of the Currency of the condition of the First National Bank of Vinita at the close of business on the 4th day of September, 1906. The report was alleged to be false, in that it showed the balance due from the Hanover National Bank, New York, to the First National Bank of Vinita, on September 4, 1906, as \$21,007.97, when in truth and in fact said balance was only \$14,895.97. Upon trial, a verdict of guilty was rendered by the jury, and Phillips was thereupon sentenced to the penitentiary for five years.

On June 20, 1907, a plea of not guilty was entered to the indictment. November 16, 1907, the state of Oklahoma was admitted to the Union. December 19, 1907, the United States attorney for the Eastern district of Oklahoma filed a petition in the district court for Craig county, Second judicial district of Oklahoma, praying that an order of that court might be entered removing said case from the district court of Craig county, Okl., to the District Court of the United States for the Eastern District of Oklahoma. On December 20, 1907, the prayer of this petition was granted, and the indictment, subpoena, petition for transfer, and order of transfer were duly certified and transmitted to the United States District Court for the Eastern District of Oklahoma.

Section 16 of "An act to enable the people of Oklahoma and of the Indian Territory to form a constitution and state government, etc." (Act June 16, 1906, c. 3335, 34 Stat. 276), provided:

"That all causes pending in the supreme and district courts of Oklahoma Territory and in the United States courts \* \* \* in the Indian Territory \* \* \* in which the United States may be a party \* \* \* shall be transferred to the proper United States Circuit or District Court for final disposition."

Said section 16 was amended by Act March 4, 1907, c. 2911, 34 Stat. 1286, by adding, after the word "disposition":

"And shall therein be proceeded with in the same manner as if originally brought therein."

Section 16, as amended, further provided:

"Prosecutions for all crimes and offenses committed within the territory of Oklahoma or in the Indian Territory, pending in the district courts of the

territory of Oklahoma or in the United States courts in the Indian Territory upon the admission of such territories as a state, which, had they been committed within a state would have been cognizable in the federal courts, shall be transferred to and be proceeded with in the United States Circuit or District Court established by this act for the district in which the offenses were committed, in the same manner and with the same effect as if they had been committed within a state."

[1] The case against Phillips was continued from time to time, sometimes at his own request, and at other times seemingly abandoned by both parties, until May 9, 1911, when the case was moved for trial at Tulsa, in the Eastern district of Oklahoma. At this time, counsel for Phillips moved the court to dismiss the case for want of jurisdiction, for the reason that the record had not been properly certified from the court in which the indictment was found, or its successor, the district court for Craig county, Second judicial district of Oklahoma. The motion was overruled and an exception taken. There is no merit whatever in this contention, as the record, taken in connection with the law providing for the transfer of the case, shows it was properly transferred.

[2] It appears from the record that the jurors, with the exception of one, were drawn from that portion of the Eastern district of Oklahoma which did not include any portion of the old Northern district of the Indian Territory. These jurors were challenged, and, upon the challenges being disallowed, exception was taken to the ruling of the court in reference thereto. In view of the acts of Congress hereinbefore quoted, we think there was no error in this action of the court, especially in view of the decisions in *Billingsley v. United States*, 178 Fed. 653, 101 C. C. A. 465, *Cook v. United States*, 138 U. S. 157, 11 Sup. Ct. 268, 34 L. Ed. 906, and *Hallock v. United States*, 185 Fed. 417, 107 C. C. A. 487.

[3] Counsel for Phillips also moved the court to dismiss the case and discharge the defendant, because the United States had failed to bring him to trial at an earlier date. This motion was also overruled. The sixth amendment to the Constitution of the United States provides that the accused shall enjoy the right to a speedy and public trial; but the record does not show that Phillips ever asked for a trial during the four years that the indictment was pending, and we do not think a defendant can acquiesce in the postponement of his trial, and then, when the same is called, move that the case be dismissed because he had not been given a speedy trial. It is his duty, if he wants a speedy trial, to ask for it; and we must presume that he would have been granted an earlier trial if he had so asked. There was no error in the ruling of the court in this respect.

[4] The refusal of the court to allow the defendant to withdraw his plea of not guilty and file a demurrer to the indictment was within the sound discretion of the court, and we see no abuse of discretion.

[5] The sufficiency of the indictment was raised by motion in arrest, and the motion was overruled. Judged by the statute under which the indictment was returned, and the cases of *United States v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520, and *Harper*

v. United States, 170 Fed. 385, 95 C. C. A. 555, the indictment was clearly sufficient.

[6] At the close of all the evidence counsel for defendant moved for a directed verdict, on the ground that there was a variance between the indictment and the evidence. It appeared in evidence that the true balance due from the Hanover National Bank to the First National Bank on September 4, 1906, was \$14,947.68, instead of \$14,895.97, as alleged in the indictment. This was an immaterial variance. The gist of the offense was the making of a false entry, knowingly and with intent to deceive, the exact amount of the balance stated to be due was not material, and the defendant could not have been misled or surprised in any way by the proof. *United States v. Harper* (C. C.) 33 Fed. 471; *Flickinger v. United States*, 150 Fed. 1, 79 C. C. A. 515; *United States v. Graves* (D. C.) 53 Fed. 634; *Richardsbn v. United States*, 181 Fed. 1, 104 C. C. A. 69; *Daniels v. United States* (C. C. A.) 196 Fed. 459. It follows, also, that the court did not err in refusing to instruct in this matter as requested by counsel for defendant, and no exceptions were taken to the charge as given.

[7] Certain witnesses were allowed to give testimony, over the objection of counsel for the defendant, to the effect that the defendant, on October 9, 1906, had admitted that he was short in his accounts, and that he thought most of it was in the account of the Hanover National Bank. The defendant was charged with having made a false entry on September 4, 1906, and it is a close question as to whether or not this testimony concerning admissions of defendant made on October 9, 1906, tended in any way to prove the commission of the offense with which he was charged. It was admitted by the court on the theory that it would furnish a motive for the defendant to make the false entry, and that it would be some evidence that he made the entry knowing it to be false. The court in its charge limited the effect of the evidence, so far as it could, by telling the jury that the defendant was not charged with embezzlement or misapplication of the bank's funds, and that they should only consider the admissions of the defendant in so far as they would throw light upon the question as to whether the defendant knowingly made the false entry with which he was charged. We think, upon the whole, that as limited by the court it was not error to receive this evidence.

[8] Two books of account, a register and a journal, of the Hanover National Bank, were admitted in evidence over the objection and exception of counsel for the defendant, and the court charged the jury that these books were presumed to be correctly kept until the contrary was shown. The following testimony is all the foundation that was laid for their admission:

Frank E. Wheeler was called as a witness for the prosecution, and testified as follows:

"Q. Are you in any way associated with the Hanover National Bank of New York? A. I am. Q. In what capacity? A. There isn't any name for my position. Q. No official name for it? A. No. Q. Are you familiar with the books of the Hanover National Bank of New York? A. I am. Q. I will ask you to look at this journal. What book is that called—what is the name

of it? A. That is a register showing the accounts of banks under the—whose titles come under the—letters T to Z, national banks. Q. Does this ledger show the account between the Hanover National Bank and the First National Bank at Vinita, Indian Territory, in the year 1906? A. Six months of the year 1906. Q. Those entries in that book, by whom were they made, Mr. Wheeler? A. By various bookkeepers. Q. In the employ of the Hanover National Bank. And you say this is a book kept by that bank in the transacting of its banking business? A. This is an original book of record. Q. And in transacting its business with the correspondent bank of the First National Bank of Vinita, Indian Territory? A. It is. Q. Then that ledger which you have identified was one of the books used by the Hanover National Bank in transacting its bank business? A. It was. Q. And was it, or not, one of the books used in transacting its business with its correspondent banks? A. It was. Q. Was one of those correspondent banks the First National Bank at Vinita, Indian Territory? A. It was. Q. You said that it contained an account of the Hanover Bank and the First National Bank at Vinita, for six months of the year 1906? A. Yes, sir. Q. What six months? A. The last six months. Q. You may state, Mr. Wheeler, if it has not been shown, what your duties were in connection with the Hanover National Bank of New York. A. During this period, do you refer to? Q. During that period; yes. A. I was city manager; as such I had general supervision of the books of the bank, and of the clerical force. Q. You may state, then, what your duties were, Mr. Wheeler? A. I was city manager; as such I had general supervision of all the records and clerical force of the bank. Q. Is that all? A. That was enough. Q. What was included in the clerical force? A. 250 men. Q. Yes, sir; what was the duty of those men among other things? Did it pertain to the books? A. Yes; some of them were bookkeepers, some tellers, some assistants, etc. Q. Then, in the discharge of your duties, did you or not become acquainted with the books of the bank? A. I did. Q. And you have testified about this particular book? A. Yes. Q. Your knowledge as to the book and your means of identification are because of your duties with the bank? A. They are. Q. You may examine this book, Mr. Wheeler. A. Very well, sir. Q. What is the name of that book? A. That is a balance book; it shows the balances of all the accounts on that particular ledger, from the early part of 1906 to December, 1907. Q. Is that one of the books kept by the Hanover National Bank or not? A. It is. Q. And you can testify as to the identity of that book by the same means that you can as to the identity of the other book? A. I can. \* \* \*

#### Cross-examination:

"By Mr. Thompson: Q. Mr. Wheeler, you say the position you occupy with the Hanover National Bank has no name? A. That is correct. Q. You didn't keep these records yourself, or make these entries? A. I did not. Q. Not in any one of these books? A. I did not. \* \* \*

"The Court: Q. I believe you said you had general charge of the bookkeepers who made these various accounts? A. Yes, sir. Q. Was that general charge such as—you can answer this question yes or no—such as enables you now to say whether or not these books are correct? A. Yes, sir. Q. Do they correctly state the amount which they purport to state? A. They do.

"Mr. Thompson: Q. You were not present at the time these entries were made? A. Do you mean—? Q. In these books? A. Looking over the bookkeeper's shoulders, that what you mean? Q. Yes. A. No, sir; I was not. Q. You didn't direct these entries be made? A. I did not. Q. They were made independently by the bookkeeper? A. They were. Q. You say you were city manager. What did you do as city manager? A. I saw that the work of the bank was done correctly, for one thing, so far as possible. Q. But you had to rely on the independent work of these parties for this work? A. Entirely; I didn't do it myself. Q. And you didn't direct the entries to be made? A. No, sir. Q. And didn't examine the items at the time they were made? A. No, sir. Q. To see that they were made correctly? A. No, sir."



Here was a witness whose position with the Hanover National Bank had no name. He called himself in his testimony "city manager." Outside of the questions put by the court, the testimony given by the witness simply amounted to an identification of the books as belonging to the Hanover National Bank. He was asked by the court if his position enabled him to testify as to whether the books were correct, to which he answered in the affirmative, and then testified that the books correctly stated the amounts they purported to state. The prosecution brought by the United States against Phillips was not a proceeding brought by or against the Hanover National Bank. Entries in its books were as to the defendant, as a matter of evidence, clearly hearsay. The question now arises: Did the testimony of Wheeler authorize the admission of the books as against Phillips for the purpose of showing the falsity of the entry made by him in the report of the Comptroller of the Currency?

The admission in evidence of books of account of private parties constitutes one of the exceptions to the rule of evidence which excludes hearsay testimony. The exception was born of necessity, and the courts have always required, in the absence of statutory provision, that before private books of account can be admitted in evidence, over the objection of the opposing party, some evidence must be introduced as to their trustworthiness. In the case of *Bacon v. United States*, 97 Fed. 35, 38 C. C. A. 37, Thayer, Circuit Judge, delivering the opinion of this court, used the following language:

"The books of the bank, when they were offered in evidence by the government, were further objected to by the defendant below on the ground that no testimony had been adduced to show that they had been properly kept. This objection was overruled, and error is assigned on account of that ruling. The government did prove, however, that the books in question were the books of the American National Bank, in which it had been accustomed to keep a record of its daily business transactions, and that the books had been kept according to what is known as the 'Boston System' of bookkeeping, by which system original entries are made on slips called 'debit' and 'credit' slips. The defendant, against whom the books were offered, was the chief executive officer of the bank, and as such actually had control and direction of its affairs while it was a going concern. Besides, the act of Congress under which the bank was organized in effect enjoined that its books should be truthfully kept, since section 5209 of the Revised Statutes, heretofore cited, made it an offense, punishable by imprisonment, for any officer or agent of the bank to make any false entry in its books. In view of these considerations, we are of opinion that a presumption existed that the books in question had been truthfully or properly kept, and that it was unnecessary to fortify that presumption with additional proof, when the books were produced, and proved to be the regular books of account of the bank. We have no fault to find with the rule which is enunciated in some cases that the books of a corporation cannot be used by the corporation without independent evidence showing that they are correct, for the purpose of establishing an indebtedness to itself on the part of its stockholders or directors. *Rudd v. Robinson*, 126 N. Y. 113, 28 N. E. 1046, 12 L. R. A. 473, 22 Am. St. Rep. 816. But we are unwilling to sanction the doctrine that in a proceeding against the president of a national bank, to convict him of making a false report to the Comptroller of the Currency concerning its financial condition, the books of the bank, although properly identified as such, cannot be used by the prosecution as evidence to show its condition, without first producing other evidence to show that they have been truthfully kept, and are in all respects correct.

This latter rule would impose a burden upon the government which it should not be compelled to assume. Inasmuch as the act under which national banks are organized makes it the duty of all officers and employes of such institutions to make no entries in their books except such as are correct and truthful, the government should be entitled to rely upon the presumption that such duty has been faithfully performed until the contrary thereof is established."

It must not be forgotten, with reference to the language above quoted, that Bacon, the defendant, was the president of the American National Bank of Salt Lake City, and had been indicted for a violation of section 5209, Rev. Stat., with reference to the books of said bank, and that the bank books there offered in evidence were the books of a bank of which Bacon was the chief executive officer, charged with knowledge of all the transactions of the bank appearing in the books thereof, and that they were offered against him as proof, practically, of his own acts. We think the language of this court in the case cited should be limited to the question that was then before the court, and, thus limited, the rule enunciated was correct. We do not think, however, that the fact that the laws of the United States make it a criminal offense to make false entries in the books of a national bank makes the books of all national banks in a case like the one before us *prima facie* evidence of their contents simply upon their being identified as bank books. Notwithstanding the command of the statute that no false entries shall be made, the records of the courts show that they are frequently made. The witness Wheeler, although he said the entries in the books of the Hanover National Bank were correct, gave no evidence whatever to show that he had any knowledge upon the subject, or held such position in the Hanover National Bank that the court could say he ought to have knowledge regarding them. He had nothing to do with the keeping of the books, nor with the financial transactions which resulted in the entries appearing in them. The two bank books were offered in *solido*, and just how the account between the Hanover National Bank and the First National Bank of Vinita appeared therein the record does not show. The decisions of the courts upon the admissibility of book entries and account books are not harmonious, but the rule that must obtain in the federal courts is plain.

In the case of *Insurance Co. v. Weide*, 9 Wall. 677, 19 L. Ed. 810, it appears that Charles Weide and Joseph Weide, of Minnesota, brought suit in one of the state courts of that state against the *Ætna* Insurance Company on a policy of insurance to recover \$10,000 upon a stock of goods lost by fire within the conditions of the policy. The suit was duly removed to the federal court. Both the plaintiffs in the trial court were witnesses to prove the value of the goods in the store lost by fire. All the books of account were burned except two daybooks and a ledger. The daybooks covered entries of sales and purchases in the store from 1865 down to the day of the fire, which was on the 22d day of February, 1867. The ledger began the 1st of October, 1866, and contained all merchandise accounts posted from the daybooks, also coming down to the time of the fire. The witnesses identified the daybooks and ledger, and testified that these books were

kept by them, as they had no clerk; that they were the books kept in their business, and that they were correct; that the entries in the daybooks were the original entries of purchasers and sales; that they could not state from recollection the amount or value of the stock on hand at the time of the fire, nor at the time of taking the last inventory in February, 1866, nor by the purchases and sales after that inventory. The daybooks and ledger were offered and admitted in evidence. Mr. Justice Nelson, in delivering the opinion of the court in the case cited, said:

"There can be no doubt but the daybooks and ledger, the entries in which were testified to be correct by the persons who made them, were properly admitted. They would not have been evidence, *per se*, but with the testimony accompanying them all objections were removed."

The case of *Chaffee & Co. v. United States*, 18 Wall. 516, 21 L. Ed. 908, was a case brought by the United States against Chaffee & Co. to recover penalties incurred for the alleged violation of section 48 of the Act of June 30, 1864 (13 Stat. 240, c. 173), to provide internal revenue to support the government. That act provided that any person who should have in his custody or possession any goods, wares, or merchandise, subject to duty, for the purpose of selling the same with the design of avoiding payment of the duties imposed thereon, should be liable to a penalty of \$500. Chaffee & Co. were distillers at Tippecanoe, a small town upon the Miami Canal, which traversed the state of Ohio from Cincinnati, on the south line of the state, by a course north and south, to Toledo, in the north. The custom of Chaffee & Co. was to ship whiskies in both directions. Going north, such whiskies had to pass through a place called Piqua, which was the first place on the canal at which toll was payable when the vessel was going from Tippecanoe in the direction named. Going south, towards Cincinnati, the whiskies had to pass through Dayton, the first place at which toll was payable when the vessel was going from Tippecanoe south. There was no other distillery at Tippecanoe. The Miami Canal, on which these whiskies were transported, had been made and for some years was managed by the state of Ohio. A statute for the regulation of the navigation thereof, and for the collection of tolls, enacted that no boat should be permitted to pass on it unless the master had first obtained a clearance for each voyage from the collector of tolls, which clearance the collector nearest the place at which the boat began her voyage was required to issue. To enable the collector to issue clearances that should truly represent what cargo was on board, the act made it obligatory on the master to exhibit to the collectors a just and true account or bill of lading of each and every article of property on board, when the boat should depart on her voyage, or which should be taken on afterwards; and, further, to insure accuracy, every collector receiving a bill of lading might require the master to verify it by his oath. Though the canal had been originally managed by the state, it was not so managed at the time when the whiskies of Chaffee & Co. were transported. The state had leased it.

On the trial, the defendants having proved that during the time

embraced in the controversy they had paid taxes on full 6,045 barrels of whisky made by them during that time, the government, in order to show that the defendants had in their custody or possession dutiable whisky, for the purpose of selling the same with the design of avoiding payment of duties imposed thereon, offered in evidence the books of the collectors at Piqua and Dayton, which the collectors produced, to show by different certificates in them, on which clearances had been granted at Dayton and Piqua, the collection offices nearest to Tippecanoe, at which place, as already said, Chaffee & Co. were the only distillers, that 200,000 gallons more whisky had been moved from the said place than duties were paid on. The collectors at Piqua, Dayton, and Cincinnati were examined. They had little personal knowledge of any facts bearing on the controversy. The handwriting of Kaufman, the young man who made some entries at Dayton, and who was dead, was proved, and the grandson of Brown, who made some others, was produced and sworn. But the government examined none of the captains whose names were signed to the several certificates in the books at Dayton and Piqua, as to the genuineness of their signatures, nor was proof given of the handwriting or death of any of them. The collector at Cincinnati did not testify from any knowledge of his own that his books contained true records of what whiskies had arrived. Some, but not all, of the captains were examined as witnesses, and testified to the carriage of whiskies from Chaffee's distillery on their boats, at dates corresponding and of quantities corresponding to their several certificates, respectively. The defendants objected to the reception of the books, on the ground that it was hearsay and *res inter alios acta*. But the evidence was admitted, not as evidence that whisky came from or belonged to the defendants, but only as competent to show that a given quantity passed a certain point on a given day, and, if the government did not connect this whisky with the defendants, the testimony would be stricken out. The defendants excepted. The evidence was never afterwards stricken out. Mr. Justice Field, in delivering the opinion of the Supreme Court to the effect that the books were improperly admitted, used the following language:

"The books were not public records. They stood on the same footing with the books of the trader or merchant. The fact that the lease was from the state did not change the character of the entries made by the collectors, who were simply agents of the lessees, and not public officers of the state. Their admissibility must therefore be determined by the rule which governs the admissibility of entries made by private parties in the ordinary course of their business. And that rule, with some exceptions not including the present case, requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead, or insane, or beyond the reach of the process or commission of the court. The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subjected to cross-examination, affords the greatest security for truth. Their declarations, verbal or written, must, however, sometimes be admitted when they themselves cannot be called, in order to prevent a failure of justice. The admissibility of the declarations is in such cases limited by



the necessity upon which it is founded. We do not deem it important to cite at length authorities for the rule and its limitation as we state it. They will be found in the approved treatises on evidence and in the numerous cases cited by counsel on the argument."

In *Reyburn v. Queen City Savings Bank & Trust Co.*, 171 Fed. 609, 96 C. C. A. 373, Gray, Circuit Judge, in delivering the opinion of the Circuit Court of Appeals of the Third Circuit, after holding certain entries in bank books admissible, said:

"Of course judicial discretion in every such case is appealed to, to see that such testimony, when offered, has been safeguarded by such an environment of circumstances as will give it the requisite circumstantial trustworthiness. The entries accordingly must have been made in the regular course of business, and must be testified to, if possible, by the entrant, who must be shown to have been the one whose ordinary business it was to make such entries, and that such entries are to all intents and purposes, or as nearly as possible, original entries, and such as the business of the bank requires, and upon the faith of which such business is transacted."

As stated by the Supreme Court, all of the approved treatises on Evidence lay down the rule as stated in these decisions. If this rule obtains in civil cases, it should not be relaxed in criminal cases. It results, therefore, that the books of the Hanover National Bank were improperly admitted in evidence, in the absence of the testimony of some person who either had some knowledge of the correctness of the entries made, or some knowledge of the original transaction upon which the entries were founded, and in the absence of testimony showing that the person or persons who possessed such knowledge were either dead, insane, or beyond the jurisdiction of the court.

[9] So far as the error assigned as to the admission of the expert testimony bearing upon what the books showed, it may be stated that it is proper for an expert accountant to give a summary of books and documents, where the items are multifarious and voluminous, and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements. *Wigmore on Evidence*, § 1230. We think, however, that the true rule is that before such expert testimony may be given the books or documents must be public records, or, if they are private books of account or documents, that sufficient evidence must first be given to admit the books or documents themselves in evidence, unless the books or documents are admitted to be correct. Otherwise, items in books of account might be given in evidence through the testimony of an expert accountant, when the account books themselves would not be admissible. This would seem to be wrong in principle and dangerous in practice.

For the error in the admission of the books of the Hanover National Bank, and in allowing an expert accountant to testify as to what they showed, in the absence of testimony which would allow the books themselves to be admitted, the judgment of the court below is reversed, and the case is remanded to the United States District Court for the Eastern District of Oklahoma, with directions to grant a new trial,

## YORK HAVEN WATER &amp; POWER CO. v. YORK HAVEN PAPER CO.

(Circuit Court of Appeals, Third Circuit. December 5, 1912.)

No. 1,680.

**1. NAVIGABLE WATERS (§ 46\*)—RIPARIAN RIGHTS IN USE OF WATER—NATURE OF PROPERTY.**

The rights of a riparian owner in the use of the waters of a stream, whether navigable or not, are incident to the ownership of the land bordering on the stream, and pass with the land without special mention in the deed; and while their enjoyment may be granted in whole or in part to another by the owner of the land, the grantee has no property therein, and the stipulated enjoyment is only enforceable against the grantor.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 283-291, 293; Dec. Dig. § 46.\*]

**2. NAVIGABLE WATERS (§ 22\*)—RIPARIAN OWNERS—RIGHT TO DAM STREAM.**

The right of a riparian owner on a stream notoriously navigable, or declared so by legislative enactment, to dam for milling purposes, must be conferred by an exercise of the legislative will amounting to a license.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 100-103, 105, 106, 108, 120, 132; Dec. Dig. § 22.\*]

**3. DEEDS (§ 138\*)—CONSTRUCTION—"RESERVATION" OR "EXCEPTION"—CONVEYANCE OF RIPARIAN LAND.**

A provision in a deed to riparian land on the Susquehanna river in Pennsylvania to a power company, with all water rights, except as reserved therein, requiring the grantee, "after the construction of a contemplated power plant," to furnish to the grantor a flow of water sufficient to develop 3,000 horse power, to be delivered at headgates to be constructed on the grantor's land adjoining, but not riparian, on which it operated a paper mill, the right to such flow of water being "reserved" by the grantor, created a "reservation," and not an "exception," there being at the time of the conveyance no dam to furnish such water power, but the grantee, as riparian owner, being licensed to build one by the Pennsylvania Milldam Act of March 23, 1803 (4 Smith's Laws, p. 20), and such reservation did not retain in the grantor any right or interest in the land or appurtenant water rights for which ejectment could be maintained or on which a trespass could be committed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 456; Dec. Dig. § 138.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2538-2544; vol. 8, p. 7656; vol. 7, pp. 6140, 6141; vol. 8, p. 7787.]

**4. NAVIGABLE WATERS (§ 46\*)—RIPARIAN RIGHTS—EXCEPTION FROM CONVEYANCE OF LAND.**

The right to use the water of a stream is dependent solely on the ownership of land in contact with the stream, and the owner cannot retain such right from a conveyance of the land which divests him of all riparian ownership.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 283-291, 293; Dec. Dig. § 46.\*]

**5. INJUNCTION (§ 57\*)—RESTRAINING BREACH OF CONTINUING CONTRACT—EQUITY JURISDICTION.**

An injunction will not be granted to restrain the breach of a covenant to furnish water power to complainant "for all time," since such an injunction would perform the office of a decree of specific performance, and require continuous supervision by the court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 111-113, 130; Dec. Dig. § 57.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**6. INJUNCTION (§ 24\*)—OBJECTIONS TO RELIEF—INTERFERENCE WITH OPERATION OF QUASI PUBLIC CORPORATION.**

An electric power company, incorporated for the purpose, and which has entered into contracts with municipalities and electric roads to furnish light and power, is a quasi public corporation; and a court of equity, in the exercise of its discretion, should refuse to grant an injunction to restrain its breach of a contract with a private corporation, the probable effect of which would be to disable it from performing its other contracts, if not to create insolvency, and when the contract sought to be enforced itself provides for the payment of liquidated damages for its breach.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 23; Dec. Dig. § 24.\*]

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

Suit in equity by the York Haven Paper Company, to the use and benefit of Henry W. Stokes, receiver of said Company, against the York Haven Water & Power Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 194 Fed. 255.

Reynolds D. Brown, of Philadelphia, Pa., and Charles L. Bailey, Jr., of Harrisburg, Pa., for appellant.

R. Stuart Smith, of Philadelphia, Pa., W. U. Hensel, of Lancaster, Pa., John P. Kelly, of Scranton, Pa., and Charles E. Morgan, of Philadelphia, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. The York Haven Paper Company, the complainant below (hereinafter called the Paper Company), from 1885 to 1901 owned a tract of land on the west bank of the Susquehanna river. In 1901, the then stockholders of the Paper Company caused the York Haven Water & Power Company, the defendant below (hereinafter called the Power Company), to be incorporated, and to be conveyed to it the greater portion of the said tract of land owned by the Paper Company, to wit, 374 acres, having a frontage on the said river of about 6,825 feet.

The conveyance from the Paper Company to the Power Company was effectuated through an intermediate conveyance to the Security Title & Trust Company, of New York. The deed contained the following:

"Reserving also to the said York Haven Paper Company, its successors and assigns, a sufficient flow of water to enable the said York Haven Paper Company to develop three thousand horse power for all time after the construction of a contemplated power plant by the said York Haven Water & Power Company, said supply of water to be furnished said York Haven Paper Company without cost or charge to it, by the said York Haven Water & Power Company and delivered at headgates to be constructed at the expense of the said Power Company in accordance with plans to be approved by the York Haven Paper Company, at such point on land belonging to the said Paper Company as it may designate; and the said York Haven Paper Company is to be first entitled to receive from the said York Haven Water &

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Power Company the said supply of water to enable it to develop the said three thousand horse power, before any power which may be developed by the said York Haven Water & Power Company to be used by it or furnished by it to any person or corporation; and no power shall be used or furnished at any time by said York Haven Water & Power Company unless said Paper Company is so supplied with the water necessary to develop said three thousand horse power hereby reserved to it. And in the event of the said Power Company refusing or failing to supply the said water necessary to create said three thousand horse power, then the York Haven Water & Power Company shall pay to the said York Haven Paper Company at the rate of forty dollars per horse power per annum, for as many horse power as are represented by the difference between the amount actually furnished and the said three thousand horse power agreed to be supplied, and this payment to be considered as liquidated damages between the said York Haven Paper Company and the said York Haven Water & Power Company. In the event of the deficiency of supply being caused by destruction of or injury to the dam, race or waterworks in consequence of floods or ice, such liquidated damages shall not be enforced. Together with all and singular the water rights and privileges of the said grantor in the said Susquehanna river, except as hereinbefore reserved, ways, streets, alleys, passages, waters, water courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever, unto the hereby granted premises belonging or in any wise appertaining; and the reversions and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, claim and demand whatsoever, of it the said grantor, as well at law as in equity, of, in and to the same."

Though the consideration named in the deed was nominal, a very large proportion of the bonds of the newly created Power Company passed, as alleged in the answer, to the Paper Company, and the greater part of its capital stock fell into the hands of stockholders of the Paper Company, as promoters of the scheme. The Power Company having thus been originally created in the interest and for the benefit of the Paper Company and its stockholders, a community of interest between the two companies continued to a time recently before the commencement of the present suit, the officers of the two companies being to a great extent the same.

Immediately after its creation, the Power Company built, as was contemplated, its power plant at the lower end of its water frontage and out into the river, damming the water at that point and extending a wing dam therefrom up the stream for a considerable distance, making a forebay, in which the water was raised to a sufficient height to be used for power purposes. It also constructed headgates and a conduit therefrom, to supply the water to the mills of the Paper Company, as stipulated for in the reservation contained in the deed from the Paper Company to the Power Company above referred to. These works were all constructed at the expense of the Power Company, but under the supervision of one Henry L. Carter, president of the Paper Company, as well as of the Power Company. The smaller tract of land, with the paper mills thereon erected, retained by the Paper Company, lay below and to the south of the tract conveyed by the Paper Company to the Power Company. This tract does not abut on the Susquehanna river, as expressly found by the court below, and the headgates for supplying the Paper Company with water are not the property of the Power Company, though built by it under the arrangement with the former company.



It appears from the evidence that the stockholders of the Paper Company, as promoters of the Power Company, had in view, when it was created, that it should engage in the business of supplying electric power and light to business concerns and municipalities within the region accessible to its operations, extending from York to Harrisburg, and various contracts to that end had been made on behalf of the Power Company for furnishing power to street car lines, manufacturing plants and electric lighting systems in the region aforesaid. At the time the Power Company was formed, it was understood by its promoters that its power plant for thus furnishing electricity for industrial purposes would require a flow of water capable of producing 20,000 horse power, including the 3,000 horse power for the use of the Paper Company. As this 3,000 horse power was reserved to the Paper Company for all time, and free of expense to it, it was necessarily in contemplation of the Paper Company and its stockholders at the time they caused the Power Company to be created, that its (the Power Company's) only source of revenue would be its capacity to furnish electrical power and electric lighting to customers in the region referred to, on the basis of the 21,000 calculated horse power, to be obtained by damming the flow of the stream. It appears from the evidence that the money secured from the proceeds of the securities of the Power Company remaining in its hands after the deduction of those delivered to or retained by the Paper Company and its stockholders, proved to be insufficient to defray the expense of the construction of works necessary to produce the requisite horse power. New issues of bonds and stock to a large amount were therefore made by the Power Company to raise the funds required for that purpose. The Power Company, after the completion of its works, entered upon its business of supplying electrical power and light to manufacturing concerns, street railways and municipal lighting plants.

It appears from the evidence that the bottom of the headgates, built by the Power Company under the supervision of the Paper Company, opening into the race, through which the water was conveyed to the paper mills, was nine feet or more above the bottom of the forebay containing the dammed up water, and from which the water power was supplied to the turbines of the Power Company, as well as to the mills of the Paper Company. Such being the situation, it necessarily resulted that when, in a dry season, the water was drawn down to the level, or nearly to the level, of the bottom sills of the headgates, the Power Company could still secure a flow of water which was not available, for the reasons stated, to the Paper Company. In order, therefore, that the Paper Company might at all times have its stipulated flow of water, it would be necessary that the height of the water in the forebay should be maintained considerably above the level of the bottom of the headgates. This, the Power Company claims, and its claim is supported by the evidence, it was not able to do at certain seasons of drought and low water in the Susquehanna, and that at such seasons, even if the Power Company were to abstain from any use of the stored water power, it would be unable to furnish more than a small proportion of the stipulated flow to the Paper Company.

This state of things having been brought about by low stages of water in the Susquehanna, and especially after a severe drought in 1907, complaints were made by the Paper Company to the Power Company, and various suggestions of accommodation, by equitably dividing the water power that was obtainable, were made by the Power Company.

On December 4, 1909, upon the petition of a New Jersey corporation, a creditor of the Paper Company, alleging, *inter alia*, that by reason of the interruption of the operation of its plant, resulting from failure of water power from the Susquehanna river, the Paper Company was without cash and quick assets sufficient to pay its current liabilities, the Circuit Court of the United States for the Middle District of Pennsylvania appointed Henry W. Stokes receiver of the property of the Paper Company, authorizing him to operate the plant and to manage and conduct the business of the company until further order of the court.

On January 10, 1910, upon petition of said receiver, the court ordered that he be authorized and directed to file a bill in equity against the Power Company, ancillary to the receivership proceedings, in the name of the Paper Company but for the use and benefit of the receiver of that company. Thereupon, the bill of complaint in this case was filed by the Paper Company, for the use of the receiver, praying for an injunction restraining the Power Company "until final hearing and perpetually thereafter, from appropriating or using at any time, for any purpose whatsoever, any water in said forebay necessary to allow a sufficient flow of water at the headgates of the Paper Company to develop said 3,000 horse power, reserved to the Paper Company as aforesaid." Also praying "that the amount of damages suffered by the Paper Company, and by your orator as its receiver, by reason of said wrongful use and appropriation by defendant of the said supply of water reserved" to the Paper Company, be ascertained, and that defendant be required to pay over to the receiver the amount so ascertained to be due.

The case having come on to be heard upon the pleadings and proofs on May 12, 1912, an interlocutory injunction pending the taking of an account was decreed by the court, restraining the Power Company from depriving the Paper Company, or its receiver, of a sufficient flow of water at the headgates of the Paper Company to develop the 3,000 horse power "excepted and reserved" to the Paper Company by its deed of May 30, 1901, and from appropriating or using at any time, for any purpose whatsoever, any water in the forebay of the said Power Company necessary to allow a sufficient flow of water at the said headgates to develop the 3,000 horse power, etc. It was further ordered and decreed that an account be taken of the damages sustained by the said Paper Company, by reason of the wrongful use and appropriation by the said Power Company and its receiver of the supply of water "excepted and reserved as aforesaid." And a special master was thereby appointed to ascertain and report to the court the amount of such damages.

From this decree the present appeal is taken. The main and im-

portant question raised by the specifications of error is, whether the plaintiff is entitled to an injunction, or whether he should have brought an action at law to recover the stipulated or other damages for any injury that may have been sustained.

It is not denied in the argument of the Power Company that the Paper Company has suffered damage by the conduct of the Power Company, nor is there any controversy as to the extent of such damage. "The sole question is whether the lower court should have granted an injunction."

The ground upon which equitable relief is sought is, that a right of property of the Paper Company in the water power incident or appurtenant to the riparian lands conveyed by it to the Power Company was "excepted" out of the grant by express words in the deed of conveyance. It is insisted that this right of property is an absolute one, and though described in the deed as a "reservation," was in reality an "exception" out of the subject-matter of the grant. The bill therefore prays for an injunction as of right. As said in the brief of counsel for appellee, "it is a bill to restrain a continuing trespass against this right of property."

It is contended on behalf of the appellant that by the deed of the Paper Company the entire riparian rights incident to the lands conveyed were vested in the Power Company without exception, and that the flow of water sufficient to develop 3,000 horse power was a reservation arising out of the thing granted, imposing upon the grantee a duty or obligation to deliver or render the same in the manner and under the conditions stated in the reservation and its auxiliary covenants.

It is apparent that the distinction between an exception and a reservation here relied upon, is vital and substantial, and the question whether the stipulation in the deed be one or the other, is to be determined, not technically or by what the parties have called it, but by what was the essential character and quality of the interest or right sought to be reserved.

[1] The ordinary rights of the owner of lands along which or through which a nonnavigable stream passes, have been long settled and are well understood. Such owner may use a stream thus flowing for his ordinary and domestic uses, or for any extraordinary purposes, so long as such extraordinary use does not interfere with the rights of others along or through whose lands the stream flows. These rights are incident to the lands in contact with the stream. They pass with the land and do not exist except in relation thereto. Enjoyment of such rights, in whole or in part, however, may be granted by the owner of the land to another, but the grantee has no property therein, and the stipulated enjoyment is only enforceable against the grantor.

[2, 3] The rights of riparian owners on navigable streams are essentially of the same character. Generally, they consist of right of access to the stream, as a public highway, and to such use of the water and the flow thereof as will not interfere with the public rights of navigation. There are other subordinate rights, such as the right to wharf into the stream, so far as it may not interfere with the rights

of others or with public navigation; the rights of fishery, etc. These rights, which may be called the natural rights of a riparian owner, are incident to the ownership of the land bordering upon the stream, whether navigable or not, and pass to the grantee of such lands without special mention in the deed of conveyance. If notoriously navigable, or declared to be so by legislative enactment, these natural rights are restricted so far as to exclude the right to any serious diversion of the water, by damming or otherwise. On such streams or rivers, the right to dam for milling purposes must be conferred by an exercise of the legislative will amounting to a license. Such was the nature of the right conferred by the so-called "Milldam Act" of March 23, 1803 (4 Smith's Laws, p. 20). By virtue of the license conferred by this act, the Power Company erected its transverse and wing dams, creating the forebay for the storage of water flowing past its lands to such height as might be necessary to develop the whole or such part as was possible of the 21,000 horse power contemplated by its promoters. Its right to this license came to the Power Company by virtue of the riparian ownership conveyed to it by the Paper Company. It was only by costly and extensive structures erected under this legislative license that the Power Company was enabled to even measurably meet the obligation imposed upon it by the reservation in question. It was with reference to this artificial water power thereafter to be created that the reservation and its auxiliary covenants were made. Clearly this was the creation of a right or interest which had no prior existence as such in the property conveyed. It was a new right or interest and was reserved as a rent or an easement might have been reserved. It was something that was created by and grew out of the transaction. The distinction is well illustrated in this very deed, where the grantor "excepts" a certain lot or parcel of land described by metes and bounds from the grant of the whole tract. The thing excepted was in esse, as is the coal or other minerals which are excepted from the grant of the land which they underlie, or the standing timber excepted from the land on which it grows. *Sheffield Water Co. v. Elk Tanning Co.*, 225 Pa. 614, 619, 74 Atl. 742.

We think, therefore, that no right of or title to property was retained by the Paper Company by the reservation contained in its deed to the Power Company. No action of ejectment could be maintained therefor, and no trespass or tort could be committed thereon. The reservation was of a sufficient flow of water to enable the Paper Company to develop a certain horse power *after* the construction of the contemplated power plant by the Power Company, said supply of water to be furnished without cost or charge, and to be delivered at headgates constructed at the expense of the Power Company. The very existence, as well as the value of the interest reserved, rested in the obligation of the Power Company to construct the works and deliver and supply the water it had stored to the headgates of the Paper Company. For "*refusing or failing to supply the said water necessary,*" etc., the Power Company is to pay to the Paper Company liquidated damages at the rate of \$40 per horse power per annum.



In these covenants and stipulations, the whole value of the right or interest reserved to the Paper Company rests.

[4] Moreover, among the findings of fact made by the court below is the following:

"The property of the Paper Company does not abut on the Susquehanna river at any point, and the headgates of the Paper Company are not the property of the defendant."

It is well established that the right to use the water of a stream is dependent solely upon the ownership of land in contact with the stream. The Paper Company, after its conveyance to the Power Company, being no longer a riparian owner, could not possess riparian rights. As it could not exercise them, it could not retain them from a grant of lands which divested it of all riparian ownership. This being true as to ordinary riparian rights, a fortiori is it true as to the right growing out of the revocable license which the defendant enjoyed as a riparian owner under the "Milldam Act" of 1803. Whatever obligation, contractual or otherwise, defendant was under in respect to this right, the right itself could not be the subject of an exception in the deed of the Paper Company to the Power Company. It is a contractual right, as between plaintiff and defendant, but it is not a right of property for which a possessory action of trespass would lie.

Chief Baron Pollock, in delivering the judgment of the Court of Exchequer in the case of *Stockport Water Works Company v. Potter*, 3 Hurls. & Colt. 300, 325, is very clear in his exposition of the principle underlying such cases:

"There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river, the possession of which gives him his water rights, and at the same time transfer those rights, or any of them, and thus create a right in gross by assigning a portion of his rights appurtenant. It seems to us clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water rights by virtue merely of his occupation. Can he have them by express grant? It seems to us that the true answer to this is that he can have them against the grantor, but not so as to sue other persons in his own name for an infringement of them."

No more, as we have said before, can a riparian owner divest himself of all riparian ownership and reserve as a right in gross any riparian rights incident to the lands conveyed. We therefore conclude that the failure of the defendant to supply the water power stipulated for in the reservation, cannot be regarded as a trespass upon an absolute right of property, whose constant recurrence renders the remedy at law inadequate, and as thus furnishing ground for relief by injunction.

[5] This brings us to consider whether the equitable remedy of injunction is appropriate and proper, under the circumstances of this case, to prevent a future infraction of the defendant's covenant with

the plaintiff, with an ascertainment and award of damages for past infractions. It can hardly be questioned that such an injunction would perform the office of a decree for specific performance, imposing upon the court the duty of enforcing the same for all time to come.

United Cigarette Mach. Co. v. Winston C. Mach. Co., 194 Fed. 947, 958, 114 C. C. A. 583, cited by counsel for the appellant; was a bill in equity by a buyer of patents covering cigarette machinery, with the exclusive right to sell the same, except in the United States, and with the right to require the seller to construct and deliver machines to the buyer for a specified price. It was alleged that the seller sold eight machines in foreign countries, thereby depriving the buyer of the profits therefrom. Injunctive relief was sought with an accounting. The liability of the defendant was not questioned, but in regard to the relief prayed for, the Court of Appeals for the Fourth Circuit said:

"Under the circumstances of this case, another reason for refusing an injunction lies in a rule, to which there are exceptions not here of interest, that an injunction will not be issued to restrain a breach of the long term contract. The contract at bar is without time limit. An injunction to prevent breaches of contract is frequently a negative enforcement of specific performance. 3 Pom. Eq. § 1341. Specific performance is frequently denied of contracts 'whose performance would be continuous and would require protracted supervision and direction.'"

In General Electric Company v. Westinghouse Electric & Mfg. Co. (C. C.) 144 Fed. 458, 462, a contract to remain in force for 15 years provided that defendant should not manufacture certain electrical controllers for use in the United States. Complainant in its bill prayed for an injunction, restraining further or future violation of the contract by defendant, and an accounting. The court in its opinion said:

"Assuming that the contract is valid between the parties, is it of such a nature that equity will interfere to prevent a violation thereof by either party? It is clear that equity cannot compel the General Electric Company to manufacture and sell to the Westinghouse Company controllers such as are described in the complaint. It is a continuing contract running for 15 years and the courts will not undertake to supervise a complete performance of such a contract. 2 High on Injunctions, § 1109; Marble Co. v. Ripley, 10 Wall. 339 [19 L. Ed. 955]; Tex. & Pac. R. Co. v. Marshall, 136 U. S. 393 [10 Sup. Ct. 846, 34 L. Ed. 385]. In Marble Co. v. Ripley, supra, the court said: 'Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties which it requires of the owners of the quarries. These duties are continuous. \* \* \* No decree the court can make will end the controversy. If performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but,' etc."

In the case at bar, the covenants are to supply and deliver at plaintiff's headgates so much water power *for all time*, and for all time the Power Company must itself refrain from using the water power created by its extensive and costly works until the water power stipulated for has been furnished to the plaintiff. A perpetual and continuing performance is of the very essence of the covenants, and in-

volves an enormous outlay of money and continuous effort on the part of the defendant. We think that the court below should not impose upon itself the duty of enforcing through the indefinite future the performance of such a contract. In this connection, it should be borne in mind that the jurisdiction of the court below to entertain this appeal is an incident to the receivership, and is not, therefore, of indefinite duration.

It is to be noted, too, that the enforcement of the injunction prayed for would result at many periods during the year in a total suspension by the defendant, the Power Company, of the use for its own purposes of such water power as was stored in the forebay. The earning power of that company would consequently be destroyed, as by its contract it was bound to deliver the requisite horse power at the head-gates of the plaintiff for all time, free of charge. The Power Company would thus be brought to a standstill, both as to its own use of the water power, and that which was to be furnished by it to the plaintiff, and the court would be unable to compel the defendant, without revenue, to continue the extensive operation of providing water power under its license from the state.

[8] This brings forcibly in view another feature of this case, that the defendant is a quasi public corporation; it matters not whether declared to be such by judicial decision or now recognized as such from the inherent character of the purposes for which it was incorporated. Pursuant to these purposes of a quasi public nature, the Power Company immediately after its incorporation, entered into contracts with a number of municipalities, manufacturing concerns, electric roads, and others, to furnish light and electric power, for due compensation. It can hardly be denied that there is a probability that the enforcement of the decree of the court below would result in paralysis of the Power Company, and in disabling it, not only to furnish water power to the Paper Company, but to furnish electric light and power through a wide and thickly settled region of country. Such a probability appeals strongly to the wide discretion of a court of equity, as to the issuing or not issuing of an injunction.

The leading case of *Tex. & Pac. R. Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385, is apposite on this point of public convenience, as well as of the difficulty of enforcing a continuous performance through an indefinite period. The city of Marshall agreed to give the railway company \$300,000 in county bonds, and 66 acres of land within the city limits, for shops and depots, and the company, in consideration of the donation, agreed to permanently establish its eastern terminus and Texas offices at the city of Marshall, and to establish and construct at said city the main machine shops and car works of said railway company. After the expiration of a few years, Marshall ceased to be the eastern terminus of the road, and some of the shops were removed. The city filed a bill in equity to enforce the agreement. Mr. Justice Miller, in delivering the opinion of the Supreme Court, after noticing the contention of counsel for the city, that the word "permanent" meant what it said, and that for all time the

offices and shops of the company should be maintained at Marshall, said:

"But we are further of opinion, that if the contract is to be construed as the appellant insists that it should be construed, it is not one to be enforced in equity. We have already shown that to decree the specific performance of this contract, is to impose upon the company an obligation, without limit of time, to keep its principal office of business at the city of Marshall, to keep its main shops there, and its car works there, and its other principal offices there, although the exigencies of railroad business in the state of Texas may imperatively demand that these establishments, or some of them, should be removed to places other than the city of Marshall, and that this would be also required by the convenience of the public, in which case both the public convenience and the best interests of the railroad company would be sacrificed by a contract which is perpetual, that all of its business offices and business shall forever remain at Marshall. It appears to us that if the city of Marshall has, under such a contract, a remedy for its violation, it is much more consonant to justice that the injury suffered by the city should be compensated by a single judgment in an action at law."

In the present case, the situation is one where an adverse decree would measurably disable the defendant from performing its contract with the plaintiff, as well as from performing the public service imposed upon it by the act of incorporation and by the contracts made in pursuance thereof. Something more, therefore, is involved than the mere balancing of convenience and injury between the plaintiff and defendant, or deciding, where one party or the other has to be injured, which party should have the advantage—the defendant, who would probably be prevented from performing a quasi public service, or the plaintiff who has a contract, for the violation of which there is a remedy at law, whether entirely adequate or not. In this view of the position of the parties, the adequacy of the remedy at law should be considered. It was evidently in the contemplation of the stockholders of the Paper Company, who promoted the incorporation of the Power Company, and aided in carrying out the purposes of its incorporation by the contracts referred to, that, inasmuch as the water power to be supplied to the Paper Company was to be free of charge, the only source of revenue would be these contracts with the public for electric light and power, and that to take away this revenue in whole or in large part, would be to disable the Power Company from performing its contract with the Paper Company, or from storing water at all. We therefore find in the reservation of the deed in question, it is provided that, in the event of the said Power Company refusing or failing to supply the said water necessary to create said 3,000 horse power, the Power Company shall pay to the Paper Company, at the rate of \$40 per horse power per annum, for as many horse power as are represented by the difference between the amount actually furnished and the said 3,000 horse power agreed to be supplied, which payment shall be considered as liquidated damages between the two companies. Such a settlement for the failure of the Power Company, from any cause, to furnish the stipulated amount of water power to the Paper Company, would leave the revenue of the former company wholly or in large part intact, and its financial ability unimpaired to maintain the large and expensive



works necessary to create the water power it was licensed to create, by the "Milldam Act" of 1803, for the benefit of the plaintiff as well as for its own.

We think the ends of justice and the equities of the case require a reversal of the decree below, and the dismissal of the bill without prejudice. And it is so ordered.

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GOLCONDA CATTLE CO. v. UNITED STATES.†

(Circuit Court of Appeals, Ninth Circuit. December 2, 1912.)

No. 2,143.

**1. PUBLIC LANDS (§ 19\*)—UNLAWFUL INCLOSURE—CONSTRUCTION OF STATUTE—"INCLOSURE."**

Act Feb. 25, 1885, c. 149, § 1, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), prohibiting the inclosure of public lands to any of which land included within the inclosure the person or corporation making or controlling the inclosure has no claim or color of title made or acquired in good faith, in view of the conditions which led to its enactment, should receive a construction which will give effect to its broad purpose. The word "inclosure" as used therein cannot be restricted in meaning to a complete encircling of the land with a fence without openings, but applies to any means whereby there is effected practical separation of public land from the body thereof.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3498, 3499.]

**2. PUBLIC LANDS (§ 19\*)—UNLAWFUL INCLOSURE.**

Defendant cattle company maintained a post and wire fence 44 miles long around 37,000 acres of land, 26,000 of which was public land and 11,000 privately owned, the most of it by defendant. It was for the most part bottom land and practically surrounded that owned by the government. No part of the fence was on the public land. There were about nine openings in the fence each 100 feet or more in length but separated by long distances and some where the ground was very rough and almost inaccessible. *Held*, that it constituted an unlawful inclosure within the meaning of Act Feb. 25, 1885, c. 149, § 1, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), the maintenance of which was properly enjoined under section 2 of the act.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.\*]

**3. PUBLIC LANDS (§ 19\*)—UNLAWFUL INCLOSURE—SUIT FOR INJUNCTION.**

Inclosure of any of the public land or maintaining such an inclosure except by one making claim to the land in good faith is made unlawful by Act Feb. 25, 1885, c. 149, § 1, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), and the intent with which the inclosure was made or is maintained is immaterial in a suit in equity for an injunction under section 2.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.\*]

**4. PUBLIC LANDS (§ 19\*)—POWER OF GOVERNMENT TO PROTECT—UNLAWFUL INCLOSURE.**

The enforcement of a decree for the removal or destruction of an unlawful inclosure of public lands rendered under Act Feb. 25, 1885, c.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing granted February 24, 1912.

149, § 2, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), is within the police power of the United States to protect its property and is not an infringement of the constitutional rights of the owner of the inclosure.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.\*]

Appeal from the District Court of the United States for the District of Nevada; Edward S. Farrington, Judge.

Suit in equity by the United States against the Golconda Cattle Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 196 Fed. 240.

William Denman and Charles R. Lewers, both of San Francisco, Cal. (G. S. Arnold, of counsel, of San Francisco, Cal.), for appellant. Samuel Platt, U. S. Atty., of Carson City, Nev.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The United States brought this bill in equity before the District Court in and for the District of Nevada, to restrain the Golconda Cattle Company, a cattle raising corporation, from maintaining a certain fence alleged to inclose about 26,000 acres of public land in Elko county, Nev. The bill charged that the Golconda Cattle Company continuously, from May, 1910, maintained and controlled an inclosure made of posts and wire and natural barriers about the land; and that the fence was so constructed as to prevent stock, such as cattle, horses, sheep, etc., from passing over, under, or through the same.

The Golconda Company denied that it had ever maintained or controlled an inclosure of any of the lands described in the complainant's bill, by means of fence or in any other way. The company admitted that there were fences upon or near various portions of the land described in the bill, but averred that they were not constructed so as to prevent live stock from passing through the same; that in many places there were holes and openings through the fences; that, while there were fences and portions of fences on some of the land, they were not constructed or joined so as to constitute an inclosure; that stock and vehicles could freely pass through the openings and across the lands described in the bill; that there was an open public road leading into the tract and passing out of the same; that there were various openings; and that there had been no inclosure for exclusive use of the lands as described.

The District Court found that an inclosure existed and that the law was violated, and then made an alternative order to the effect that unless the defendant should make certain openings, as defined in the opinion of the judge, the inclosure described in the bill should be abated. Thereafter the court made an order reciting that, the openings as fixed in the opinion of the court having been made without reference to the convenience of the public or the defendant, and in the absence of evidence as to the most suitable places therefor, each party should be allowed three months within which to make proofs

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

before a master as to the points where the openings provided for in the opinion might be more conveniently made. This order also provided that a master might be appointed at the instance of either complainant or defendant after five days' notice, but that in the interim the openings would have to be made as indicated in the opinion, or the marshal would be ordered to abate the inclosure. From the order just last referred to, the Golconda Company appeals to this court.

It appears from the evidence and the findings made by the District Court that, inside of certain fences or parts of fences which are owned or controlled by the Golconda Company, there are 26,000 acres of government land and 11,000 acres of lands owned privately; nearly all of such privately owned lands being the property of the Golconda Company. These 11,000 privately owned acres are, generally speaking, bottom lands, and are so situated that they may be said to surround the government lands involved in this controversy. Toejam Mountain lies toward the northeastern part of the entire tract. Toejam creek and Rock creek traverse the bottom lands on the north and west sides, respectively, while Willow creek and Siawappe creek traverse them on the south and east, respectively. In the northeastern end of the tract are the western slopes and foothills of the Rock Creek Mountains. The headwaters of Toejam and Siawappe creeks are less than a mile apart at a point in these foothills. Sixteen miles away, and at a considerably lower level, in a southwesterly direction, the last-named creeks come together. Inside the fences, and just above the junction of Willow and Rock creeks, there are about 2,500 acres of the 11,000 acres privately owned, as hereinbefore stated. The privately owned lands extend on the northern side up Rock creek and Toejam creek toward the northeast end, and on the southern side up Willow creek and Siawappe creek. It was found that the tract of public lands, formed, as just described, was inclosed by a post and wire fence, some 44 miles in length, none of which is on government land.

The learned district judge said:

“ \* \* \* All of this fence except about 4 miles on Rock creek immediately above its junction with Willow creek, and a drift fence known as North's fence at the northeast corner of the tract, has been constructed since 1908. About 4 miles above the junction of the two creeks, there is a short lane 150 feet in width, through which passes the public highway from Tuscarora to Midas. From this lane to the next opening in the fence up Rock creek is more than 4 miles in a direct line, and more than  $5\frac{1}{2}$  miles by fence. Here is an opening of 100 feet, known as opening No. 3. From this gap to the next, designated as No. 4, 100 feet in length, there are more than 4 miles. From the last opening there are  $2\frac{1}{2}$  miles of fence to opening 'B,' 50 feet long. Between this opening (B) and North's fence, there are  $2\frac{5}{8}$  miles. North's fence, which forms something more than  $1\frac{1}{2}$  miles of the inclosure, is old, in poor repair, and down at a number of places. Between North's fence and Nelson's fence there is a gap of  $1\frac{1}{4}$  miles. The country here is rough and mountainous, but not impassable for either cattle or sheep. Following Nelson's fence  $1\frac{1}{8}$  miles to the south we come to opening 'A,' a gap of 300 feet. From this gap south to opening No. 6, defendant maintains a continuous fence for  $4\frac{5}{8}$  miles. Gap No. 6 is about 3,400 feet long, and is favorably and conveniently located for the passage of cattle drifting toward Rock Creek Mountains. Between openings 6 and 7 there are more than 4 miles of fence. The last is an opening of 100 feet, through which the road from Tuscarora

enters the field emerging at No. 1 on the west side.  $5\frac{1}{2}$  miles west of opening No. 7 is opening No. 8, 100 feet long. Following the fence from this point in a southwesterly direction down Willow creek around the southwest end of the field, and thence northeast up Rock creek, a total distance of 8 miles, we come to opening No. 1, the place of beginning. There are thus nine openings in a total fence line of more than 40 miles. The evidence shows that cattle belonging to neighboring stockmen have often grazed on the government land in question, since the inclosure was made, and across it in 1910 more than 200,000 sheep were driven from southwest to northeast. The government land is all rough and hilly; it has a general slope toward the southwest, as well as an inclination from the central highland toward Willow creek on the south, and to Rock creek and Toejam creek on the north and west. It affords only a somewhat scant pasturage for about two months in the early spring."

It is not disputed that the fences are along the outside, and not the inside of the cattle company's lands, so that between the fences and appellant's lands lies the large area of public domain involved here. It is impossible to gain access to this land except by crossing land which belongs to the cattle company, either through certain openings in the fences purposely made by the cattle company, or the opening of 3,400 feet situate in the northeastern part of the tract lying at the foot of Toejam Mountain.

[1] Upon this state of facts appellant takes the position that there was no inclosure, and that section 1 of the act of Congress under which this suit was instituted is not applicable. In their essence, the contentions, upon which appellant stands, are: That the fences made by the cattle company are upon its own lands, and were constructed for the sole purpose of protecting its lands; that access to the public lands was not prevented; that openings to the public lands have been maintained; that there has been no assertion of a right by appellant to the exclusive use and occupancy of any of the public lands; and that there has been no exclusion of man or beast from enjoyment of use of the public lands. Statement of these contentions makes it plain that the case turns upon the meaning of the act of Congress entitled "An act to prevent unlawful occupancy of the public lands," approved February 25, 1885, 23 U. S. Stat. L. 321, and to that we shall address ourselves. Before quoting the text of the act, brief reference to matters of general knowledge and legislative history is appropriate.

After the enactment of the homestead act in 1862, there was much immigration to the Western States having large areas of public lands. Naturally the public lands immediately tributary to streams were first settled upon while the uplands were used for grazing purposes. The public lands were not fenced, and the privilege of use of the public domain for stock ranges was not denied by the government. As time passed, the available lands in the creek bottoms became scarce, and settlers were obliged to seek homesteads upon lands back from streams. It was soon proved, however, that such lands could be irrigated and profitably cultivated; hence, as knowledge of these facts spread, demands for such lands by homestead seekers greatly increased. As occupation became more common, settlers fenced their claims, and so the area of public lands available for stock ranges became less extensive. Under these conditions, not infrequently men sought home-



steads upon the public domain which happened to be adjacent to ranches owned by corporations or individuals who possessed large bands of cattle or sheep which required extensive pasture grounds. Such settlements were often unwelcome to stock owners who did not wish to be disturbed in the enjoyment of their accustomed range privileges upon the public lands, or to be interfered with in a sort of exclusive dominion which they had come to exercise over the ranges upon which their stock pastured. This dominion was exerted by constructing fences and utilizing barriers, sometimes natural as well as artificial, to separate their accustomed ranges from the body of the public domain. Often in making the inclosure a fence would be run along the land of the owner to a point where it would connect with a fence on an adjoining ranch, as in *Potts v. United States*, 114 Fed. 52, 51 C. C. A. 678; sometimes advantage would be taken of a portion of an existing fence and a sheet of water, as in *Thomas v. United States*, 136 Fed. 159, 69 C. C. A. 157; sometimes a fence would be extended to a precipitous rim rock, as in *Hanley v. United States*, 186 Fed. 711, 108 C. C. A. 581; or a cañon or ravine would be tied to, or even a thick undergrowth would be used, to form a link in a fence built to impede access by prospective settlers, or to turn stock which would otherwise drift to the land inside the lines of the barrier so made; or owners of odd-numbered sections of lands acquired by purchase would so construct their fences as to be useless for inclosing their own lands but which were effective in inclosing the even-numbered sections belonging to the government. Such was the case in *Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260, where the offenders erected fences near the outside of their own lines on odd-numbered sections, but also immediately outside of even-numbered sections, though in fact a few inches inside their own lines.

As a result of the continuance of such practices, much public land was fenced, and often one who in the best of faith wished to take up a homestead found that immense tracts of what he believed to be the public domain (and which were so in fact) were segregated by some form of fence or barrier. Free access to the public lands was prevented, and the generous invitation to enter upon the unoccupied public lands which had found its expression in the homestead law appeared to mean less than the pioneer had been led to believe it meant. Naturally, fences or strips of fence built as if to separate the lands inside themselves conveyed notice that the lands within were claimed by some right. Often far from a land office or other place where he had a right to go for immediate information, too poor to incur unforeseen expenses and delays, the settler would heed the warning of the fence and go elsewhere in search of open unoccupied domain.

In time, however, dissatisfaction with such unlawful occupancy became widespread in the Western States, and in 1885 Congress, in order to protect the public domain, considered as a remedial measure the law under which the government not only herein, but in many other cases, has proceeded to accomplish the removal or destruction of unlawful inclosures. The history of the act of Congress shows that

on January 12, 1885, the bill was reported for passage with these remarks by the Committee on Public Lands of the Senate:

"The necessity of additional legislation to protect the public domain because of illegal fencing is becoming every day more apparent. Without the least authority, and in open and bold defiance of the rights of the government, large, and oftentimes foreign, corporations deliberately inclose by fences areas of hundreds of thousands of acres, inclosing the avenues of travel and preventing the occupancy by those seeking homes. While those fencing allege the lands within such inclosures are open to settlement, yet no humble settler, with scarcely the means for the necessities of life, would presume to enter any such inclosure to seek a home.

"The government has sufficient authority to drive those seeking homes from the Indian Territory, and to burn the ranches of those invading the Yellowstone Park, while those appropriating vast areas are hoping the only remedy to be used against them will be the law's delay in the courts.

"Therefore your committee have added a new section to the Army bill, authorizing the President of the United States to summarily remove all obstructions, and, if necessary, to use the military power of the United States."

Thereafter, on February 25, 1885, the act was duly approved. 23 Stat. U. S. 321 (U. S. Comp. Stat. 1901, p. 1524). The first section is as follows:

"That all inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited."

Section 2 makes it the duty of a district attorney in the proper district, on affidavit filed by a citizen that section 1 of the act is being violated, to institute a civil suit in the name of the United States against the parties in charge of or controlling the inclosure complained of. Jurisdiction is conferred upon the United States courts to hear and determine proceedings in equity by writ of injunction to restrain violations of the act. As indicative of the determined purpose of Congress to afford speedy and adequate remedy, it is worthy of remark that section 2 directs that suits brought under the provisions of that section shall have precedence for hearing and trial over other cases on the civil docket of the court, and, in case the inclosure complained of is found to be unlawful, the court is authorized to make proper order for the destruction of the inclosure in a summary way, unless such inclosure shall be removed by the defendant within five days after the order of the court.

Section 3 provides that no person, by force, threats, intimidation, or by any fencing or inclosing or any other unlawful means, shall prevent or obstruct any person from peaceably entering upon or estab-

lishing a settlement or residence on any tract of public land subject to entry under the public land laws; or shall prevent or obstruct free passage or transit from or through the public lands, provided claims in good faith shall not be affected.

Section 4 makes it a misdemeanor to violate the provisions of the act.

Section 5 authorizes the President to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any public lands, and to employ such civil or military force as may be necessary for that purpose.

Executive attention was also specially given to the conditions existing, and President Cleveland on August 9, 1885, issued his proclamation in these words:

"Whereas, public policy demands that the public domain shall be reserved for the occupancy of actual settlers in good faith, and that our people who seek homes upon such domain shall in no wise be prevented by any wrongful interference from the safe and free entry thereon to which they may be entitled; and

"Whereas, to secure and maintain this beneficent policy, a statute was passed by the Congress of the United States on the 25th day of February, in the year 1885, which declared to be unlawful all inclosures of any public lands in any state or territory to any of which land included within said inclosure the person, party, association, or corporation making or controlling such inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office; and which statute also prohibited any person, by force, threats, intimidation, or by any fencing or inclosure or other unlawful means, from preventing or obstructing any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, and from preventing or obstructing free passage and transit over or through the public lands; and

"Whereas it is by the fifth section of said act provided as follows: 'That the President is hereby authorized to take such means as shall be necessary to remove and destroy any unlawful inclosure of any of said lands, and to employ civil or military force as may be necessary for that purpose;'

"And whereas it has been brought to my knowledge that unlawful inclosures, and such as are prohibited by the terms of the aforesaid statute, exist upon the public domain, and that actual legal settlement thereon is prevented and obstructed by such inclosures and by force, threats, and intimidation:

"Now, therefore, I, Grover Cleveland, President of the United States, do hereby order and direct that any and every unlawful inclosure of the public lands maintained by any person, association, or corporation be immediately removed; and I do hereby forbid any person, association, or corporation from preventing or obstructing by means of such inclosures, or by force, threats, or intimidation, any person entitled thereto from peaceably entering upon and establishing a settlement or residence on any part of such public land which is subject to entry and settlement under the laws of the United States."

Now, in the presence of the situation just described, which led up to the consideration of the remedial measure quoted, of the history of the act of Congress, and of the executive action taken after the enactment of the statute, it is very clear to us that the courts should give effect to the broad purpose of the act to prevent unlawful occupancy of the public domain by avoiding a construction which would

narrowly confine the definition of what constitutes an inclosure to cases only where there is literally a complete separation of a tract by means of fences or other barriers in which there are no openings through which settlers and live stock may pass to and fro. The spirit and true intention of the act are inconsistent with such an interpretation; its substance is violated if there be a surrounding of any tract of public land by means of fences or other barriers, or both, which do in a practical way and for all practical purposes withdraw the tract so surrounded from free access by those seeking homes upon the public domain, or from free access by live stock which by acquiescence may graze upon the public range.

[2] We are not at all unmindful of the general right of an owner of a tract of land to build a fence thereon. It is fundamental that the rights of individual proprietorship which carry with them right to inclose or fence one's own land must be carefully guarded; but at the same time, as was held by the Supreme Court in *Camfield v. United States*, supra, the rights of the government in its proprietorship of the public domain do not exist by the sufferance of individual owners. It has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. Here the surrounding is in no sense confined to the land of the Golconda Company, for, of the total 37,000 acres included, 26,000 acres are public land. That is to say, the Golconda Company, by maintaining miles of fence along only the outside of its own 11,000 acres and connecting such fences with natural or other barriers, has separated one immense tract consisting not only of 11,000 acres belonging to it, but also of 26,000 acres of public land. The serious significance of the act is even more apparent when we realize that within the barriers there is public land more than sufficient to comprise 162 homestead entries.

The particular argument that the openings which are referred to in the opinion of the District Court as having been made by the cattle company were for the purpose of allowing free use and access for all persons and cattle to the government lands "in the vicinity" of the fences, and that there has been such free use and access, is not persuasive. In a restricted sense this may be true, but in a practical way it does not materially change the situation. For instance, as pointed out by the lower court, from the lane through which passes the road between Tuscarora and Midas there are more than 5½ miles of fence before another opening is reached. Then there is an opening of 100 feet, and then again more than 4 miles of fence, then an opening of 100 feet and 2½ miles more of fence, and so on. At one point a mile and a half of fence, called "North's fence," is in bad repair and down at places. Granted that cattle will sometimes drift, more or less reluctantly, over wire fence which is down, it is nevertheless true that even a fence partly down is a visible tangible barrier, and where there are over 40 miles of fence surrounding an area of public land, with only 8 or 9 narrow openings therein, the fact that in a rocky rough section a mile and a half of the fence is in bad repair and partly down



does not necessarily make the surrounded area any the less inclosed, within the meaning of the statute. Nor does the additional fact that in such a length of fence there is a gap of approximately 3,400 feet, left at the foot of a mountain where the country is rough, necessarily exclude the area surrounded by the fences which lead up to the sides of the rocky gap from the definition of an "inclosure" as meant by the act. It is not enough that a would-be settler can pass through such a gap if he follows along miles of fence and turns in and goes over the rocky place, or that cattle may do likewise, or that they do to some extent enter through and graze upon the lands inside; for the law in forbidding inclosure has not laid down that one kind of barrier and not another may be utilized to separate the public land from the main body thereof. It has not prescribed that to constitute an inclosure there must be substantial fences or any fences around the shut-off tract, or that natural barriers cannot be tied to. Nor has it declared that nothing shall be held to be an inclosure provided there be an opening of any kind by which the public land may be reached, no matter how inaccessible the opening may be or how difficult to go through it when reached. On the contrary, as already indicated, the policy and intent of the statute being that no part of the public domain shall be separated from the body thereof, but shall remain wholly free from inclosure of any kind made by any person or corporation, except where the person or corporation has or asserts claim in good faith with a view to entry, any means whereby there is effected practical separation of public land from the body thereof imposes liability in a suit in equity. The consequences of a contrary view might lead to a practical withdrawal of much public land from the general domain, for, by building miles of fences about public lands but leaving only one or two small openings, and one larger one, in a remote and inaccessible place, one could obtain the benefits of an inclosure, yet say he was not maintaining an inclosure, and so defeat an action to have such an inclosure removed under section 1 of the act.

We have not overlooked the possible applicability of section 3 to such a situation. It is to be said, however, that that section is specially intended to prevent obstructing any person from peaceably entering upon or settling upon the public domain, as well as to prevent obstructing free passage or transit over or through the public lands. The word "fencing," as used in this section, is but the enumeration of one character of means by which obstruction or prevention from entry upon the public lands or free passage over them may be effected. "Inclosing" is also specifically enumerated as another means; so are force, threats, intimidation. But while any fencing or inclosing is declared to be a means of obstruction, the act of maintaining an inclosure of the public land is to be reached by suit under section 1 and not under section 3. It would be correct, for instance, to invoke section 3 as against one who has a piece of drift fence but no inclosure whatsoever, provided such a fence is an obstruction to entry or settlement or prevents free passage over the public lands; and, if one obstructs entry or settlement by an inclosure such as appellant herein had, he could be indicted for violating section 3; but, to have the in-

closure and its maintenance decreed to be unlawful irrespective of whether or not it is an obstruction as defined by section 3, the government may properly resort to the summary remedy provided by section 1.

Another illustration of how section 3 might be inapplicable is this: A person might go into the roughest isolated mountains, and there without claim of any kind inclose a section of public land. Such an inclosure, however, might not prevent or obstruct any person from peaceably entering upon or establishing a settlement or residence upon the public domain, nor might it prevent free passage over or through the public lands; all because no one would wish to settle upon the inclosed tract or any land near to it or to gain access to any of the public domain within the inclosure or near to it. But under section 1 unquestionably such an inclosure of public land would be unlawful, and, upon complaint made to the district attorney of the proper district, it would be his duty to institute a civil suit against the person controlling the inclosure, and, upon its being found unlawful, it would devolve upon the court to make an order for the destruction of the inclosure in a summary way, unless it should be removed within five days. And indictment would also be proper under section 4.

[3] A word as to the question of intent, to which counsel for appellant has referred: If it were necessary for the court to deduce an intent from the facts, we should have to say that the reasonable inference to be drawn from the situation of the fences and the fact that they were placed as they were is that the appellant intended to maintain an inclosure of public lands. But we do not deem it material to the case. Inclosure of any of the public land, except under bona fide claim of title thereto, is made unlawful by the statute, and as was held by the Court of Appeals of the Eighth Circuit in *Camfield v. United States*, 66 Fed. 101, 13 C. C. A. 359, it matters not what the intent of the parties may have been in making the inclosure. There are some expressions in the opinion of this court in *Potts v. United States*, 114 Fed. 52, 51 C. C. A. 678, which seem to consider the intent with which an inclosure upon the public domain has been made as a material element in proving guilt under a criminal charge brought for violation of section 3 of the act. But the facts of that case and the section of the statute examined make it distinguishable from the question now before us. In *Bircher v. United States*, 169 Fed. 589, 95 C. C. A. 87, this court held that under an indictment under section 1 of the act the test of criminality is "whether the person who committed the act had, at the time of committing it, color or claim of title, or asserted right under the land laws." The court said of the act:

"It makes punishable the act of unlawfully inclosing the government lands, and it makes punishable the act of unlawfully maintaining an inclosure, whether the person maintaining the same was the person who erected it, or whether, at the time when it was erected, it was erected with or without authority of law."

In *Homer v. United States*, 185 Fed. 741, 108 C. C. A. 79, the Court of Appeals of the Eighth Circuit reaffirmed its opinion in the *Camfield Case*, *supra*, by expressly deciding that one's intent in build-

ing a fence is immaterial if in fact it incloses public land. The court goes on to distinguish carefully what was before the Supreme Court when the *Camfield Case*, *supra*, was considered on appeal (*Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260), and concludes that the opinion by Justice Brown, when taken as a whole and construed with relation to the issues before the court, necessarily was that building a fence on one's own land without an intention of including lands of the United States was no defense, if in fact the lands involved were actually inclosed. In *Hanley v. United States*, 186 Fed. 711, 108 C. C. A. 581, the question of necessity for intent seems not to have been directly involved.

[4] It is said that enforcement of the decree of the District Court may be an invasion of the constitutional rights of the appellant, in that it would constitute a taking of private property for public use. But under the doctrine laid down by the Supreme Court in the *Camfield Case*, *supra*, the United States has a clear right to legislate for the protection of the public lands and to exercise what is called a police power to make the protection effective, even though there may be some inconvenience or slight damage to individual proprietors. There being nothing in the facts of this case to take it out of this rule, we must hold that no rights of appellant have been infringed.

The order appealed from is affirmed.

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UNITED STATES v. GRAY et al.

(Circuit Court of Appeals, Eighth Circuit, October 21, 1912.)

No. 3,794.

(Syllabus by the Court.)

**INDIANS (§ 27\*)—LEASES AND RIGHTS—PLEADING AND PRACTICE—CAPACITY OF UNITED STATES TO SUE TO ENFORCE GOVERNMENTAL RIGHTS.**

The United States has capacity to sue to recover damages for the breach of a lease made by an Indian allottee with the approval of the Secretary of the Interior, or to protect or enforce any other Indian property right which remains under the control and supervision of the Secretary or the Indian agent, his subordinate, because such suits are indispensable to the protection and enforcement of the governmental rights of the United States and its governmental policy to protect the property rights of the Indians and to teach them the arts of civilized life.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 19, 20; Dec. Dig. § 27.\*]

In Error to the District Court of the United States for the District of Utah; John A. Marshall, Judge.

Action by the United States, as guardian and trustee of Ben Nicowree, against Arthur Leon Gray and John Dinkins. Judgment for defendants, and the United States brings error. Reversed and remanded.

Hiram E. Booth, U. S. Atty. (Wm. M. McCrea, of Salt Lake City, Utah, on the brief), for the United States.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before SANBORN and CARLAND, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. The question which this case presents is whether or not the United States has capacity to sue a lessee and his surety for breaches of the covenants of a lease made by an Indian allottee and approved by the Secretary of the Interior.

Ben Niccowree was an Uncompahgre Ute Indian, under the direction and supervision of the Uintah and Ouray Indian agency, and an allottee of a tract of 80 acres of land under the act of Congress of February 8, 1887, the legal title to which the United States was holding in trust for the period of 25 years for him, or in case of his death for his heirs. Act Feb. 8, 1887, c. 119, 24 Stat. 389, § 5; Act May 27, 1902, c. 888, 32 Stat. 263; Joint Res. June 19, 1902; 32 Stat. 744; *United States v. Rickert*, 188 U. S. 432, 436, 23 Sup. Ct. 478, 47 L. Ed. 532. He had no power to alienate the land during the 25 years, and the act of Congress expressly declared that any conveyance of or contract touching it during that time should be absolutely null and void. Pursuant to section 3 of the act of February 28, 1891 (26 Stat. 795, c. 383), and of the act of August 15, 1894 (28 Stat. 305, c. 290), which provided that when it is made to appear to the Secretary of the Interior that by reason of age, disability, or inability any such allottee cannot personally with benefit to himself occupy or improve his allotment, the same may be leased upon such terms, regulations, and conditions as shall be prescribed by the Secretary of the Interior for a term not exceeding five years for farming or grazing purposes, this land was leased by Niccowree, on terms and conditions approved by the Secretary in accordance with regulations made by him, to the defendant Gray, and the defendant Dinkins became a surety for Gray's performance of the covenants of the lease. This lease recited that it was between "Ben Niccowree of Uintah and Ouray Indian agency" and Arthur Leon Gray. It contained covenants that Gray would pay to the agent of Uintah and Ouray agency \$28 per annum for the use of Niccowree, the allottee, and that he would cultivate all the arable land leased, set out an orchard of not less than 5 acres, seed 20 acres to alfalfa, build a stable, and make other improvements upon the land. It was signed by Niccowree and Gray, it bore the certificate of the Indian agent of the Uintah and Ouray agency that Niccowree could not personally and with benefit to himself occupy or improve the land, and that the rent was just and fair, and the agent testified that he made the lease. The lease also bore the written approval of the First Assistant Secretary of the Interior. The lessee failed to make the improvements he had agreed to make, to the damage of the lessor in the sum of about \$1,000. The foregoing facts were proved without contradiction at the trial, and thereupon the court instructed the jury to return a verdict for the defendants, on the ground that the United States had no capacity to maintain the action, because it did not bring it as the holder of the legal title for injury to its ownership of the land, because it had no pecuniary interest or contractual



right in the matter, and the action was not brought to enforce any legal prohibition or to redress any violation of any law of the United States.

But for more than a century it has been and still is the governmental policy of the United States to exercise the power granted to it by the Constitution (article 1, § 8, subd. 3) to protect the Indians and their property from the greed, rapacity, cunning, and perfidy of the members of the superior race, which have so often driven them to poverty, despair, and war, and to teach and persuade them to abandon nomadic habits and to adopt and practice the arts of civilization. In order to carry out this policy it has reserved and held in trust for them large tracts of land and large sums of money derived from their release of their rights of occupancy of their lands in this country, it has controlled and managed their property for them, it has furnished them with houses, barns, and other permanent improvements, with domestic animals, means of subsistence, and money in small amounts. It has provided them with government agents to advise them and to protect their property, and with physicians, farmers, schools and teachers to instruct them. And while, under the act of 1887, Niccowree has become a citizen of the United States and subject to its laws and the laws of the state in which he resides (24 Stat. 390, § 6), the United States is still pursuing its policy of protection and instruction, and his property is still in charge of the Indian agent of the Uintah and Ouray agency.

The civil and political status of the Indians does not condition the power of the government to protect their property or to instruct them. Their admission to citizenship does not deprive the United States of its power, nor relieve it of its duty, to control their property, to protect their rights to it from the rapacity and faithlessness of the members of the superior race, to discharge faithfully its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit. *Matter of Heff*, 197 U. S. 488, 509, 25 Sup. Ct. 506, 49 L. Ed. 848; *United States v. Thurston County*, 143 Fed. 287, 289, 74 C. C. A. 425; *Tiger v. Western Investment Co.*, 221 U. S. 286, 316, 31 Sup. Ct. 578, 55 L. Ed. 738; *United States v. Logan* (C. C.) 105 Fed. 240, 241; *Eells v. Ross*, 64 Fed. 417, 420, 12 C. C. A. 205; *United States v. Mullin* (D. C.) 71 Fed. 682, 685.

It has been and still is the policy of the United States to protect the property and the rights of the Indians under its control, and to teach them agriculture and the arts of civilized life. The Indian reservations, the funds derived from the lease of their right of occupancy to their lands, the lands allotted to the individual Indians, but still held in trust by the United States during the period of restriction upon alienation, the leases of these lands made by the Indian superintendents or agents on the terms and conditions fixed by the Secretary of the Interior and approved by him, the tools, animals, houses, improvements, and other property furnished to these Indians by the United States, and the proceeds and income from all these, are the means by which the nation pursues its beneficent pol-

icy of protection and instruction and exercises its lawful powers of government. If one threatens or proceeds to destroy these means, may not the United States resort to its own courts to prevent such destruction, or to recover the damages caused thereby? "Every government, intrusted, by the terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter." *In re Debs*, 158 U. S. 564, 584, 15 Sup. Ct. 900, 906 (39 L. Ed. 1092).

The United States may maintain a suit to prevent the officers of a state from subjecting any of these means, whether they consist of real property or of personal property, to taxation for state or county purposes. *United States v. Rickert*, 188 U. S. 432, 443, 444, 23 Sup. Ct. 478, 47 L. Ed. 532; *United States v. Thurston County*, 143 Fed. 287, 289, 74 C. C. A. 425, 427. It has capacity to sue to avoid conveyances made by Indian allottees in violation of restrictions upon alienation, although it has no pecuniary interest therein, or in the land conveyed. It has this right to sue, because such conveyances violate its governmental rights and hinder or prevent the execution of its governmental policy. *Heckman v. United States*, 224 U. S. 413, 438, 32 Sup. Ct. 424, 56 L. Ed. 820; *United States v. Allen*, 179 Fed. 13, 103 C. C. A. 1; *Wright v. United States* (C. C. A.) 196 Fed. 1007; *Bowling v. United States*, 111 C. C. A. 561, 191 Fed. 19. On the same ground it may maintain suits to cancel leases procured from Indian allottees without the required approval of the Secretary of the Interior. *United States v. Flournoy Live Stock & R. E. Co.*, 69 Fed. 886, 892, 893, 894; *United States v. Noble*, (C. C. A.) 197 Fed. 292. And it has capacity to sue to enforce and protect the treaty right of Indians to fish in waters outside Indian reservations. *United States v. Winans* (C. C.) 73 Fed. 72, 75.

The breach by lessees of their covenants in leases with Indian allottees, the terms and conditions of which were prescribed and approved by the Secretary pursuant to the act of Congress, obviously may be as effective to violate the governmental rights of the United States, and to hinder or prevent the execution of its policy of protection of the property rights of the Indians under its charge, it may be as effective to deprive the Indians of their rights and to pauperize them as the violation of the restriction on the alienation of their lands or the procurement of unauthorized leases, and for the same reason that the United States has capacity to sue to avoid the latter it has capacity to sue to recover the damages caused by the former. The Indians themselves are practically helpless in either case, and unless the United States may sue to protect and enforce their rights they will be disregarded with impunity. Our conclusion is that the United States has capacity to sue to recover damages for the breach of a lease made by an Indian allottee with the approval of the Secretary of the Interior, or to protect or enforce any other property right of such a lessor which remains under the control and

supervision of the Secretary or the Indian agent, his subordinate, because such suits are necessary to protect and enforce the governmental rights of the United States and its governmental policy to protect the property rights of the Indians and to teach them the arts of civilized life.

The judgment below must accordingly be reversed, and the case must be remanded to the District Court, with instructions to grant a new trial; and it is so ordered.

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UNITED STATES v. FITZGERALD.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1912.)

No. 3,716.

(Syllabus by the Court.)

**1. INDIANS (§ 23<sup>4</sup>)—PERSONAL PROPERTY—CAPACITY OF UNITED STATES TO SUE FOR WRONGFUL TAKING.**

The United States has capacity to sue for the fraudulent or wrongful taking from an Indian of his personal property held by him subject to the control and management of an Indian agent, because such a taking infringes its governmental rights, obstructs the execution of its governmental policy, and interferes with the lawful means it uses to carry it into effect.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 15; Dec. Dig. § 23.\*]

**2. INDIANS (§ 6\*)—CITIZENSHIP—GOVERNMENT CONTROL OF PROPERTY.**

The admission of Indians to citizenship does not necessarily withdraw their property from the control and management of the United States, or relieve it from the duty to protect such property from the force, fraud, and wrong of the superior race, and to redress its wrongful taking or injury.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 12; Dec. Dig. § 6.\*]

Admission of Indians to citizenship, see note to United States v. Allen, 103 C. C. A. 13.]

In Error to the District Court of the United States for the District of Utah; John A. Marshall, Judge.

Action by the United States, as guardian of Towanta, an Indian, against Riley Fitzgerald. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Hiram E. Booth, U. S. Atty., of Salt Lake City, Utah (Wm. M. McCrea, of Salt Lake City, Utah, on the brief), for the United States.

Before SANBORN and CARLAND, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. The United States brought this action against the defendant, Fitzgerald, for damages for the wrongful taking by him from the Indian, Towanta, of certain sacks of wool that had been sheared from the latter's sheep. The facts set forth in the complaint were these: Towanta was an Indian allottee, located on a

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

part of the former Uintah Indian reservation, to whom personal property had been issued by the United States from time to time to induce him to adopt the habits of civilized life. His allotment and his personal property had been under the control, supervision, and management of the United States, and under the direct management and control of the Indian agent of the Uintah and Ouray agency, and to this management and control Towanta had agreed. Under this agreement, and the rules and regulations of the Interior Department, Towanta had no right or authority to sell or otherwise part with any of his personal property without the consent of the Indian agent, who had the management and control thereof. Towanta had a large number of sheep under the management and control of the Indian agent, which he grazed on the lands within the former Indian reservation. Fitzgerald, without the consent of the Indian agent, by means of fraud and deceit practiced on Towanta, obtained from him and took possession of certain sacks of wool, for which he paid nothing, worth \$250, that had been sheared from these sheep, and upon demand he refused to return this wool or to pay for it. It is assigned as error that a demurrer to this complaint was sustained on the ground that the United States had no capacity to sue for the damages claimed therein.

[2] Assuming that under Act February 8, 1887, c. 119, 24 Stat. 390, § 6, the Indian allottee had become a citizen of the United States and of the state of Utah, his admission to citizenship did not necessarily withdraw him or his property from the supervision, control, and protection of the United States. *Matter of Heff*, 197 U. S. 488, 509, 25 Sup. Ct. 506, 49 L. Ed. 848; *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; *United States v. Thurston County*, 143 Fed. 287, 289, 74 C. C. A. 425, 427; *Tiger v. Western Investment Co.*, 221 U. S. 286, 316, 31 Sup. Ct. 578, 55 L. Ed. 738; *McKnight v. United States*, 130 Fed. 659, 662, 65 C. C. A. 37, 40

[1] The United States has the power, and for more than a century it has been, and still is, its governmental policy, to protect the Indians and their property from the force, fraud, cunning, and rapacity of the members of the superior race, and to teach them the arts and induce them to adopt the habits of civilization. Indian reservations, allotments of land in severalty with restrictions on alienation held in trust for the Indians, leases thereon on terms prescribed or approved by the Secretary of the Interior, agricultural implements, houses, barns, domestic animals, and other property furnished to the Indians by the United States, or held by the Indians subject to its control and management, are the means by which the United States exercises its power and carries into effect its policy to protect these Indians and their rights of property, and to teach them to abandon nomadic habits and become farmers, laborers, clerks, and business men. The United States may lawfully maintain suits in its own courts to prevent interference with the means it adopts to exercise its powers of government and to carry into effect its policies. It may maintain such suits, although it has no pecuniary interest in the subject-matter thereof, for the purpose of protecting and enforcing its governmental rights and



to aid in the execution of its governmental policies. *United States v. Thurston County*, 143 Fed. 287, 289, 74 C. C. A. 425, 427; *United States v. Flournoy Live Stock & R. E. Co.* (C. C.) 69 Fed. 886, 892, 893, 894; *United States v. Rickert*, 188 U. S. 432, 443, 444, 23 Sup. Ct. 478, 47 L. Ed. 532; *United States v. Allen*, 179 Fed. 13, 103 C. C. A. 1; *Wright v. United States*, 196 Fed. 1007; *Bowling v. United States*, 191 Fed. 19, 111 C. C. A. 561; *McKnight v. United States*, 130 Fed. 659, 664, 65 C. C. A. 37, 42. A more extended review of the authorities upon and discussion of this subject may be found in the opinion of this court in *United States v. Gray*, 201 Fed. 291, 119 C. C. A. —, which is filed herewith.

The taking by the defendant of the personal property of the Indian, Towanta, from him by fraud without the consent of the Indian agent, under whose control, supervision, and management it had been placed for the purpose of protecting it against the fraud and rapacity of members of the defendant's race, was an infringement of the governmental rights of the United States, a hindrance of the execution of its governmental policy, and a wrongful seizure of the lawful means it was using to carry that policy into effect. It was therefore a wrong for the redress of which the United States had the capacity to sue. It may maintain an action for damages for the fraudulent taking of the personal property of an Indian allottee, which is under the supervision, control, and management of the Secretary of the Interior, or his subordinate, an Indian agent, and may hold the amount it recovers in trust for the Indians whose property has been taken or injured, because such suits are lawful aids to redress infringements of its governmental rights, obstructions to the execution of its governmental policy, and interference with the means it is using to carry that policy into effect.

The judgment below must accordingly be reversed, and the case must be remanded to the District Court, with instructions to permit the defendant to answer and to take further proceedings in accordance with the views expressed in this opinion.

It is so ordered.

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### MAMMOTH MINING CO. v. THOMAS.

Circuit Court of Appeals, Eighth Circuit. October 21, 1912.)

No. 3,695.

#### 1. APPEAL AND ERROR (§ 1048\*)—RULINGS ON EVIDENCE—PREJUDICE.

Where, in an action for injuries to a miner by the fall of a portion of the roof, a witness, in response to a proper question not objected to, testified fully as to the character of plaintiff's work and duties, and as to the place where he was required to work, defendant was not prejudiced by the court's allowance of a leading question as to whether plaintiff's duties compelled him to go into any part of the particular chamber or winze, to which the witness' answer was not responsive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. MASTER AND SERVANT (§ 274\*)—INJURIES TO SERVANT—EVIDENCE.**

Where, in an action for injuries to a miner by the fall of a portion of the roof in an unprotected part of a chamber, where plaintiff kept a pail of drinking water, questions asked of a miner employed in such chamber as to whether witness knew where plaintiff kept his water pail before the accident, which the witness answered that two days prior to the accident plaintiff kept it in the unguarded part of the chamber, and as to whether the witness had been ordered not to go down there to get a drink, which he answered in the negative, were not objectionable as immaterial; it being necessary for plaintiff to prove that he was in the place where he was injured in the discharge of his duty as a servant of the mine company, pursuant to its direction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.\*]

**3. MASTER AND SERVANT (§ 232\*)—INJURIES TO SERVANT—DANGEROUS PLACE.**

Where a miner was temporarily in an unprotected part of a chamber, without notice of danger, to get a needed drink from his water pail, which he kept there in close proximity to his work, at the time he was injured by a fall of a portion of the roof, he did not thereby forfeit his right to the protection the discharge of his employer's duty would afford.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 678-680; Dec. Dig. § 232.\*]

**4. WITNESSES (§ 268\*)—CROSS-EXAMINATION—SCOPE.**

In an action for injuries to a miner by a fall of a portion of the roof while he was in an unprotected portion of the chamber to drink from his water pail, a witness testified for defendant on direct examination that plaintiff and he had placed a plank near the place where the latter was injured, and that plaintiff took a water pail down there. On cross-examination he testified without objection that he never had a water pail, but might have drank from plaintiff's pail, but did not do so on the day of the accident, that plaintiff always had a water pail in the unprotected part of the chamber, and that witness used to go down there to drink once or twice a day. *Held*, that the witness' testimony opened to cross-examination all that he knew concerning the use of the water pail, and the instructions of the employer, if any, regarding such use, and that a question whether witness had been ordered not to go to that place for a drink was proper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.\*]

**5. TRIAL (§ 62\*)—RECEPTION OF EVIDENCE—REBUTTAL.**

A skip in a mine in which plaintiff was injured was operated by a system of signal bells. As part of plaintiff's main case, witnesses had testified that plaintiff shoveled loose material into the skip from the lower part of the chamber on the morning of the accident, just after he had cleaned out the winze. Defendant then called the hoist engineer, who testified that he knew by marks on the cable to what point he lowered the skip, and that he did not lower it to the lower part of the chamber on the morning of the accident. *Held*, that plaintiff was entitled to show in rebuttal that, when witness signaled for the skip to come down in the winze, it always stopped wherever he wanted it to, and that the skip stopped at the lower part of the chamber immediately after plaintiff had cleaned up the bottom of the winze.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.\*]

In Error to the Circuit Court of the United States for the District of Utah; John A. Marshall, Judge.

Action by John R. Thomas against the Mammoth Mining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Dey, Hoppaugh & Fabian, of Salt Lake City, Utah, for plaintiff in error.

Hiram E. Booth, of Salt Lake City, Utah (E. O. Lee, Carl A. Badger, Benjamin L. Rich and Dale H. Parke, all of Salt Lake City, Utah, on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. Mr. Thomas, the plaintiff below, was employed by the Mammoth Mining Company to shovel loose material in its mine into a skip which a hoisting engine drew up to a higher level. The defendant's main shaft had been sunk to the 2,100-foot level. At the end of that level a winze or tunnel had been driven down, at an angle of about 45 degrees, a distance of about 120 feet, and at a point about 25 feet from the bottom of this winze a chamber about 15 feet high and 16 feet long had been stoped out on the right side of the winze. Planks had been placed on stulls in this chamber, so that a part of the upper portion of it above the stulls was a reasonably safe place for men to work, and Richard Bourquist, a miner, was at work in this part of the chamber, picking down the ore and waste material.

That portion of the roof of this chamber that was not protected by these stulls was composed of such loose material that it was dangerous for men to work under it, and this fact was known to the Mining Company; but the plaintiff testified that he was not aware of it. Hugh McDonald was a miner at work about 25 feet below the chamber driving the winze. On the morning of January 13, 1910, Thomas shoveled the loose material at the bottom of the winze into the skip for about an hour. Thereafter he performed like work in the upper part of the chamber, where Bourquist was engaged, and at about a quarter before 12 was in the lower and unprotected part of the chamber, on the line between the chamber and the winze, with his water pail, from which he had drank, when boulders and earth fell from the roof above and seriously injured him. There was testimony tending to show that he knew the dangerous condition of the roof above him, and that the shift boss had ordered him not to work in it; but he testified that he had received no notice of any such danger, and that the shift boss had directed him to work in that chamber that day, when he had cleaned up the face of the winze and the upper part of the chamber where Bourquist was at work. He further testified that he had finished all this work, and had gone down to the unguarded part of the chamber to remove the loose material therefrom. Upon this general state of the evidence Thomas recovered a judgment for \$5,000 against the Mining Company for its alleged failure to exercise reasonable care to provide him with a reasonably safe place in which to work, and counsel for the company contend that this judgment should be reversed on account of four alleged errors in the conduct of the trial below.

[1] The first complaint is that the court overruled the objection that this question was leading:

"Was the character of his [the plaintiff's] work and his duties such that he was compelled to go into any part of the chamber or winze?"

But, conceding that the ruling was erroneous, the record conclusively demonstrates that it did not prejudice, and could not have prejudiced, the Mining Company; for his answer to the question did not state whether or not the character of his duties and his work compelled him to go into the chamber or the winze, and subsequently, in response to such a proper question as, "What were the duties of Mr. Thomas?" to which no objections were made, the witness testified fully to the character of 'Thomas' work and duties, and to the places where he was required to perform them.

[2, 3] The second and third errors specified are that the court overruled the objection that the evidence sought was immaterial, which was made to the question, "Do you know where he kept his [the plaintiff's] water pail before the accident?" which Bourquist answered that two days before the accident he kept it in the unguarded part of the chamber, and that it overruled, on the ground that it was cross-examination, the objection that the evidence sought was incompetent, and not within the issues made by the pleadings, which was made to the question, "Had you been ordered not to go down there and get a drink?" which Bourquist answered in the negative. It was material and necessary for the plaintiff to prove that he was in the place where he was injured in the discharge of his duty as a servant of the Mining Company pursuant to its direction; otherwise, he could not avail himself of the duty of his employer to use reasonable care to keep that place reasonably safe for him. If, however, he was temporarily in the unprotected part of the chamber, without notice of danger, to get a needed drink from his water pail, which he kept there in close proximity to his place of work, he did not thereby forfeit his right to the protection the discharge of his employer's duty would afford. The evidence of the place where he kept his water pail was therefore material, and there was no error in its admission.

[4] Bourquist was a witness called by the Mining Company, and on his direct examination he testified that he and Thomas had placed a plank near the place where the latter was injured, that Thomas took the water bucket down there, and he did not know whether he placed it on the plank or not, but that he was accustomed to do so. On his cross-examination he testified without objection that he (Bourquist) never had a water pail; that he might have gone down where 'Thomas' water pail was to drink from it, but that he did not do so on the day of the accident; that Thomas always had a water pail in the unprotected part of the chamber; that he took the pail with him to the bottom and worked up; that two days before the accident he had his pail where he was injured; that he (Bourquist) used to go down there to get a drink once or twice a day, but that he had not been down on the day of the accident. This was the state of the evidence when Bourquist was asked by plaintiff's counsel if he had not



been ordered not to go down there to get a drink. The question was cross-examination, because the defendant had drawn from the witness the fact that he knew that Thomas was accustomed to keep his water pail at the place where he was injured. This testimony opened to cross-examination all that Bourquist knew about the use of the water pail, and the instructions of the employer, if any, regarding that use. One of the main issues in the case was whether or not Thomas had been ordered not to work in and to keep out of the unprotected part of this chamber, where the water pail was, and the evidence was undisputed that he and Bourquist worked together in the upper or protected part of the chamber, and used the water pail in the unprotected part thereof. In this state of the case, testimony in the cross-examination of Bourquist that he was not ordered not to go where the water pail was to get a drink was neither incompetent nor so far without the issues made by the pleadings as to be inadmissible.

[5] The fourth and last alleged error is that, over the objection that it was not proper rebuttal, the witness McDonald was permitted to testify that when he signaled for the skip to come down in the winze it had always stopped wherever they wanted it to stop. The skip was operated by a system of signals by means of bells, whereby the men in the mine notified Mr. Webb, who ran the hoisting engine above, when and where they respectively wanted the skip to stop. In the plaintiff's main case witnesses had testified that he shoveled the loose material into the skip from the lower part of the chamber on the morning of the accident, just after he had cleaned out the winze. To meet this testimony the defendant called Webb, who testified that he knew by marks on the cable to what points he lowered the skip, and that he did not lower it to the lower part of the chamber on the morning of the accident. McDonald was then asked the challenged question on rebuttal, and his answer was followed by a repetition of his testimony in chief that the skip stopped at the lower part of the chamber immediately after Thomas had cleaned up the bottom of the winze. The answer to the question assailed was proper rebuttal of Webb's testimony. There was no error in the trial of this case, and the judgment must be affirmed.

It is so ordered.

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**FIELD LINE (CARDIFF), Limited, v. SOUTH ATLANTIC S. S. LINE.**

(Circuit Court of Appeals, Fifth Circuit. December 3, 1912.)

No. 2,358.

**1. SHIPPING (§ 62\*)—CHARTERS—LIABILITY OF OWNER—CONFLICT BETWEEN BILLS OF LADING AND CHARTER PARTY.**

Where a charter party which does not effect a demise of the vessel provides that the master shall sign bills of lading when presented without prejudice to the charter party, the owner is bound to a shipper by the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

terms of a bill of lading so signed, although they may be in conflict with those of the charter party.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 257-269, 313-315, 317; Dec. Dig. § 62.\*]

**2. SHIPPING (§ 62\*)—CHARTERS—RIGHTS OF PARTIES.**

A charter party provided that the master should sign bills of lading when presented "without prejudice to this charter party." It was further stipulated, "Average (if any) in accordance with the York-Antwerp rules, 1890," and such rules provided that "no jettison of deck cargo shall be made good as general average." The master, however, was required by the charterer to sign bills of lading for certain consignments of lumber containing a provision that such rules should govern, "excepting that jettison of deck cargo (and freight thereon) for the common safety shall be allowable as general average," and did sign the same under protest. A part of the deck cargo covered by such bills of lading was jettisoned, and the shipowner was subjected to loss in general average, and, the other bills of lading containing no such exception, it could not call on the other shippers to contribute. *Held* that, while it was bound by such bills of lading as regarded the shippers, the rights of the parties to the charter were governed by its terms, and that it was entitled to recover its loss from the charterer.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 257-269, 313-315, 317; Dec. Dig. § 62.\*]

Appeal from the District Court of the United States for the Southern District of Georgia; Wm. B. Sheppard, Judge.

Suit in admiralty by the Field Line (Cardiff), Limited, against the South Atlantic Steamship Line. Decree for respondent, and libellant appeals. Reversed.

Anton P. Wright and Walter C. Hartridge, both of Savannah, Ga., for appellant.

Samuel B. Adams and A. Pratt Adams, both of Savannah, Ga., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

SHELBY, Circuit Judge. Libel by the shipowner against the charterer for an alleged breach of the contract of charter party. The charterer excepted to the libel, the exceptions were sustained, and the libel dismissed. The libellant appeals, and assigns, with specifications, that the District Court erred in sustaining the exceptions and dismissing the libel.

It is shown by the libel that the Field Line (Cardiff), Limited, the appellant, a British corporation, is the owner of the steamship Eastfield. The South Atlantic Steamship Line, the appellee, is a Georgia corporation, engaged in the business of chartering vessels for the transportation of merchandise. On December 3, 1908, the appellant chartered its vessel to the appellee for a voyage from Tampa, Pensacola, or New Orleans to the United Kingdom, or to the continent between Havre and Hamburg. The charter party provided that the captain of the vessel should sign bills of lading, when presented, "without prejudice to this charter party," and that he should report at the office of the charterer, or its agents, at the port of loading

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

at least twice daily, at times designated by it for signing bills of lading, and it was stipulated as follows:

"Average (if any) in accordance with the York-Antwerp rules, 1890"

—which rules, it is alleged, provide that:

"No jettison of deck cargo shall be made good as general average."

Article 3 of the charter party was to the effect that such goods only as the charterer or its agents may direct shall be received on board any part of the steamer. The bills of lading issued for the cargo were in accordance with the charter party, with the exception of three. These three were issued to the Pensacola Lumber Company for lumber and timber, and contained these words:

"General average payable according to York-Antwerp rules, 1890, excepting that jettison of deck cargo (and freight thereon) for the common safety shall be allowable as general average."

This provision is in direct conflict with the charter party, which, by reference to the York-Antwerp rules, 1890, provided that:

"No jettison of deck cargo shall be made good as general average."

When these three bills were presented to the master of the vessel for his signature, he protested against signing them; but the charterer's agent pointed out to the master that the charter party provided that the bills of lading should be signed "without prejudice to this charter party," and insisted that the master should sign them. The master then signed them. On the voyage which followed, heavy weather was encountered, and, to save the ship, cargo, and life, it became necessary to jettison part of the deck cargo, after which the vessel arrived safely at Rotterdam. The deck cargo, consisting of sawn pine logs, was loaded by the Pensacola Lumber Company, and was included in one of the bills of lading which was in conflict with the charter party, and which was signed by the master after protest. No part of the cargo was jettisoned, except part of the deck load, and because of the fact that the three bills of lading provided for the recovery in general average of deck load jettisoned, the appellant, as owner of the ship, was compelled to proceed with the adjustment of general average at Rotterdam, incurring expenses which are stated in the libel, and was also required to pay for the jettisoned cargo. The payment for the jettisoned cargo was made to underwriters who had been subrogated to the rights of the owners of the cargo. The appellant, as shipowner, could not call on the owners of the cargo not jettisoned for contribution, because their bills of lading were in conformity to the charter party.

There is a prayer for a decree against the charterer, the appellee, for \$3,861.95, the aggregate of the sums paid out by the appellant by reason of the facts alleged.

The District Court sustained the exceptions to the libel generally, without reference to any particular ground of exception, and we proceed to consider what we take to be the material questions raised by the controversy.

It appears clearly from the allegations of the libel that the issu-

ance of the bills of lading in conflict with the terms of the charter party subjected the appellant to the loss which it sues to recover.

Two general questions are necessary to be considered in arriving at a conclusion as to whether or not the libel shows a cause of action: First, was the appellant, as owner of the ship, required by the bill of lading to pay for the deck cargo jettisoned? and, second, having paid for it, do the facts alleged show a breach of the charter party by the charterer which makes it liable to the shipowner for the amount so paid?

[1] The charter party provided that the captain should sign the bills of lading when presented to him. There was no demise of the vessel; the master and the crew remained in possession; the owner, by the charter party, only let the vessel for the purpose of carrying a cargo to be furnished or procured by the charterer. There has been much controversy in such cases as to whether the authority of the master to sign the bills of lading is on behalf of the charterer or the owner (*Carver's Carriage by Sea* [3d Ed.] § 154); but it seems that here this question is not material, if the altered state of the master's authority will not affect the liability of the owner. The charter party permitting the master and crew to remain in control of the vessel, the master continued to be the representative of the shipowner; and the meaning of the stipulation that the master shall sign the bills of lading is that the shipowner shall, through the master, contract with shippers for the charterer's benefit. It would seem to follow that the shipowner in such cases is bound by the bill of lading, although it may in terms differ from the charter party. In *Sandeman v. Scurr*, 2 Q. B. 86, 97, it is said:

"We think that until the fact that the master's authority has been put an end to is brought to the knowledge of a shipper of goods, the latter has a right to look to the owner as the principal with whom his contract has been made."

The English cases bearing on this question are reviewed by Carver, and he concludes from them that the bill of lading in a case like this is a contract with the shipowner, and that the master should be regarded as having made it on the owner's behalf and not on behalf of the charterer; that the provision in the charter party that the master shall sign bills of lading is not a mere authority to him to do so, but an agreement that he shall do so, for a breach of which the owner is liable. *Carver's Carriage by Sea* (3d Ed.) §§ 155, 157. In *Schooner Freeman, etc., v. Buckingham et al.*, 18 How. 182, 189 (15 L. Ed. 341), Mr. Justice Curtis makes an observation that indicates that the admiralty law of this country is the same. Speaking for the court, he says:

"We are of opinion that, under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner."

In *The Alert*, 61 Fed. 113, 9 C. C. A. 390, it is held that even where a ship is chartered, so that the charterer is deemed the special owner, the ship is not freed from liability on the contracts of af-



freightment received from the agent of the ship. In *Purvis v. Tunno*, 1 Brev. (S. C.) 259, 2 Am. Dec. 664, it is held that the master is the agent of the owner, who is liable for his defaults, although the whole vessel is chartered, unless the charterer engage the master and seamen. In *Robinson v. Holst & Weber*, 96 Ga. 19, it is held that where the owner of a ship, who has chartered out the hold, retains control of the navigation of the vessel, and bills of lading for goods consigned therein, which themselves contain the contract of affreightment, are issued by the master at the instance of the charterer to consignors, the owner is bound directly to the consignors for the performance of the contract of affreightment as contained in the bills of lading, and the consignors are not affected by provisions of the charter party inconsistent with such contract.

We are of the opinion that the appellant, the owner of the vessel, was legally bound by the stipulations of the three bills of lading issued to the Pensacola Lumber Company, although the bills were in conflict with the charter party. The shipowner was therefore obligated to pay to the owners of the jettisoned cargo, or to those subrogated to their rights, the amount of their loss.

[2] Having paid it, can the shipowner, the appellant, recover the amount from the charterer, the appellee?

The contract of charter party was duly executed by the owner of the vessel and the charterer through their authorized agents. The contract is mutual, imposing obligations upon each of the parties. It is elementary that either party who commits a breach of such a contract is liable to the other for at least actual damages. There was an express stipulation:

"Average (if any) in accordance with the York-Antwerp rules, 1890."

The rules referred to provided that:

"No jettison of deck cargo shall be made good as general average."

Such goods only as the charter party directed were to be received on the vessel. The charterer was to present to the master the bills of lading for his signature. Clearly, the charterer was not authorized or expected to present and procure the signing of bills of lading not in conformity to the charter party and that increased beyond its terms the liability of the owners. It did present such bills, and procured the signature of the master to them against his protest. It is contended that, as the charter party provided that the bills of lading were to be signed "without prejudice to this charter party," the bills would not be binding on the owners, or at least that the action of the charterer constituted no breach of the charter party.

In *Turner et al. v. Haji Goolam Mahomed Azam* [1904] A. C. 826, 91 Law T. Rep. 216, 219, it is held that the words "without prejudice to this charter" mean that the rights of the shipowners against the charterers, and vice versa, are to be preserved; that it is a term of the contract between the charterers and the shipowners, meaning that, notwithstanding any engagements made by the bills of lading, the charter party shall remain unaltered. To the same effect

is *Hansen v. Harrold Brothers*, 1 Q. B. (1894) 612, 619. This view is clearly recognized by the Supreme Court as correct in *Crossman v. Burrill*, 179 U. S. 100, 108, 21 Sup. Ct. 38, 41 (45 L. Ed. 106) where it is said:

"The provision of the charter party which requires 'the bills of lading to be signed as presented, without prejudice to this charter,' while it obliges the master to sign bills of lading upon request of the charterers, does not mean that the bills of lading, or the consignee holding them, shall be subject to all the provisions of the charter, but only that the obligations of the charterers to the ship and her owners are not to be affected by the bill of lading so signed."

The case of *Kruger & Co. v. Moel Tryfan Ship Company* [1907] A. C. 272, 97 Law T. Rep. 143, decided by the House of Lords, is an authority directly in point. The charter party in that case contained the clause that the master was to sign bills of lading "without prejudice to the charter party." He signed bills in conflict with the charter party which subjected the shipowners to loss. The owners sued the charterers for breach of duty, and it was held that the charterers had committed a breach of contract in presenting for signature bills of lading which imposed a greater liability on the shipowners than that imposed by the charter party, and that they were liable to indemnify the shipowners for the loss which they had incurred. The doctrine of these cases has been approved, in effect, by the decision of this court in *Kennedy v. Weston & Company*, 136 Fed. 166, 69 C. C. A. 78, where it is held, Pardee, Circuit Judge, delivering the opinion of the court, that an action for damages lies by the owner against the charterer who procures from the master, over his protest, a bill of lading which conflicts with the charter party, by which the owner is subjected to loss.

We are of the opinion that, on the facts alleged, the appellant has a cause of action against the appellee, and that the District Court erred in dismissing the libel.

Reversed.

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STRAUS et al. v. AMERICAN PUBLISHERS' ASS'N et al.

(Circuit Court of Appeals, Second Circuit. December 9, 1912.)

No. 63.

1. PLEADING (§ 305\*)—PROFERT—JUDGMENT.

By the profert of the judgment in a cause in the state court, made by the answer pleading it as *res judicata*, the record of such cause becomes part of the pleading, so that the court may, and is bound to, inspect it as such; it not being required to be annexed as an exhibit to the answer, and testimony or affidavits not being necessary.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 910-917; Dec. Dig. § 305.\*]

2. JUDGMENT (§ 714\*)—RES JUDICATA—IDENTITY OF SUBJECT-MATTER.

The combination complained of is not a new one, or different from that complained of in a former suit, judgment in which is pleaded as *res judi-*

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cata, because after such suit defendants modified it by eliminating part of its scope.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1240, 1242, 1243; Dec. Dig. § 714.\*]

**3. JUDGMENT (§ 663\*)—RES JUDICATA—PENDENCY OF APPEAL.**

Pendency of an appeal from a judgment does not interfere with its operation as res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1174; Dec. Dig. § 603.\*]

**4. JUDGMENT (§ 828\*)—RES JUDICATA—MATTERS CONCLUDED.**

The same matters being complained of in a suit in the state court and a subsequent one in the federal court, the fact that the judgment in the state court depended on the state statutes, and that the complaint in the second suit is founded on the federal statute, which is not within the jurisdiction of the state court, is immaterial as regards the judgment being res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504–1509; Dec. Dig. § 828.\*]

Conclusiveness of judgment as between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

**5. JUDGMENT (§ 660\*)—RES JUDICATA—ERRONEOUS JUDGMENT.**

The question involved being one the court was competent to decide, the fact that it may have decided erroneously is immaterial as regards its judgment being res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1171; Dec. Dig. § 660.\*]

**6. JUDGMENT (§ 701\*)—RES JUDICATA—PARTIES—PRIVIES.**

The judgment in a suit against corporations and an association is none the less res judicata because of the addition as parties to the second suit of persons who were officers of the association at its organization, and members and officers of the corporations, and took part in organizing the combinations complained of, and were included in the injunction issued in the first suit; they being privy thereto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1226; Dec. Dig. § 701.\*]

**7. JUDGMENT (§ 590\*)—RES JUDICATA—IDENTITY OF ISSUES.**

That the second suit seeks damages for a longer period than the first is immaterial as regards the judgment in the first being res judicata; the thing adjudicated being that plaintiff could recover no damages for the combination complained of, whatever its period.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1035, 1063, 1064, 1102–1106; Dec. Dig. § 590.\*]

In Error to the Circuit Court of the United States for the Southern District of New York; E. Henry Lacombe, Judge.

Action by Isidor Straus and others against the American Publishers' Association and others. Defendants had judgment on the pleadings, and plaintiffs bring error. Affirmed.

See, also, 178 Fed. 586.

Wise & Seligsberg, of New York City (E. E. Wise and Wallace Macfarlane, both of New York City, of counsel), for plaintiffs in error.

S. H. Olin, of New York City, for defendants in error.

Before COXE, WARD, and NOYES, Circuit Judges.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WARD, Circuit Judge. October 1, 1909, the plaintiffs began this action at law to recover treble damages against the defendants under the federal anti-trust law of July 2, 1890. The complaint alleges that the defendants, publishers of books, combined to organize a membership corporation under the laws of New York called the American Publishers' Association, of which they were members and which included a majority of the publishers in the United States, and of which the other defendants were the directors for the first year and also officers or directors of defendant corporations; that the purpose of the association was to maintain the retail price of copyrighted books and was to be effected by an agreement of the publishers to sell their books, copyrighted or uncopyrighted, only to such dealers as would maintain the net retail price of the copyrighted books; that in further prosecution of the combination the defendants aided the organization of a voluntary unincorporated association to co-operate with the Publishers' Association, called the American Booksellers' Association, which included a majority of the booksellers of the United States; that the purpose of this organization was to bring about an agreement between the booksellers to maintain the retail price of the publishers' copyrighted books by refusing to sell the books, copyrighted or uncopyrighted, of any publisher who declined to support the combination, and by refusing to sell any books at less than the usual retail price to any bookseller who cut the retail price of the publishers' copyrighted books; that these combinations went into operation May 1, 1901, and have been continued ever since, contrary to the provisions of the anti-trust law of July 2, 1890, except that in about the month of March, 1904, the Court of Appeals of the state of New York (177 N. Y. 473, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819), in an action brought against the defendants herein and others, having declared the foregoing agreements unlawful so far as uncopyrighted books were concerned, the Publishers' Association and Booksellers' Association modified the said agreements so as to exclude uncopyrighted books, but continued the same illegal combination and conduct in respect to copyrighted books; that because the plaintiffs refused to conform to the regulations of these combinations they were put on a cut-off list, their business followed up by detectives, and their supply of books cut off, to their damage in the sum of \$125,000.

The answer of the defendants contained, among other things, a separate defense to the effect that the plaintiffs had brought an action in equity in the Supreme Court of the state of New York, December 3, 1902, against them (except defendants Scribner, Scott, Britt, Putnam, Harvey, and Appleton, who were trustees and officers of certain of the defendants) for the same cause of action in which the defendants (except the defendants aforesaid) appeared, and in which it was so proceeded that the said agreements were held invalid as to uncopyrighted books and valid as to copyrighted books, and an interlocutory judgment was entered May 20, 1909, restraining the defendants from interfering in any way with the purchase by the plaintiffs of uncopyrighted books, and directing the plaintiffs' damages to be ascertained



by a referee, which judgment was on appeal affirmed by the Appellate Division and by the Court of Appeals. The referee having subsequently ascertained the damages, final judgment was entered on his report for \$3,675.60 damages and costs, from which judgment the plaintiffs appealed to the Court of Appeals, which affirmed the same. Thereupon they took a writ of error to the final judgment of the Supreme Court of New York, which is now pending in the Supreme Court of the United States. The said judgment was pleaded as *res adjudicata* of all the matters complained of, and profert of the same was made.

The plaintiffs replied to this defense that the judgment in the state court was not *res adjudicata*, and that the cause of action was not the same as that in the action in the state court, because damages in respect to copyrighted books was excluded in the latter action, because the present action was founded on the federal statute, under which the state court had no jurisdiction, because there were additional parties in this action, and because different periods of time were covered.

The defendants having moved for judgment on the pleadings, Lacombe, Circuit Judge, granted the motion and dismissed the complaint.

[1, 2] The first contention of the plaintiffs in error is that the record of the cause in the state court should not have been inspected by the Circuit Judge, because it was not annexed as an exhibit to the answer. This is a very technical objection, especially in view of the fact that the action was referred to by the plaintiffs themselves in their complaint. It would prove a cumbersome practice to load such records upon pleadings. By the profert the record became a part of the pleading and the court was bound to inspect it as such. That is the practice in this circuit (*Bogart v. Hinds* [C. C.] 25 Fed. 484); and there is abundant authority elsewhere (*American Bell Tel. Co. v. Southern Tel. Co.* [C. C.] 34 Fed. 803; *Dickerson v. Greene* [C. C.] 53 Fed. 247; *Germain v. Wilgus*, 67 Fed. 597, 14 C. C. A. 561; *Heaton v. Schlochtmeier* [C. C.] 69 Fed. 592). No testimony or affidavits were necessary. The pleadings show that the agreements and conduct complained of in the action in the state court are exactly the same as those complained of in this action, except that, as the plaintiffs themselves have alleged in the complaint, the agreements have been modified since the decision in the Court of Appeals in one particular, viz., so as to confine them entirely to copyrighted books. The combination after this modification was in no sense a new combination.

Reliance is also placed upon the refusal of the Supreme Court in *Pacific Railroad of Missouri v. Missouri Pacific Railway*, 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498, to consider the record of a case referred to in the bill. That was a demurrer to the bill, and the Supreme Court said the record of the case mentioned could not be considered, because it was not certified to the Supreme Court as part of the record in the Circuit Court. In this case, however, the transcript of the record of the cause in the state court on writ of error to the Supreme Court of the United States is a part of the record and contains the judgment roll of the state court, stipulated by the parties to be correct and certification waived.

[3] The point is also made that the judgment was not *res adjudicata* because of the appeal pending to the United States Supreme Court. This fact does not suspend the operation of the judgment as an estoppel, *Parkhurst v. Berdell*, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384; *Deposit Bank v. Frankfort*, 191 U. S. 499, 510, 24 Sup. Ct. 154, 48 L. Ed. 276; *Freeman on Judgments*, § 328.

[4, 5] The fact that the judgment in the state court depended upon the state statutes and that the complaint in this case is founded on the federal statute, which is not within the jurisdiction of the state court, makes no difference. The plaintiffs, having the option to go into either court, chose the state court, and their claim, having been there adjudicated, cannot be presented the second time to any other court. *Clabaugh v. Southern Wholesale Grocers Association (C. C.)* 181 Fed. 706. It may be admitted that the state court erroneously held, in view of the subsequent decision of the Supreme Court in *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, that the agreements complained of were valid so far as copyrighted books were concerned, and that therefore as a matter of law the plaintiffs could not recover damages in respect to them at any time. Still this question was actually involved in the cause before the state court, which was competent to decide it. Having done so, its judgment is binding in any subsequent action between the same parties for all time. *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195. If the plaintiffs are entitled to any relief, they can obtain it only in the original action.

[6] The judgment in the state court is not prevented from being a bar because of the additional parties in this court. They were officers of the Publishers' Association at its organization, were members and officers of the defendant corporations, took an active part in organizing the combinations complained of, were included in the injunction issued in the state court action, and were so stated to be in the complaint in this court. They must be regarded as privy to that action.

[7] The fact that evidence of damages in this action may cover a longer period of time than was covered by the action in the state court is immaterial. The thing that was adjudicated between the parties in the state court was that the plaintiffs could recover no damages in respect to copyrighted books at all, be the period of the combination long or short.

The decree is affirmed.

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**FARLESS et al. v. MOREHEAD et al.**

(Circuit Court of Appeals, Sixth Circuit. December 13, 1912.)

No. 2,205.

**1. JUDGMENT (§ 245\*)—PARTIES—EFFECT OF ERRONEOUS DESCRIPTION OF PLAINTIFFS AS PARTNERS.**

Under the liberal rule of pleading prevailing in Ohio (Rev. St. Ohio 1908, §§ 5082, 5096, 5114, 5115), the fact that plaintiffs erroneously describe

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

themselves as partners will not bar their recovery in the right of any joint interest which they may have; an amendment in such case being a matter of course.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 431; Dec. Dig. § 245.\*]

**2 GAMING (§ 44\*)—ACTION TO RECOVER MONEY LOST THROUGH BUCKET SHOP—OHIO STATUTE.**

Defendants conducted a bucket shop in Ohio, with branches in charge of agents in that and other states. Such agents were without power to close deals with customers, but received margins and submitted the proposed deal to defendants in Ohio for acceptance or rejection, and, if accepted, deposited the margins in a local bank account kept by defendants, from which they were later transmitted to Ohio. *Held* that, under Rev. St. Ohio 1908, § 4270, which provides that if any person, by playing at any game or by means of any bet or wager, loses to any other person any sum of money or other thing of value, and pays the loss to the winner, he may recover the same back, a customer in Kentucky, who made deals through an agent in Indiana whereby he lost money, which he paid, could maintain an action in Ohio to recover the same back from defendants.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 90; Dec. Dig. § 44.\*]

In Error to the Circuit Court of the United States for the Southern District of Ohio; Albert C. Thompson, Judge.

Action at law by William H. Farless and another against B. H. Morehead and others. Judgment for defendants, and plaintiffs bring error. Reversed.

The court below, at the close of plaintiff's testimony, directed a verdict for defendants; hence, we must consider as the facts the best case for plaintiffs which their testimony tended to prove. It is this: Plaintiffs lived in Henderson, Ky. Defendants lived in Cincinnati, and there conducted a bucket shop, having branches or agencies scattered over Ohio and other states. Gavitt was conducting, in Evansville, Ind., a business as a "broker"; but this was, really, one of defendants' branches. Plaintiffs, persuaded thereto by Gavitt, who told them that he was representing defendants, decided to go in together in some "stock deals" for the purpose of buying and selling on margins through Gavitt and defendants. All parties understood that no stock was to be in fact purchased and received, that plaintiffs were only to put up and maintain required margins, that settlements were to be made only on market differences, and that the transactions were to be really wagers or bets on the fluctuations of the market. The course of business was that plaintiffs, usually by telephone from across the river at Henderson, but sometimes orally across his counter, instructed Gavitt to buy or sell certain stock at a certain price, and mailed or delivered to him their check for the margin; that Gavitt, who had from defendants no authority to close such deals, but only to receive and transmit to defendants offers thereof, would at once communicate with defendants, in Cincinnati, over their private wire from his office, and defendants would either accept or reject. If they accepted, Gavitt would mail or deliver to plaintiffs a bought or sold note in the form of a memorandum that "M. & Co." had bought or sold for "R. & F." a specified stock at a specified price. The record does not indicate any rejection of any of plaintiffs' deals, or what the course of practice would have been in such event. If the market went against plaintiffs, Gavitt telephoned them that they must put up more margins, whereupon they either mailed their check or dropped out. Defendants maintained a bank account in Evansville, and in this account Gavitt every day deposited to their credit the net receipts of their business through him for the day before; or, if there was a net loss, they authorized its payment to him out of this account. The net money so coming into this bank account, whether kept, as it was at

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

first, in their own name, or, as it was later, in a dummy name, they from time to time caused to be transmitted to their general account in a Cincinnati bank.

Plaintiffs met with some successes, but more losses, and after an experience of eight months they found their net loss to be about \$6,500. Thereupon they brought this action in the court below. In the petition they describe themselves as a partnership, and they base their claim upon an Ohio statute permitting recovery of a sum lost in gaming. The case came to trial before the late Judge Thompson and a jury, with the result above stated; and plaintiffs bring error.

H. M. Roberts, of Cleveland, Ohio, and T. B. Paxton, Jr., of Cincinnati, Ohio, for plaintiffs in error.

F. W. Cottle, of Cincinnati, Ohio, for defendants in error.

Before KNAPPEN and DENISON, Circuit Judges, and SANFORD, District Judge.

DENISON, Circuit Judge (after stating the facts, as above). The court below based its direction upon two grounds: First, that no lawful partnership could exist for the purpose for which plaintiffs associated themselves, and that no such partnership as theirs could maintain any suit; second, that the evidence did not show money lost and paid in Ohio, on a wager made in Ohio, but rather that the wager was made and the money lost and paid in Indiana, and hence that the Ohio statute was not effective.

[1] It is true that the plaintiffs describe themselves as a partnership, and it is equally true that the law will not recognize and give full effect to a partnership formed to engage in gambling; but we think that neither of these facts is controlling here. The existence of a technical partnership, with any of its special, legal attributes, is not involved. The fact that plaintiffs are so described in their petition would not, under the liberal rules of pleading prevailing in Ohio, bar their recovery in the right of any joint interest which they might have. R. S. §§ 5082, 5096, 5114, 5115; F. & P. M. R. v. McPherson (C. C. A. 6) 105 Fed. 210, 211, 44 C. C. A. 449. It is immaterial for the purpose of this case whether the mutual agency, the right of survivorship control and the other peculiarities of a partnership did or did not exist. Joint enterprises which are not partnerships are well known; and if plaintiffs, with a joint interest, misdescribe themselves as partners, an amendment would be a matter of course; and, if the peculiar partnership character of the relationship is not material, no prejudice can come from the mistaken description. The statute, as quoted below, applies to "any person" who has paid money lost in this way. The Ohio statutes have a general provision that words in the singular include the plural (R. S. § 4947); and it would be frittering away this statute to say that it applied to one person who went in alone, and not to two persons who went in together and mingled their funds, even if the mingling went so far that the identity of the funds was lost and that each had only a fractional interest in the net result. Cases like *Jackson v. Brick Association*, 53 Ohio St. 303, 41 N. E. 257, 35 L. R. A. 287, 53 Am. St. Rep. 638, which deny relief to a partnership engaged in illegal business, depend on the same



rule which would deny relief to the loser in a wager; but that rule is abolished by this statute. The abolition is not limited to the case of a sole loser.

[2] To consider the other question involved, a quotation of the entire statute is necessary. It is as follows:

"R. S. Ohio, § 4270. If any person, by playing at any game, or by means of any bet or wager, loses to any other person any sum of money or other thing of value, and pays or delivers the same, or any part thereof, to the winner, the person who loses and pays or delivers may, at any time within six months next after such loss and payment or delivery, sue for and recover the money or thing of value so lost and paid or delivered, or any part thereof, from the winner thereof, with costs of suit, by civil action founded on this chapter, before any court of competent jurisdiction."

It will be noticed that the statute contemplates, as conditions precedent to a recovery, three things: The making of a bet, the losing of money thereby, and the payment of such loss. The case has been argued as though the statute, on its face, provided that one or two or three of these things must have been done in Ohio, in order that this action should be maintainable; but it carries no such express condition. Such limitation can be found only by reading it into the law through the operation of the familiar rule that a statute does not have extraterritorial effect (Endlich on Interpretation of Statutes, § 169; *Shaw v. Railway* [C. C. A. 6] 173 Fed. 746, 752, 97 C. C. A. 520); and the problem here is whether plaintiffs can recover without giving to the statute a territorial effect either beyond the power or beyond the presumed intent of the Legislature. If the language of a statute is broad enough to cover a particular transaction, we suppose that whether the Legislature had power to reach that transaction and whether it intended to do so may be distinct questions. The presumption of nonintent would seem to follow from a lack of power, but it is not necessarily true, conversely, that, from power, intent is presumed. So both power and intent should be examined.

It is an established rule that a statute of one state cannot create, from acts done and completed in another state, between persons in that other state, a cause of action otherwise nonexistent; nor can it take away a cause of action duly arising and existing in the state where the actors were and the acts were done. To do either would be a taking of property. *Steamboat Ohio v. Stunt*, 10 Ohio St. 582, 587.

While this is the rule, it might not apply, in its broadest aspects, to the question of power we are now considering, even if nothing had been done in Ohio in the course of the gaming or the payment, and it appeared only that defendant was found in Ohio with the money there in his possession and was there sued. It may well be the Legislature of Ohio would have power to provide that one of its citizens who had gone outside of the state and procured money or property by means which were unlawful in Ohio, and presumably unlawful at the place of occurrence, should be liable, in the courts of Ohio, to return the money or property so wrongfully acquired; but, however this may be, we think it at least must be true that the power extends

to a transaction where a defendant was in Ohio at the time of making the wager, in Ohio gave the sanction without which it could not have been closed, from Ohio directed the temporary receipt and custody of the money, and to Ohio, a little later, brought the money—in short, where the whole wager and the payment of the loss thereon constituted only an incident appurtenant to the general business carried on by defendants within the state. We think we may well dismiss without further consideration the power of the Ohio Legislature to pass an act which would permit a recovery in this case, and say that such power is clear.

What, then, is the fair and reasonable conclusion as to the intent of the Legislature, to be drawn from the statute itself, from other statutes, and from common knowledge regarding the subject-matter? The acts here involved being perfectly described by the broad language of the statute, should we presume that the Legislature did not intend to reach such acts because it would be conscious of its territorial limitations, or because it would not concern itself with acts done in other states, or for any other reason? As bearing on this question of intent, we must first observe that the statute does not, in the broadest sense of the term, *create* any cause of action (as was created in favor of a stranger in the statutory application sought in *Jacob v. Clark*, 115 Ky. 255, 72 S. W. 1095). One who wins a bet, and pursuant to the bet receives money or property, does not get an indefeasible title; if the loser can do so peaceably, he may retake the money or property, and his title would be good. The money paid under such a bet having been paid without consideration, the loser could (except for the rule of public policy which forbids a remedy) maintain an action for money had and received. The only thing preventing such prosecution is the obstacle created by the legal rule that the law will not listen to a plaintiff in such a plight; so in one sense, and a very fair sense, a statute like that under consideration does not create any nonexistent property right. It removes an obstacle to the assertion of a right. In effect (and even giving it a construction broader than we adopt in this case) the statute only says to citizens of Ohio: "When you are sued in the courts of this state to recover money you have wrongfully received, the fact that you won it by gaming shall no longer be a good defense."

These considerations are of force in determining the intent. They tend to convince that there is nothing unnatural or abnormal in supposing that the Legislature intended at least to reach a situation like that shown by the record.

It is quite true that the Ohio Legislature should probably be presumed not to be primarily interested in the doings of the plaintiffs, in Kentucky, or of Gavitt, in Indiana; but this does not mean that it had no concern with what defendants were doing in and from Ohio, just because they were thereby reaching, through Indiana, into Kentucky. It had a legitimate interest in preventing gambling in Ohio; and whether or not an express provision that a plaintiff, living in another state, who had wagered and lost money at a gambling establishment in that state, which was a branch of the main gambling es-

establishment located in Ohio, might bring a suit in Ohio and recover his money, should be thought to be fairly pertinent to the suppression of gambling in Ohio, we need not decide, because, as above pointed out, this case does not go so far.

We may lay aside all questions of nicety as to which state would have been the place of contract, if the contract had been one cognizable by the law, and we may assume that Gavitt was defendants' agent for the transmission of the acceptance, and that the acceptance was not complete until Gavitt, in Indiana, delivered the bought or sold note; and it still remains true that the personal act of acceptance by defendants took place in Ohio, and that this was an indispensable step in the completion of the wager. Without it, the transaction would have stopped at that point, and could not have been consummated. Further, as noticed in discussing the question of power, the things done outside of Ohio were only incidental to the main business carried on within the state. There seems to be no reason why the Legislature would not have intended to direct this blow at this precise situation, if its attention had been specially called thereto. No doubt it has used apt words to include this result; and we hold that it has accomplished this result.

We find confirmation of this legislative policy in other sections of the statute (86 Ohio Laws, 12-14), which, though later in date than section 4270, have been re-enacted with it in the present General Code (sections 5965, 1371-1380), and seem to be part of a continuing and general policy. These other sections provide fine and imprisonment for one who keeps a bucket shop, or who, from such bucket shop, transmits by wire to a nonresident of the state information concerning a bucket shop deal. The penalties are imposed even upon certain nonresidents who cause a violation of the act within the state. It is declared, also, that the offense is completed by the mere offer to sell or buy, whether accepted or not, and may consist solely in keeping a place for making or offering to make wagering contracts, "whether such contract is to be performed within or without this state." These provisions clearly indicate that the state of Ohio does not exclude from its field of regulation all wagers not wholly made or completed within this state.

There is another consideration. We should not unnecessarily presume an intent and adopt a resulting construction which make a statute largely ineffective, because easy to evade. If a defendant carrying on, in Ohio, such a business as here appears, and accumulating at its head office money won by gaming, and maintaining a system of branches or feeders in adjoining states, can avoid all liability as to the transactions initiated outside the state by providing that some formality customarily essential to the closing of a contract shall be done outside the state, then, as to matters initiated inside the state, it would require much less ingenuity than has been expended in this business to devise a plan by which such deal must be approved by an associate outside the state, and so a defendant would escape in any event and at all times. We are, as the rule requires, strongly inclined to adopt that reasonable construction which will make the stat-

ute completely effective, rather than one which makes it partially inoperative.

We do not overlook those decisions, of which *Cruthers v. State*, 161 Ind. 139, 145, 67 N. E. 930, and *State v. Gritzner*, 134 Mo. 512, 527, 36 S. W. 39 (both gambling cases), are typical, holding that a penal offense cannot be committed partly in one state and partly in another, though this rule is seemingly not always followed with regard to similar offenses (*Com. v. Schmunk*, 207 Pa. 544, 56 Atl. 1088, 99 Am. St. Rep. 801). The former cases can well be distinguished from the present, both because of the stricter rule of construction applicable to criminal statutes, and because otherwise the offender might be subject to double punishment as for two crimes, while obviously there is but one payment of such a loss, and defendants would be protected from undue civil liability by the ordinary rule against a double collection. At any rate, these decisions do not persuade us that the Ohio Legislature intended not to reach these defendants civilly in the very matter in which it has made them liable criminally.

Nor do we find a different result necessary because a large part of the loss here sued for was composed of "remargins," or further margins, put up by plaintiffs to save an existing "deal" from being "closed out," though these margins were paid to Gavitt, in Indiana, on his demand, and without any specific action in Ohio. They were incidents in carrying out the wager already made. They affected the amount of the loss under the wager. They did not constitute new and different transactions separable from the original. A legislative intent which would reach the main thing, the "stock deal," would not fail to include the appurtenant and supplementary "remargins."

Our conclusion that plaintiffs' case should be considered as within the intent of the Ohio statute is that of the majority of the court; as to the right of plaintiffs to be heard under the statute, and as to the legislative power to reach such a case, we find ourselves in entire agreement.

The plaintiff was entitled to go to the jury, and the judgment must be reversed, with costs.

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#### IN re GUANACEVI TUNNEL CO.

(Circuit Court of Appeals, Second Circuit. December 9, 1912.)

No. 14.

#### 1. BANKRUPTCY (§ 47\*)—ADJUDICATION IN VOLUNTARY PROCEEDINGS—PARTY ENTITLED TO QUESTION.

A creditor may not complain of an adjudication in bankruptcy of a corporation in a voluntary proceeding on the ground that the voluntary petition was filed without authority.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 41, 42; Dec. Dig. § 47.\*]

#### 2. BANKRUPTCY (§ 44\*)—"VOLUNTARY PETITION IN BANKRUPTCY."—REQUISITES.

A voluntary petition for the adjudication of a corporation as a bankrupt which offers to surrender the assets of the corporation for the bene-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



fit of its creditors, but which does not ask for the dissolution of the corporation, and which alleges that the corporation is unable to meet its current obligations, is tantamount to a general assignment of the property of a corporation unable to meet its current obligations for the benefit of creditors or to apply for a receiver, and, in the absence of any restriction by statute or charter and by-laws, the board of directors may file the petition within Bankr. Act July 1, 1898, c. 541, § 59a, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3445), providing that any qualified person may file a petition to be adjudged a voluntary bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 43-46; Dec. Dig. § 44.\*]

**3. BANKRUPTCY (§ 47\*)—VOLUNTARY PETITION—JURISDICTION—OBJECTIONS—PARTY ENTITLED TO RAISE.**

The objection that the District Court for a district was without jurisdiction to adjudicate a corporation a bankrupt on the ground that it had not maintained its principal place of business in the district for the greater part of six months before the filing of the petition as required by Bankr. Act July 1, 1898, c. 541, § 2 (1), 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), is jurisdictional, and may be made by a creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 41, 42; Dec. Dig. § 47.\*]

**4. BANKRUPTCY (§ 16\*)—JURISDICTION—PRINCIPAL PLACE OF BUSINESS OF CORPORATION—EVIDENCE.**

A voluntary petition for adjudication of a mining corporation as a bankrupt alleged that the principal place of business of the corporation was in New York City. The affidavits showed that the corporation had never done any mining, and that its activities had been chiefly connected with the sale of its stock and the payment of its running expenses, and that the only place in which the business had been conducted was in New York City. The rent for the place was not paid by the corporation, but its business was transacted there, and its books were kept there, and all the meetings of the board of directors were held there. The charter of the corporation authorized a principal place of business outside of the state. *Held*, that the principal place of business of the corporation was in New York City within the jurisdiction of the District Court there, and it had jurisdiction to adjudge the corporation a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 16.\*]

**5. BANKRUPTCY (§ 44\*)—VOLUNTARY PETITION—PRESIDENT OF CORPORATION.**

Where the president of a corporation resigned, but acquiesced in the refusal of the board of directors to accept it, and continued to act as director and president, the board of directors could authorize him to file a voluntary petition for adjudication of the corporation as a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 43-46; Dec. Dig. § 44.\*]

**6. BANKRUPTCY (§§ 391, 446\*)—ORDERS REVIEWABLE—STAYING PROCEEDINGS IN STATE COURT.**

An order staying a creditor's proceedings in a state court on his judgment made after the adjudication of the debtor, a bankrupt, until 12 months thereafter or a discharge should be denied, is discretionary with the District Court, and is not reviewable by the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637-655, 929; Dec. Dig. §§ 391, 446.\*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York; Charles M. Hough, Judge.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of the bankruptcy of the Guanacevi Tunnel Company, a bankrupt. Petition by Joseph G. Switzer to revise order of the District Court denying the application of the petitioner for the vacation of the adjudication in bankruptcy in a voluntary proceeding, and an order staying him from proceeding on his judgment in a state court. Affirmed in part, and denied in part.

C. L. Craig, of New York City, N. Y., for petitioner.

R. P. Levis, of New York City (Jas. N. Rosenberg, of New York City, N. Y., of counsel), for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. This is a petition to revise an order of the District Court denying the application of the petitioner, a judgment creditor, to vacate the adjudication in bankruptcy in a voluntary proceeding and an order staying him from proceeding upon his judgment in the state court until 12 months after adjudication or denial of discharge.

February 15, 1911, Switzer, the petitioner, recovered a judgment in the state court of New York against the Guanacevi Tunnel Company upon which an execution was issued and returned wholly unsatisfied. Thereupon he instituted proceedings supplementary to execution and examined Meloy, the president or acting president of the company, as a witness.

June 21st Meloy, by authority of the board of directors, filed a voluntary petition for adjudication of the Tunnel Company as a bankrupt in the United States District Court for the Southern District of New York. Adjudication followed on the same day, and further proceedings were referred to one of the referees. The bankrupt is a corporation of the state of Arizona, and all its property, real or personal, is in Mexico.

[1, 2] The petitioner contends that the voluntary petition was filed without authority, because he alleges that the corporation is solvent (in the sense of the Bankrupt Law), and because only the majority of shareholders can, by the laws of Arizona, dissolve a corporation prior to the time fixed in the articles of incorporation. We will examine this contention, although we think it is one which a creditor has no standing to make in the case of a voluntary petition. The petition offers to surrender all the company's assets for the benefit of its creditors, and does not ask for the dissolution of the corporation. Only the state of Arizona, which created the corporation, can dissolve it. There is nothing to show what authority is given to the directors by the charter and by-laws. In the absence of any restriction, by statute or by the charter and by-laws, the power of the board to make a general assignment of the property of a corporation which is unable to meet its current obligations for the benefit of creditors or to apply for a receivership is to be presumed. *Vanderpoel v. Gorman*, 140 N. Y. 563, 35 N. E. 932, 24 L. R. A. 548, 37 Am. St. Rep. 601; *Rogers v. Pell*, 154 N. Y. 518, 49 N. E. 75. The voluntary petition for adjudication as a bankrupt is tantamount to such proceedings. The petition charges that the corporation is unable to meet its current obligations, which is commercial

insolvency. The Bankruptcy Act itself permits any person who owes debts to file a petition to be adjudicated. "Any qualified person may file a petition to be adjudged a voluntary bankrupt." Section 59a.

[3, 4] It is next contended that the District Court for the Southern District of New York was without jurisdiction, because the company had not maintained its principal place of business in New York for the greater part of six months before the filing of the petition. Section 2 (1). This objection, being jurisdictional, may be made by a creditor. The majority of the court do not think this contention well founded. The charter of the company provides that its principal place of business shall be at Phoenix, Ariz., and that it may have such other offices, principal and branch, as may be established by the board of directors. The statement in the charter is not conclusive, the question being where, in point of fact, was the company's principal place of business during the period fixed by the act. The petition asserts that it was at No. 55 Liberty street, New York City. This formal statement of the board of directors, resulting in an adjudication, at least creates a prima facie case which leaves the burden of evidence to meet it upon the creditor who seeks to vacate the adjudication. The affidavits show that the Tunnel Company has never done any mining; that its activities have been principally connected with the sale of its stock and the payment of its running expenses; and that the only place in which the business has been conducted has been at 55 Liberty street, in this city. It is true that this had ceased to be the office of the company in the sense that the company paid the rent, and was, in point of fact, the office of Meloy, June 6, 1911, when the board of directors met there and authorized him to file the petition; but, while the company's business was being transacted there, it may well be held to have been established by the board of directors within the meaning of the charter provision. The books were kept there, all meetings of the board were held there, and all moneys of the company were disbursed from there. No meetings were ever held at Phoenix except the technical ones required by the law of the state of Arizona. It is not necessary that the company should have actually transacted much, or even any, business at 55 Liberty street during the period fixed by the act. The question is, Where was its principal place of business? Its business was small and irregular, and it may have transacted little or none, but if it had any principal place of business at all, it was there. The petitioning creditor has not satisfied us to the contrary.

[5] A good deal is said about Meloy's not being president or director of the company at the time the board, including him as a director, authorized him, as president, to file the petition. We will consider this, assuming that a creditor has standing to make the objection. It is true that Meloy had resigned before that time, and that acceptance was not necessary to the effectiveness of his resignation. Still, instead of insisting upon his resignation, he acquiesced in the refusal of the board to accept it and continued to act as director and president.

[6] The order refusing to vacate the adjudication must be affirmed, and, the order staying the creditor's proceedings in the state court upon his judgment, made after the adjudication, until 12 months thereafter

or until a discharge, should have been denied, being discretionary, cannot be revised. There is ground for supposing that the bankruptcy proceedings were instituted, not for the distribution of the bankrupt's estate, but to hold off all creditors, especially the petitioner, and that there was and is no bona fide intention to press the proceedings to a conclusion. It will be for the District Court to examine the situation, and, if nothing is done in pursuance of the adjudication, to vacate the stay.

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**CORNELL v. NICHOLS & LANGWORTHY MACH. CO.**

(Circuit Court of Appeals. Second Circuit. December 9, 1912.)

No. 26.

**1. RECEIVERS (§ 152\*)—INSOLVENCY—PROCEEDS OF CHOSSES IN ACTION—RIGHT TO DISTRIBUTION—LIMITATION—JURISDICTION.**

Certain foreign insurance companies, having issued policies on property of insolvent, denied liability. A receiver had no funds with which to litigate the question, and to do so would be compelled to deposit \$3,500 in England to begin and maintain litigation there. *Held*, that the court had power to direct that only such creditors as would come in and contribute to the fund should participate in any recovery secured from such policies.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 272-275, 278; Dec. Dig. § 152.\*]

**2. RECEIVERS (§ 152\*)—SPECIAL FUND.**

Where foreign insurance companies holding policies on property of the insolvent denied liability, and in order to enable the receiver to enforce the policies an order was passed that only such creditors as contributed to a fund required to prosecute such litigation should share in the proceeds, the general creditors could only share in the amount received from such foreign insurance in the event the amount was in excess of the claims of the contributing creditors, and then only to the extent of the surplus.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 272-275, 278; Dec. Dig. § 152.\*]

**3. RECEIVERS (§ 200\*)—COMMISSIONS—EXPENSE OF ADMINISTRATION—SERVICES—SPECIAL FUND.**

Where a special fund was created by litigation against foreign insurance companies, which the receiver was only enabled to maintain by contributions from creditors under an order limiting participation in the fund to the contributing creditors, the receiver could not charge the general expense of administration on such special fund; nor was he entitled to commissions, except on so much of it as remained after the claims of the contributing creditors had been satisfied, but was only entitled to an allowance therefrom for the reasonable value of his services in conducting the litigation.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 397-399, 401; Dec. Dig. § 200.\*]

**4. RECEIVERS (§ 152\*)—ASSETS—DISTRIBUTION—PROCEEDS OF INSURANCE.**

Where an insolvent covenanted with a trust company which had floated the insolvent's bonds that it would keep its property fully insured to an amount at least equal to the amount of bonds outstanding, and that all policies of insurance issued on the property should be payable to the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



trust company, the bondholders had a first lien on the proceeds of policies issued under such provision.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 272-275, 278; Dec. Dig. § 152.\*]

Appeal from the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

Action by Charles G. Cornell, Jr., against the Nichols & Langworthy Machine Company. Proceedings for the distribution of certain funds derived from policies of insurance on defendant's plant, claimed, respectively, by Charles G. Cornell, Jr., the Industrial Trust Company, John K. Hayward, and William Beverly Winslow. From decrees of distribution, Cornell, Hayward, and Winslow appeal. Affirmed.

Cyrus M. Van Slyck, of Providence, R. I., and Wing & Russell, of New York City, for Industrial Trust Co.

Charles W. Lucas and William Ferguson, both of New York City, for Hayward.

Gilbert E. Roe, of New York City, for Cornell and Winslow.

Murray, Prentice & Howland, Charles P. Howland, and Otto V. Schrenk, all of New York City, for receiver.

Briesen & Knauth, Charles P. Howland, and Otto V. Schrenk, all of New York City, for Knauth, Nachod & Kuhne.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The Nichols & Langworthy Machine Company was, at the time covered by this litigation, a Rhode Island corporation located and doing business at Hope Valley, in that state. On April 13, 1909, a large part of its plant was destroyed by fire. On that day the property was covered by insurance in foreign and domestic companies in about the sum of \$330,000, the greater part of which—about \$300,000—was in English companies, which denied their liability under the policies and refused to pay the same. The remainder, about \$30,000 was in American companies or companies duly authorized and actually doing business in the United States.

After the fire the Machine Company became insolvent and numerous suits were commenced against it, making it impossible for the company to continue to transact business. In those circumstances, on July 15, 1909, Charles G. Cornell, Jr., a judgment creditor, commenced an action in the Circuit Court for the Southern District of New York asking for an injunction restraining the removal of the property from the jurisdiction of that court, and that the insurance companies within that jurisdiction be enjoined from paying over the amount due on said policies to any person other than the receiver appointed by that court. The bill prayed for other appropriate relief. The defendant having appeared and answered admitting all the material allegations of the bill, the court, on July 16, 1909, appointed William B. Winslow as receiver, and, on the same day, the Machine Company transferred to him all its personal property, including the policies of insurance, both domestic and foreign. Subsequently and on January 18, 1910, with the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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approval of the court, the claims against the domestic insurance companies were settled, and, as a result, \$10,302.90 was paid into the First National Bank, to be there held until it was judicially determined to whom the said sum should be paid. The fund is claimed by Winslow, as receiver, and, in his individual capacity he insists that he should be paid \$5,000 therefrom for legal services rendered for the Machine Company prior to the date of the receivership. It is also asserted by John K. Hayward that long prior to the receiver's title to the policy issued by the Sun Insurance Company, the said policy, and said loss, damage or claim due or to become due thereunder, were, on the 15th day of May, 1909, transferred by the Machine Company to the Carnegie Trust Company as security for a loan made by the said Trust Company to the Machine Company and to secure a certain promissory note given for said indebtedness, which note was, before maturity, and on the 30th of June, 1909, assigned to the said Hayward, at which time there was due on the said note the sum of \$6,430.19. Hayward insists that he has a first lien upon the amount paid by the Sun Company on January 18, 1910, to the First National Bank, to wit, the sum of \$5,151.45. The court, on September 27, 1911, entered a decree awarding the entire fund in the First National Bank to the Industrial Trust Company, trustee under the mortgage executed by the Machine Company, April 1, 1906.

Cornell assigns error in awarding the entire fund to the Industrial Company and in refusing to allow his disbursements, costs and counsel fees to be paid from said sum.

Hayward assigns error in that the court did not award the sum of \$6,431 to him instead of the Industrial Trust Company.

Winslow assigns as error the ruling of the court, refusing to award him counsel fees for legal services rendered by him to the Machine Company prior to the receivership and refusing to give him an attorney's lien upon the fund disposed of by the decree.

Regarding the English companies, it appears that all of them denied liability and that it was necessary to deposit in England a fund, amounting to about \$3,500, in order to begin and maintain the litigation there.

In these circumstances the receiver, after notice to all the creditors whose names and addresses could be obtained, applied for and obtained an order permitting him to continue the litigation only in event that the creditors advance the necessary money to provide for the costs, expenses and counsel fees in the suits. The order provided further that, in the event that such sum is advanced, only such creditors as have contributed to the fund shall be permitted to share in the recovery. Due notice of this proceeding and order was given to all the creditors.

The court decided that those who had not contributed should not share in the recovery. The power of the court to make this order is challenged by the necessary assignments of error.

The questions presented for review relate to the distribution of the two funds arising, respectively, from the foreign and domestic insurance.

[1] Regarding the foreign insurance, the question turns upon the power of the court to make the order limiting the distribution to those

creditors who had contributed to the creation of the fund. We think the action of the court in this regard was proper and should be sustained.

The situation as to the foreign policies was desperate; the companies had denied all liability, there was grave doubt whether the policies could be enforced. The suits in England could not be prosecuted unless \$3,500 was advanced as security for costs and disbursements. The receiver had no money with which to prosecute these claims. The only hope to secure any part thereof depended upon the action of the creditors, unless they contributed, the suits must be dropped. All had a right to contribute and, by doing so, to share in the recovery. We think it eminently proper that those who advanced the money which made the recovery possible should alone share in the fund. To put these creditors on a par with those who, with full notice of the situation, refused to contribute a dollar to create the fund, would, in our judgment, be most unfair.

The Trust Company insists that after paying the disbursements made by the receiver and after repaying to the contributors the amount paid by each, the entire fund remaining should be paid to it as trustee of the bondholders. The Trust Company allowed the order to be entered and all the proceedings to be taken without objection and now seeks to appropriate the entire net proceeds.

[2, 3] For the services of the receiver in collecting the special fund he was allowed \$4,500. This sum, in view of the general situation and the small amount recovered, we regard as sufficiently liberal. The general creditors could only share in the amount received from the foreign insurance in the event that the amount was in excess of the claims of the contributing creditors and then only in the surplus over that amount. The receiver could only receive commissions on that surplus. He cannot charge the general expense of administration upon a special fund which was procured by the efforts and at the expense of the contributing creditors. The fund thus created with the sanction of the court cannot be depleted in any manner and must go undiminished to the creditors whose contributions created it.

An order similar in all essential features to the one in controversy was upheld in *McEwen v. Harriman Land Co.*, 138 Fed. 797, 808, 71 C. C. A. 163.

[4] Regarding the fund derived from the Domestic Companies, we think the court was correct in awarding it to the Industrial Trust Company, trustee under the mortgage, subject to the First National Bank's claim of compensation, but free of the claims of Hayward and Winslow. Winslow presents a claim for legal services rendered by him to the Nichols & Langworthy Machine Company prior to the receivership. Hayward was the purchaser of a note made by the Machine Company and delivered to the Carnegie Trust Company on which was due a balance of \$6,430.19. Hayward got only the title of the Carnegie Company to the note and collateral. He paid no money, but gave his own note for the exact amount due on the Carnegie note, and did not become a purchaser for value. His claim is subordinate to that of the trustee under the mortgage.

In short, the payment of the insurance money by the foreign and domestic companies created two separate funds, the former for the benefit of those creditors whose contributions produced it, and the latter for the benefit of the bondholders for whose benefit, in the first instance, the insurance was effected. No other creditor or claimant has any interest in or lien upon these special funds until the primary obligations are discharged.

The Carnegie Company was fully informed of all the facts when the Sun policy was transferred to it and its assignee, Hayward, received no rights superior to those of the Carnegie Company, its assignor. He paid no money for the note and was not a bona fide purchaser for value.

The Machine Company covenanted with the Trust Company that it would keep its property fully insured to an amount at least equal to the amount of the outstanding bonds, and that all policies of insurance issued upon said property should be payable to the Trust Company.

It seems clear to us that neither Cornell, Hayward nor Winslow has a claim which can be enforced until after the amount due on the mortgage has been satisfied, which is superior to all other liens.

The other questions in controversy have been fully discussed in the opinions below, and we deem it unnecessary to add further to what is there said.

The decrees are affirmed.

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**FOUNTAIN VALLEY LAND & IRRIGATION CO. et al. v. PEARSONS,†**

(Circuit Court of Appeals, Eighth Circuit. November 26, 1912.)

No. 3,702.

**BROKERS (§ 75\*)—COMMISSIONS—AGENCY TO SELL LAND AT NET PRICE—RIGHTS IN NOTES FOR DEFERRED PAYMENTS.**

A land company, owning a large tract of land, with irrigation rights, and a trust company, which as trustee held a mortgage thereon to secure bonds of the land company, joined in a contract by which complainant was given the exclusive right for a limited time to make sales from the tract at not less than \$75 per acre net, all above that obtained by complainant to belong to him as commission. On receipt by the trust company of 20 per cent. of such net price in cash, and notes secured on the land sold for the deferred payments, both companies agreed to make deeds conveying the land sold free of the mortgage. Complainant made sales at \$100 an acre, taking notes and a single mortgage from each purchaser for deferred payments, including, not only the unpaid portion of the net price, but also of his commission, and such notes and mortgage were turned over to the trust company. *Held* that, as between him and the land company and trust company, he was not entitled to an undivided interest in such notes and to receive a share of all payments thereon as made, but that the trust company was entitled to all payments until the full net price had been received; such company not having made any agreement or taken any action inconsistent with such right.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 75.\*]

Appeal from the Circuit Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied February 17, 1913.



Suit in equity by H. P. Pearsons against the Fountain Valley Land & Irrigation Company and the Continental Trust Company. Decree for complainant, and defendants appeal. Reversed.

Henry McAllister, Jr., and Richard McKnight, both of Denver, Colo. (Joel F. Vaile, William N. Vaile, Frederick T. Henry, and Marvin H. Farrington, all of Denver, Colo., on the brief), for appellants.

William V. Hodges, of Denver, Colo. (Mason A. Lewis, of Denver, Colo., on the brief), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and W. H. MUNGER, District Judge.

CARLAND, Circuit Judge. The facts which gave rise to this litigation are as follows:

On May 1, 1908, the Fountain Valley Land & Irrigation Company (hereinafter called the Land Company) was the owner of a tract of land located in El Paso county, Colo., with appurtenant water rights. On that day it executed and delivered to the Continental Trust Company (hereinafter called the Trust Company) a first mortgage or deed of trust on all of its lands and water rights to secure an issue of \$500,000 of first mortgage bonds of the Land Company, bearing interest at 6 per cent. per annum. Prior to September 28, 1908, \$309,600 in amount of said bonds had been issued and were outstanding; \$94,600 having been sold and \$315,000 pledged. Since the date of issue all of said bonds have been outstanding in the hands of various parties, and after September 28, 1908, and before this suit was instituted, the remainder of the bonds were duly issued and sold.

The only provision in the trust deed respecting the sale of the mortgaged property and its release from the operation of the lien thereon was contained in article 3, which was as follows:

"The Land Company shall have the right to sell, upon cash or deferred payments, the real estate and lands hereby conveyed, and the water rights or shares of stock representing water rights for the irrigation of land, for cash, or for part cash and the balance on time, the balance to be represented by contract or notes secured by a lien upon the water rights sold and the lands upon which the water is to be used, or in case of the sale of land to be secured by conditional contract or by mortgage upon the land or land and water sold. In no event shall the amount of the cash payment be less than 20 per cent. of the total selling price. The minimum price at which water can be sold shall be at the rate of \$1.950 per cubic foot, and the minimum price at which land can be sold shall be at the rate of \$5 per acre, and the minimum price at which land with water can be sold shall be at the rate of \$35 per acre.

"All cash payments, commissions to selling agents having been first paid therefrom, shall be made to the trustee, and all notes or contracts for deferred payments shall be duly assigned to the trustee, and by it held in accordance with the terms hereof. Thirty (30%) per cent. of all moneys received shall be turned over to the Land Company; the other seventy (70%) per cent. shall be turned into the sinking fund as hereinafter provided.

"In the event of sales in accordance with the terms of this article, the trustee shall, as soon as the land or water purchased is paid for in full, convey to the purchaser such land and water, free and clear from the incumbrance hereof."

September 28, 1908, a tripartite agreement between the Land Company, the Trust Company, and F. H. Wilhite and H. P. Pearsons, known as the Pearsons-Wilhite Company, was entered into. The object thereof was to constitute Wilhite and Pearsons, or a corporation to be organized by them, sole selling agents for a limited period. The agreement recited the ownership of the land and water rights by the Land Company, the trust deed conveying the same to the Trust Company, and appointed Wilhite and Pearsons exclusive agents to sell such land and water rights. The net price at which the first 2,000 acres of irrigable land should be sold was fixed at \$75 per acre, and the method of payment of this net price and the conveyance of the land sold and its release from the mortgage was thus specified:

"4. The said Land Company promises and covenants that when 20% of the net price per acre for land sold has been paid in cash to the Trust Company, and the remainder of the net price has been paid to the Trust Company in notes secured by a first mortgage on the land sold, which notes shall be in equal amounts payable annually for a period of not to exceed eight years and bearing 6% annual interest, it (the said Land Company) will deliver to the parties of the third part (the selling agents) for each of the purchasers to whom land has been sold an abstract of title to the land sold and also a good and sufficient warranty deed executed by it and also by the Trust Company for the purpose of releasing said land from the lien of the trust deed aforesaid, which warranty deed shall name a consideration and a grantee, that the parties of the third part, their successors and assigns, may indicate.

"5. The Trust Company promises and covenants on its own behalf to execute the deeds as hereinabove referred to for the purpose of releasing the lien of the said trust deed, it being expressly understood that it is not in any way to be responsible for the delivery of the deed by the Land Company or for the acts to be performed by any of the parties hereto except itself, and that it will in no event be bound by any warranty or guaranty clause contained in said deed—the form of the deed to be executed to be approved by it."

The commission or compensation to the selling agents was provided for as follows:

"6. The Land Company promises that the parties of the third part, their successors and assigns, as hereinafter stated, shall have for their commissions and entire pay for selling its lands with water rights all amounts that they may obtain from purchasers over and above the respective net prices per acre hereinbefore stated."

Wilhite and Pearsons assigned their contract to the Pearsons-Wilhite Company, which proceeded to sell land thereunder, and the Land Company conveyed to the purchasers the tracts sold, and the Trust Company released the land from the operation of the general trust deed.

Most of this land was sold at \$100 per acre, of which \$75 was the net selling price, and the balance represented commission. Instead of requiring the entire commission to be paid in cash, or having the same secured by a second mortgage inferior to the mortgage representing the deferred payment of net purchase price to the Land Company, the Pearsons-Wilhite Company caused the notes and mortgages given by the purchasers of land, representing the unpaid purchase price, to include, not only the unpaid portion of the net purchase price, but also their unpaid commission. After this was done the notes and mort-

gages, which were prepared and executed under the supervision of the Pearsons-Wilhite Company, were forwarded to the Land Company and by it deposited with the Trust Company under the terms of the trust deed. Each of these notes or series of notes had pinned to it or them a slip which in most cases read, "One-fourth of this note is owned by the Pearsons-Wilhite Company," that being the proportion which the commission included therein bore to the face amount. The only variation in the form of this slip consisted in a difference, in a few cases, of the fractional interest, due to variation in the gross selling price.

The inclusion by the Pearsons-Wilhite Company of the unpaid commission in the notes and mortgages taken from the purchasers of land was with the consent of the Land Company. So far as the Trust Company is concerned, it was not a party to any agreement that this should be done, and that company does not appear to have been taken into consideration until a controversy arose as to the propriety of the practice, to which it then demurred. It would appear from the testimony of the witness Johnston that the Pearsons-Wilhite Company did not wish the purchasers of the land to know the amount said company was receiving as commission. After this procedure had been followed for several months, and several tracts of land had been sold, and the notes and mortgages, representing not only the deferred net purchase price, but the unpaid compensation of the Pearsons-Wilhite Company, had been placed in the hands of the Trust Company, the Pearsons-Wilhite Company made a request upon the Land Company and the Trust Company for a segregation and delivery to it of sufficient of the notes and mortgages to cover the amount of their compensation included therein. This request, upon the advice of counsel, was refused. Thereafter, in all sales of land made, the Pearsons-Wilhite Company secured its compensation by second mortgages upon the property.

After the contract in question had expired, and on October 1, 1910, this suit was begun by Pearsons, as assignee of the Pearsons-Wilhite Company, for the purpose of fixing and determining his interest in the notes and mortgages in the hands of the Trust Company. The Circuit Court adjudged that Pearsons was entitled to a decree against both the Land Company and the Trust Company, fixing the proportionate amount to which he was entitled as assignee of the commissions in the several notes originally given by each purchaser of land and turned over to the Trust Company, and declaring that as to such amount, with accruing interest thereon, the Trust Company took and held the same in trust for said Pearsons, that as to all sums paid to the Trust Company on said proportionate interest in said notes Pearsons should have a money judgment for the amount thereof, and that as to all unpaid amounts, both principal and interest, representing said commissions, the Trust Company held the same for the use and benefit of Pearsons and should account to him therefor, and the Trust Company was ordered to turn over the same to complainant in money when collected. The Circuit Court held against Pearsons as to his claim that there was an oral agreement whereby the interest of the Pearsons-Wilhite Company should be paid by turning over notes and mort-

gages equal to the amount of the commissions due the Pearsons-Wilhite Company. Pearsons not having appealed, this finding of the court is not open to review.

The Land Company and the Trust Company do not dispute that the commissions claimed by Pearsons are included in the notes and mortgages which they hold, but they insist that the interest of Pearsons in the notes and mortgages is subordinate to the rights of the Land Company and the Trust Company, and that until the net purchase price included therein is fully paid to the Land Company and the Trust Company, with interest thereon, Pearsons is not entitled to any of the proceeds thereof.

It cannot be disputed that the Land Company and the Trust Company were to receive \$75 net for every acre of land sold by the Pearsons-Wilhite Company, whether the latter received any commission or not. The Land Company and the Trust Company were in no way interested in the amount of the commission that should be received by the Pearsons-Wilhite Company, nor was the latter in any way interested in the \$75 per acre which the former were to receive for the land. We cannot attach any importance to the fact that each of the purchase-money notes was accompanied, when turned over to the Land Company, by a slip of paper reading that "one-fourth of this note is owned by the Pearsons-Wilhite Company," and that this slip followed the notes into the possession of the Trust Company. The only knowledge that would be imputable to the Land Company or the Trust Company from the slip of paper itself would be that the commissions of the Pearsons-Wilhite Company were included in the amount of the notes. They knew that the contract empowering the Pearsons-Wilhite Company to sell did not give the latter any interest in the net price of the land, and they knew that they were entitled to receive the net price in any event.

Again, neither the Land Company nor the Trust Company ever acted with reference to this slip in any way which would be only consistent with the adoption by them of the meaning now sought to be placed upon it by the Pearsons-Wilhite Company. On the contrary, the Land Company and the Trust Company repudiated any such understanding when the Pearsons-Wilhite Company claimed that they were the owners of an undivided interest in the notes.

*Wiggins Ferry Co. v. O. & M. Railway*, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055, is cited in support of the proposition that it is not necessary that a party should formally agree to be bound by the terms of a contract to which he is a stranger, if, having knowledge of such contract, he deliberately enters into relations with one of the parties which are only consistent with the adoption of such contract. The facts in this case do not make the decision in the case cited applicable, for the reason that the Trust Company never entered into any relations with either of the other parties which would be only consistent with the adoption of the meaning now sought to be given to the words indorsed on the slips of paper. To hold on the present record that Pearsons owns an undivided interest in the notes and mortgages held by the Trust Company would make him a part-



ner with the Land Company and the Trust Company in the net proceeds arising from the sale of the land, contrary to the written contract of the parties. If the Pearsons-Wilhite Company waived its right to take its commission in cash or second mortgage, and allowed the amount of the commission to become a part of the amount for which the notes were given for the purchase price of the land, it still remains true that Pearsons must now wait until the Trust Company has received the net purchase price of the land, for the reason that to hold that Pearsons is jointly interested in the whole amount of the note might result in his obtaining his commission, whether the Land Company and the Trust Company received the net purchase price or not. Neither the Trust Company nor the Land Company agreed to pay the Pearsons-Wilhite Company any commission for selling the land. Pearsons-Wilhite Company was to obtain its commission from the purchaser or purchasers, and this commission was to be the amount paid for the land over and above the net price. Until the Land Company and the Trust Company are paid the net price, there is no excess over and above such price. The giving of the note and securing same by mortgage was not a payment of the purchase price of the land, in the absence of an agreement that it should be taken as payment. The giving of the note and mortgage simply deferred the payment.

We are clearly of the opinion that Pearsons is not entitled to a decree adjudging him to be the owner of an undivided interest in the notes and mortgages held by the Trust Company and Land Company, but that he is only entitled to his commissions after the net selling price of the land has been paid. The only difference between our view and that of the trial court is as to the time when Pearsons may demand payment of his commissions. The trial court held that he was entitled to a proportionate interest whenever a payment was made on the notes. We hold that he is not entitled to be paid his commissions until the purchase price is fully paid.

The decree appealed from must be reversed, and the case remanded to the United States District Court for the District of Colorado, with direction to enter a decree not inconsistent with the views herein expressed; and it is so ordered.

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CLEVELAND-CLIFFS IRON CO. v. GAMBLE.

(Circuit Court of Appeals, Sixth Circuit. December 13, 1912.)

No. 2,240.

1. **BROKERS (§ 46\*)—RIGHT TO COMMISSION—SALE OF LAND.**

An agreement by defendant to pay plaintiff a commission in case it should purchase certain timber land offered for sale by plaintiff as a broker, although without express limitation of time, must be given a reasonable construction, and does not entitle plaintiff to recover the commission where his services had no causal relation to the sale, as where the offer was absolutely and finally rejected, and the matter was taken

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

up anew a year or more later from a new instigation and under different market conditions, and a sale was made after negotiations between different persons representing both parties.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 47; Dec. Dig. § 46.\*]

**2. BROKERS (§ 49\*)—RIGHT TO COMMISSION—SALE OF LAND.**

Plaintiff as a broker offered to sell a tract of timber land to defendant, stating the owner's net price and what his commission would be in case a sale was made, and suggested direct negotiations between defendant and the owner. The following year the owner notified defendant that the land was withdrawn from the market until it could be thoroughly examined, when a price would be named. Some two or three years after plaintiff's first offer, defendant purchased the land at about the same price. There was evidence tending to support plaintiff's claim that the sale was the result of a renewal of the original negotiations. *Held* that, if such fact were found, plaintiff was not debarred from recovering his commission because such negotiations were not continuous, nor by the fact that in the meantime the owner had given options on a part of the tract to others from which no sale resulted.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

**3. CORPORATIONS (§ 425\*)—CONTRACTS—AUTHORITY OF AGENT—ESTOPPEL.**

Where plaintiff wrote the president of defendant corporation respecting the purchase of a large tract of timber land which plaintiff was authorized to sell as a broker and was referred to an agent of defendant, "who will take the matter up with you if it seems worth while," defendant was estopped, after it had purchased the land, from denying the agent's authority to make an agreement to pay plaintiff a commission in case the purchase was made, and which agreement was by plaintiff made a condition precedent to disclosing to the agent the land data.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1701, 1705; Dec. Dig. § 425.\*]

**4. BROKERS (§ 71\*)—CONTRACT FOR COMMISSION—CONSTRUCTION.**

Where plaintiff delivered to defendant's agent a plat of certain timber lands which he offered to sell as a broker, making an agreement for the payment of a commission to him in case the purchase was made, and defendant afterward purchased, through direct negotiations with the owner, a part of the lands shown on the plat, with other lands not so shown, plaintiff was in any case entitled to recover a commission only on the land bought which appeared on the plat and was therefore embraced in his offer.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 56; Dec. Dig. § 71.\*]

In Error to the Circuit Court of the United States for the Eastern District of Michigan; Henry H. Swan, Judge.

Action at law by Henry Gamble against the Cleveland-Cliffs Iron Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. P. Belden, of Ishpeming, Mich., and Horace Andrews, of Cleveland, Ohio, for plaintiff in error.

G. W. Weadock, of Saginaw, Mich., for defendant in error.

Before DENISON, Circuit Judge, and SATER and SESSIONS, District Judges.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

DENISON, Circuit Judge. The general facts sufficiently appear in the opinion of this court upon the former review. 158 Fed. 49, 85 C. C. A. 379. Upon the second trial, the cause was submitted to the jury, which gave to plaintiff a verdict for his claimed 5 per cent. commission upon the purchase price of the entire 60,000 acres purchased by the Cleveland-Cliffs Company. This company, the defendant below, complains of the trial and judgment upon four chief grounds: (1) That the undisputed evidence showed the final purchase to have been disconnected from plaintiff's initial service, and hence a verdict for defendant should have been instructed; (2) that recovery was permitted upon a theory different from that pleaded by plaintiff and followed earlier in the case; (3) that Redfern, defendant's agent, clearly had no authority to bind defendant by the contract upon which plaintiff relies, or that, at least, the question of authority was for the jury, and that it was error to charge that the authority did exist; and (4) that the verdict was erroneously permitted to include subject-matter not covered by the contract in suit.

1. Plaintiff's services, claimed to pertain to this transaction, were rendered in October and November, 1900. The sale, on which he claims commission, was not agreed upon until April, 1903. It was plaintiff's theory that the negotiations initiated by him resulted in the purchase; it was defendant's theory that such negotiations were terminated by the owner's letter of May 20, 1901, quoted in the previous opinion, and that the dealings which did result in the sale cannot be carried further back than October, 1902, when one of defendant's agents (not connected with Redfern or his department) suggested to Mr. Mather, defendant's president, that it should purchase this tract—or perhaps July, 1902, when Gen. Alger, president of the Manistique Company, the owner, spoke to Mr. Mather on the subject.

[1] We approve the general theory adopted by the court below on this subject and assumed in our former opinion, viz., that plaintiff cannot recover unless his services bore a causal relation to the sale. True, the promise said to have been made by defendant's agent was, in effect, "if we buy this land which you now bring to our attention, we will pay you 5 per cent. commission," and it is true that this promise was without express limitation of time, and can be read to refer to a purchase at any time in the future, no matter how far away. This is not its reasonable construction. Such language could not be intended, by either party, to contemplate a sale which could not be traced as flowing from the offer then made; and it is not reasonable to infer any understanding by either party that if the offer then made was absolutely and finally rejected, and that if then, a year or more later, the matter was again taken up from a new instigation and under different market conditions, plaintiff should nevertheless have his commission.

In the former opinion, and apparently on the trial now under review, the necessary connection, between plaintiff's offer in 1900 and the later negotiations, was found in Gen. Alger's letter of December 23, 1902. The testimony on the second trial clearly shows that the "purchase of our 30,000 acres" which Mr. Millen "brings for consid-

eration" had reference to a proposed sale to some one else; but the same letter continues (not quoted before):

"The application, however, does not cover the railroad. Do you wish to further consider the purchase of the land and the road?"

It thus clearly goes back to some previous negotiations; but in view of the present record, showing not only that the "purchase brought" by Mr. Millen was a proposition from others, but showing that Gen. Alger and Mr. Mather had been corresponding in October and November regarding the purchase of the land and the railroad, we cannot find, in this letter of itself or in the correspondence, any reaching back beyond the conversation between them in July, 1902, which conversation is, in this correspondence, expressly said to be its basis.

It does not follow that there is no connection between plaintiff's offer and the ultimate sale, just because this letter does not of itself furnish the necessary link. It is plaintiff's theory that he first, in October and November, brought this tract to defendant's attention as being suitable for purchase by it; that it then negotiated with the owner until May, 1901, when the owner withdrew the tract from sale, but with notice to defendant that the withdrawal was only temporary and the offer would be renewed; that defendant was so interested that, in preparation for the expected renewal, it made, during the summer of 1901, an extended examination of the lands (probably at large expense and covering long time); that, as the result of this examination, it determined, or became inclined, to buy the lands when the right time should come; that the delay was merely to allow the owner to get more anxious to sell, and each waited for the other; that Gen. Alger's conversation in July, 1902, was what defendant was waiting for, and was, in fact, though not in form, a renewal of the suspended deal; and that Mr. Mather's letter of October, 1902, formally opening the final negotiations, was not merely the result of Gen. Alger's suggestion, but was a step in the development of defendant's plan of purchase formed because of the examination which followed from plaintiff's offer. This theory would entitle plaintiff to recover under such a contract as he claims, if he could convince the jury that it was the true theory rightfully to be inferred from all the facts; and a verdict accordingly would not have been without support. It follows that it was not error to deny defendant's motion for an instructed verdict. However, this theory, the only one justifying a recovery, was not sharply brought to the court's attention by plaintiff's requests nor by the court distinctly put before the jury, and we find no exceptions presenting the matter in this light. Whether, under these circumstances, we ought to reverse on this account alone, we need not consider, as there is, elsewhere, sufficiently formal cause for reversal.

It will be noted that if the examination of the lands which, on this record, tends to make out the essential continuity, did in fact result, as defendant seems to claim, wholly from another source, operating like an intervening cause in the law of negligence, then this examination cannot serve as the necessary tie.



[2] It is next urged that intervening transactions, not appearing in the former record, prevent any recovery. These consist of options for the purchase of these lands or material portions of them, given by the owner in 1901 and 1902, with plaintiff's consent, to other parties; and it is said that, because these are inconsistent with defendant's continuing right to purchase under plaintiff's offer, they amount to a termination of his contract with defendant. We do not so regard the transactions, even if the owner was contingently bound to convey thereunder to others than defendant. Whatever rights plaintiff has here are not based upon the earning of a commission by assisting in negotiations under a fixed and continuing offer until it was finally accepted; they are based upon the theory that he is entitled to an agreed compensation for bringing the parties together so that they might do their own negotiating. This compensation was contingent upon the happening of a sale as the result of such negotiations; but it cannot be fatal that the owner was at the same time carrying on negotiations for sales to others. It is not material to plaintiff's case that defendant's opportunity of purchase should have been maintained unimpaired, so long as it was only suspended and not in fact destroyed. These matters bear on the question of fact whether the sale finally closed between the parties was the consummation of the bargaining begun through plaintiff, or whether that matter was considered abandoned and closed; but they do not, as matter of law, prevent his recovery.

Nor can we imperatively apply the rule of reasonable time and say that more than a reasonable time elapsed. This subject-matter ordinarily bears on the connection between offer and sale, and serves to raise a presumption that the two were connected or were separate; but here there is no room for its application. Plaintiff must show a direct connection along the line we have indicated, or else must fail. A mere nearness in time would not alone prevail against otherwise undisputed evidence showing another origin for the sale; nor is there remoteness of time which of itself would defeat the claim. The issue is sharp and clear. Either the sale had its beginning in July, 1902, and plaintiff had nothing to do with it, or else it followed from plaintiff's offer without any fatal interruption, and in the manner above indicated, and the conversation of July, 1902, had nothing to do with it, except to make an excuse for taking up again the deal temporarily laid aside. One or the other of these things is true. In either case, the question of reasonable time cuts no figure.

Coming to the next matter urged, we cannot find any insuperable obstacle to recovery in the fact that the descriptions of the hardwood lands and the purchase price, as finally fixed, were different from those specified by plaintiff's offer. The hardwood lands specified and those purchased indicate a general identity of tract, and the modification of terms was not beyond the variations which the contract might contemplate.

2. Defendant complains that plaintiff declared, and until the last trial prosecuted his action, upon the theory of a broker's commission for negotiating and consummating a sale; that confessedly he never

did anything after the first offer, had no connection with all the later negotiations, and, indeed, was out of the country much of the time; but that he recovered for the value of his plat and descriptions and information furnished at the beginning. We do not find any serious inconsistency in plaintiff's claims and positions. The differences come rather from artificial classifications sought to be imposed by defendant. It is not important whether plaintiff be called a broker, but there is no reason why those who are in the market to buy land may not say to one who comes as a broker claiming to have a good tract of land for sale that, if the broker will disclose what this tract is and put them in communication with the owners and let them deal directly together, he shall, if the land finally is bought, receive a commission. Such a contract, closed by furnishing the information, is a valid contract, by whatever name it may be called. The point is covered by the opinion on the former review.

[3] 3. Upon the subject of Redfern's authority: The majority of this court is convinced that upon the testimony shown by the present record—that is, upon plaintiff's version of the facts—defendant was not at liberty to deny Redfern's authority to make the alleged agreement, and that the court below was right in disposing of the question arising on such version, as one of law. We base our conviction on the fact that, in answer to plaintiff's letter, Mr. Mather referred him to Redfern, "who will take the matter up with you, if it seems worth while." This necessarily meant, if it seemed to Redfern worth while, and, in determining as to whether it was worth while, Redfern must pass upon the conditions which plaintiff imposed as precedent to "taking it up" at all, so long as such "conditions" were, as here, of a character not so uncommon in similar negotiations as to be clearly beyond the fair and natural expectation of the letter writer. Plaintiff's claim is that, considering together his letter to Redfern and his alleged conversation with Redfern, he substantially made the commission agreement a condition of disclosing his information. The acceptance or rejection of this condition was, as is said in the former opinion, "a necessary thing at the opening of negotiations." It was the duty of defendant's agent to communicate to defendant the condition which had accompanied the offer; and defendant cannot be heard to say either that the condition was not communicated, or that it is not bound by the agent's acceptance under such circumstances. Of course, it was for the jury to say whether such circumstances existed; that is, whether, in fact, plaintiff imposed this condition upon his disclosure.

[4] 4. The tract actually purchased included about 60,000 acres, of which about half was covered with hardwood timber and about half was cut-over lands. The hardwood lands were figured at \$5 per acre, and the cut-over lands at 50 cents per acre. The tract mentioned in plaintiff's first letter and in some other correspondence is 30,000 acres of hardwood. When plaintiff went to see Redfern, in November, 1900, he took with him a plat purporting to show the lands he had for sale. He says he talked with Redfern about a tract of 60,000 acres, and he gave Redfern this plat which showed about 60,000 acres, but the 60,000-acre purchase, as concluded, covered only about 30,000

acres of land shown by the plat; in other words, the plat indicated, as part of the tract offered by Gamble, 30,000 acres which defendant did not buy, and defendant bought 30,000 acres which were not on the plat. The probable explanation of this seems to be, although we only infer this somewhat vaguely from the record, that the plat given by the owner to plaintiff and by him furnished to Redfern covered the 30,000 acres of hardwood belonging to the Manistique Company, and 30,000 acres of cut-over lands belonging to some one else, and that, when the negotiations took definite shape, the Manistique Company put in its own cut-over lands along with its own hardwood lands. Upon this trial, plaintiff was allowed to prove that the plat which he gave to Redfern had been given to him by the owner through a blunder, and was allowed to put in evidence a corrected plat showing the same lands which defendant did afterwards buy, though this corrected plat had never come to defendant's notice.

There is no warrant for extending plaintiff's claim over lands not marked on the plat which he delivered to Redfern. No matter if plaintiff did say to Redfern that he was offering all the lands the Manistique Company had in those counties, in the same conversation he proffered the plat as a specific description of the lands about which he was talking, and it is clear that, if a contract had been then and there closed with no further details, defendant would not have been entitled to demand 30,000 acres not shown on the plat. If plaintiff's general theory of fact is correct, then defendant, when about closing the purchase, was bound to remember that upon the lands covered by this bargain with plaintiff it must also pay him his commission. In such case, defendant's officers would have been amply justified, even if they had before them plaintiff's present version of everything which had occurred, in supposing that their bargain referred only to those lands which had been specified on the plat which was the definite materialization of the more general talk.

For the errors in the subject-matter last mentioned, the judgment must be reversed, with costs, and a new trial ordered. We cannot be sure that the present record indicates with certainty the amount of excess thus erroneously embodied in the verdict so as to fix an amount to be remitted by which plaintiff could cure this error; but, if this amount could be ascertained, we would not be inclined to exercise our discretion in so avoiding another trial in a case where, as here, we think the trial which has been had was based upon a misconception of the main issue.

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SURAVITZ v. PRISTASZ.†

(Circuit Court of Appeals, Third Circuit. November 23, 1912.)

No. 1,606.

**1. COURTS (§ 321\*)—FEDERAL COURTS—JURISDICTION—ACTION BY ALIEN.**

Federal jurisdiction existed where an alien subject of the kingdom of Austria sued a resident and citizen of Pennsylvania.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 845, 847-849; Dec. Dig. § 321.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied February 10, 1913.

**2. TRIAL (§ 59\*)—RECEPTION OF EVIDENCE—TIME OF OFFER.**

Offer of a release and discontinuance of the action before the jury were sworn was properly refused; it being matter of defense, which could not be interjected into plaintiff's case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 138-140, 142, 143, 145; Dec. Dig. § 59.\*]

**3. RELEASE (§ 58\*)—LEGAL DEFENSE.**

Where a release, pleaded as a defense to an action for breach of marriage promise, was attacked for fraud, and the evidence on that issue was conflicting, it was properly submitted to the jury.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 109-114; Dec. Dig. § 58.\*]

**4. EVIDENCE (§ 434\*)—PAROL EVIDENCE—WRITTEN INSTRUMENT—RELEASE—FRAUD.**

Where a written release was attacked for fraud, parol evidence indicating that it was fraudulently secured was not objectionable, on the theory that it contradicted the written instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.\*]

**5. APPEAL AND ERROR (§ 263\*)—NECESSITY OF EXCEPTION AT TRIAL.**

An objection to the charge cannot be considered on appeal, where no exception was taken at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.\*]

**6. APPEAL AND ERROR (§ 1004\*)—REVIEW—EXCESSIVE VERDICT.**

A judgment cannot be reversed on appeal, on the ground that the damages are excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

In Error to the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, District Judge.

Action by Katie Pristasz against Jacob Suravitz. Judgment for plaintiff, and defendant brings error. Affirmed.

Richard H. Holgate, of Scranton, Pa., for plaintiff in error.

M. S. Kaufman, C. B. Little, and M. J. Martin, all of Scranton, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. The plaintiff in error has clearly disregarded our rules, and we might well dismiss the writ for this reason, without considering any other question. But in view of the size of the verdict (which seems to be unusually large, if all the circumstances of the case are taken into account) we have decided to pass upon the assignments of error as a matter of grace.

[1] The asserted lack of jurisdiction does not require discussion. The plaintiff is, and was declared in the pleadings to be, "an alien and a subject of the kingdom of Austria," and the defendant is, and was declared to be, "a resident and citizen of the state of Pennsylvania." What more was needed, we have not been advised.

[2] The refusal of the trial judge to admit the paper called a "re-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



lease and discontinuance of the action," at the time when it was first offered by the defendant, was correct. The offer was made before the trial had even begun, for the jury had not yet been sworn; but, without regard to this objection, it is plain that he had no right to interject it into the plaintiff's case. It was a matter of defense, and was duly offered and admitted at a later stage of the trial.

[3, 4] The judge was also right in refusing to direct a verdict for the defendant, and in refusing his subsequent motion for judgment non obstante veredicto. The evidence was conflicting and could not have been withheld from the jury. Moreover, the very existence of the release was attacked on the ground that its execution had been obtained by fraud, and the evidence on this subject was submitted to the jury, with instructions of which the defendant has no reason to complain. This was a legal, not an equitable, defense, and did not violate the rule that excludes evidence by parol to contradict or vary an admittedly genuine written instrument.

[5] The assignment to the charge as a whole on the ground that it was misleading and inadequate cannot be considered. Assuming the objection to be permissible in some cases under our rules and the federal practice, no such exception was taken during the trial. This was held in November, 1911, and the learned judge had no authority to make, and certainly could not give a retroactive effect to, the order that was signed on January 26, 1912.

[6] It remains to consider the objection that the court refused a new trial. This assignment is put solely upon the size of the verdict, which is said to be grossly excessive under the evidence in the case, even in a suit for the breach of a promise to marry. There may be reason for this contention, but the trial judge found no substantial ground for complaint in this particular, and the matter was peculiarly within his province. *Journal Ass'n v. Rutherford*, 2 C. C. A. 354, 51 Fed. 513, 16 L. R. A. 803; *Northern Pacific R. R. Co. v. Charless*, 2 C. C. A. 380, 51 Fed. 579, 580; *Smith v. Sun Ass'n*, 5 C. C. A. 91, 55 Fed. 248; *Railroad v. Fraloff*, 100 U. S. 31, 25 L. Ed. 531; *Wabash Railway v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605; *Cattle Co. v. Mann*, 130 U. S. 72, 9 Sup. Ct. 458, 32 L. Ed. 854 et seq.; *Wilson v. Everett*, 139 U. S. 616, 11 Sup. Ct. 664, 35 L. Ed. 286; *Erie R. R. v. Winter*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; *Railroad v. Behymer*, 189 U. S. 469, 23 Sup. Ct. 622, 47 L. Ed. 905. In *Lincoln v. Power*, *supra*, the court said:

"The plaintiff in error complains that the damages found by the jury were excessive, and appear to have been given under the influence of passion and prejudice.

"But it is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury, to take notice of an assignment of this character, where the complaint is only of the action of the jury.

"Thus it was said in *Parsons v. Bedford*, 3 Pet. 433, 447, 448 [7 L. Ed. 732], per Story, J., commenting on that clause of the seventh amendment which declares, 'no fact tried by a jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law,' that 'this is a prohibition of the courts of the United States to re-ex-

amine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a venire facias de novo by an appellate court, for some error of law which intervened in the proceedings."

An exhaustive note on the power of an appellate court to interfere with a verdict for excessive damages is appended to *Burdick v. Railroad*, 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528. The leading case in Pennsylvania is *Smith v. Times Publishing Co.*, 178 Pa. 481, 36 Atl. 296, 35 L. R. A. 819, to which may be added *Stauffer v. Reading*, 208 Pa. 436, 57 Atl. 829, *Quigley v. Railroad*, 210 Pa. 166, 59 Atl. 958, and *Turnpike Co. v. Cumberland County*, 225 Pa. 468, 74 Atl. 340. The state practice is based on the act of 1891 (P. L. 101), and we cannot follow it in the face of the federal decisions.

Finding no error for which the judgment should be reversed, it is accordingly affirmed.

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In re FARRELL.

In re HEINTZ.

(Circuit Court of Appeals, Sixth Circuit. December 13, 1912.)

No. 2,241.

**1. BANKRUPTCY (§ 297\*)—JURISDICTION OF COURTS—SUMMARY PROCEEDING TO COLLECT ASSETS IN ANOTHER DISTRICT.**

While a summary proceeding to collect property belonging to the estate of a bankrupt, which is in the possession of a stranger who resides outside of the territorial limits of the court of the adjudication, is ancillary in character, it presents a completely distinct and separable controversy, and one which must be determined by the court within whose jurisdiction the property is located and the respondent resides.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 413; Dec. Dig. § 297.\*]

**2. BANKRUPTCY (§ 20\*)—JURISDICTION OF COURTS—PROPERTY IN CUSTODY OF STATE COURT.**

Where, 18 months prior to an adjudication of bankruptcy against a building contractor, suits were commenced in the state court in another federal district to enforce liens against a fund which constituted the balance due the bankrupt on a building contract, the court of bankruptcy of the district of adjudication is without jurisdiction to order such fund turned over to the trustee, the same being within the exclusive jurisdiction of the state court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.\*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

Petition for Revision of Order of the District Court for the Southern District of Ohio; Howard C. Hollister, Judge.

In the matter of Michael J. Heintz, bankrupt. On petition of James A. Farrell, trustee, to revise an order dismissing a summary proceeding instituted by him. Affirmed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Petitioner is the trustee in bankruptcy of the estate of Michael J. Heintz, who, on the 19th day of October, 1910, was adjudged a bankrupt by the District Court of the United States for the Northern District of Ohio. The respondent, the Board of Education of the School District of the City of Cincinnati, is a public corporation having its principal and only office and place of business in the city of Cincinnati, in the Southern district of Ohio. Heintz, the bankrupt, entered into a contract with respondent for the construction of a school building, but defaulted upon and abandoned his contract before the building was completed. Respondent then took possession of and completed the work, after which there remained in its hands of the contract price the sum of \$7,685.00. The bankrupt was owing upwards of \$40,000 to subcontractors, laborers, and materialmen, who filed liens and commenced attachment suits for the amounts of their claims. About 18 months before the adjudication in bankruptcy, some of these claimants, pursuant to the statutes of Ohio, instituted proceedings in the court of common pleas of Hamilton county, Ohio, for the recovery and foreclosure of their liens. Those proceedings are still pending in that court.

After his appointment as trustee, petitioner filed his petition with the referee in bankruptcy of the United States District Court for the Northern District of Ohio, praying for a summary order requiring respondent to surrender and turn over to him the money in its hands which he claimed as the property of the bankrupt estate. A copy of the petition and notice of hearing were served upon the president of the respondent in Cincinnati. Respondent did not appear, and the referee made an order requiring it to pay and deliver to the trustee in bankruptcy said sum of \$7,685.00, to be held and distributed by him under the orders of the United States District Court for the Northern District of Ohio, "subject to the rights of any creditors, if any, who have in any way obtained or claim to have obtained any lien upon said fund," and directing the trustee to "apply by petition in the United States District Court at Cincinnati for a summary order on said Board of Education for the execution and enforcement of this order and decree." Thereupon, in accordance with such direction, petitioner applied to the United States District Court for the Southern District of Ohio for a summary order requiring respondent to comply with the order of the referee in bankruptcy. Respondent answered, setting forth in detail the contract with Heintz, his abandonment of the same, the completion of the building by respondent, the amount of the contract price remaining in its hands, the liens of subcontractors, laborers, and materialmen, the amounts thereof, and the proceedings in the state court for the recovery and foreclosure of such liens, and challenging the authority of the referee to make the original order, and also the jurisdiction of the United States District Court for the Southern District of Ohio to proceed further in the matter by either ancillary or original proceedings.

The District Court held: (1) That the order of the referee was void, because the District Court for the Northern District of Ohio did not have jurisdiction over either the respondent or the property sought to be recovered; and (2) that respondent's possession of the money is adverse to the rights of the trustee, and therefore that the controversy must be determined, if at all, in a plenary suit, instead of a summary proceeding. The order of the District Court dismissing the petition is here upon the application of the trustee in bankruptcy for revision.

Wm. Howell, of Cleveland, Ohio, for petitioner.

O. S. Bryant, of Cincinnati, Ohio, for respondent.

Before DENISON, Circuit Judge, and SATER and SESSIONS, District Judges.

SESSIONS, District Judge (after stating the facts as above). [1] Congress, by express enactment, has vested in the several courts of bankruptcy, "within their respective territorial limits," full and complete power and authority to try and determine bankruptcy controver-

sies. and specifically to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto." The jurisdiction thus defined and conferred is exclusive within the territorial limits of each court and confined to those limits. While a summary proceeding to collect property belonging to the estate of a bankrupt, which is in the possession of a stranger who resides outside of the territorial limits of the court of the original adjudication, is ancillary in character, nevertheless it presents a completely distinct and separable controversy, and therefore, one which must be determined by the court within whose jurisdiction the property is located and the respondent resides. Any other rule would result in unnecessary confusion of authority and would do violence to the plain provisions of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). This view is sustained, either directly or inferentially, by numerous authorities. *Babbitt v. Dutcher*, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402; *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414; *Staunton v. Wooden*, 179 Fed. 61, 102 C. C. A. 355; *In re Waukesha Water Co.* (D. C.) 116 Fed. 1009; *Loveland on Bankruptcy*, § 34.

[2] It is equally clear that the controversy between these parties is of such a character that it can be determined only by a plenary suit in a court of competent jurisdiction. While the respondent does not claim to be the owner of the money in question, yet it holds the fund as a legal custodian for lien claimants who are asserting rights in and to it adverse to those of the trustee in bankruptcy, and who, in accordance with the law, invoked the aid of the proper state court to perfect and enforce their liens more than 18 months prior to the filing of the petition in bankruptcy. The regularity of the proceedings to foreclose the liens is not questioned, nor can it be denied that the state court acquired complete jurisdiction and control over all the parties and property long prior to the commencement of the bankruptcy proceedings against Heintz. The ruling of this court in *Re Rohrer*, 177 Fed. 381, 100 C. C. A. 613, and the authorities there cited are decisive of this question. See, also, *Jaquith v. Rowley*, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620; *In re Rathman*, 183 Fed. 913, 106 C. C. A. 253; *In re Foster* (D. C.) 181 Fed. 703; *Loveland on Bankruptcy*, § 540.

The order of the District Court is affirmed, with costs.

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#### THE CONFIDENCE.

(Circuit Court of Appeals, Second Circuit. December 9, 1912.)

No. 49.

#### SHIPPING (§ 16\*)—OFFENSES AGAINST NAVIGATION LAWS—VIOLATION OF COLLISION RULES.

Under Inland Navigation Rules, Act June 7, 1897, c. 4, § 4, 30 Stat. 103 (U. S. Comp. St. 1901, p. 2885), which provides that "every vessel that shall be navigated without complying with the provisions of this act" shall be liable to a penalty of \$200, a vessel which is navigated in viola-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



tion of the rules prescribed therein for preventing collisions is subject to the penalty, although she was seaworthy and properly manned and equipped as required by the act, and the fault was that of the master, who is also subject to a penalty therefor under section 3.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 30-44; Dec. Dig. § 16.\*]

Appeal from the District Court of the United States for the Southern District of New York; Van Vechten Veeder, Judge.

Libel by the United States against the steam tug Confidence; the Southern Pacific Company, claimant. Decree for libellant, and claimant appeals. Affirmed.

This cause comes here upon appeal from a final decree which adjudged that the United States recover a penalty against the steam tug Confidence under Act June 7, 1897, c. 4, 30 Stat. 103 (U. S. Comp. St. 1901, p. 2885), entitled "An act to adopt regulations for preventing collisions upon certain harbors, rivers and inland waters of the United States." The relevant sections of the act are:

"Sec. 3. That every pilot, engineer, mate, or master of any steam vessel, and every master or mate of any barge or canal boat, who neglects or refuses to observe the provisions of this act, or the regulations established in pursuance of the preceding section, shall be liable to a penalty of fifty dollars, and for all damages sustained by any passenger in his person or baggage by such neglect or refusal: Provided, that nothing herein shall relieve any vessel, owner or corporation from any liability incurred by reason of such neglect or refusal.

"Sec. 4. That every vessel that shall be navigated without complying with the provisions of this act shall be liable to a penalty of two hundred dollars, one-half to go to the informer, for which sum the vessel so navigated shall be liable and may be seized and proceeded against by action in any District Court of the United States having jurisdiction of the offense."

The facts are stipulated. The Confidence and steam lighter the Martha Stevens were navigating in the harbor of New York. The two boats approached each other obliquely, the lighter being on the tug's starboard side. It does not appear what signals, if any, were blown. A collision ensued which was caused in part, at least, by the failure of the master of the tug to observe the provisions of the act of June 7, 1897, in that she failed to keep out of the way of the Martha Stevens, and failed to slacken her speed or stop or reverse in time to prevent a collision. At the time of the collision the tug was a first-class boat, thoroughly seaworthy and was in all respects equipped in accordance with the provisions of the act. Her master was duly licensed and had always borne a good reputation as a competent master and pilot.

G. M. Buck, of New York City, for appellant.

Henry A. Wise, U. S. Atty., A. S. Pratt, Asst. U. S. Atty., and Frank M. Roosa, all of New York City, for the United States.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The contention of the appellant is that the act should be so construed as to impose a penalty on the master for the master's fault and on the vessel only for the owner's fault. As he states it in the brief:

"Where the owner employs a competent master, and in all respects equips his vessel in compliance with the statute, the vessel has complied with the act; and if the vessel is later navigated, while so equipped, the act imposes no penalty on the vessel for the master's failure to observe the statutory provisions in his handling of the boat."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In other words, it is contended that the act should be construed as if it read:

"Every vessel which shall engage in navigation, without having complied with this act shall be liable," etc.

But in the opinion of a majority of this court such a construction strains the plain language of the statute, which certainly is not obscure. It provides specifically (in sections 1 and 2) that a vessel, when navigating, shall move thus and so, shall show such and such lights, and shall give such and such signals. Certainly a vessel, which, when navigating, fails to move, or show lights, or give signals as required, may most truthfully and accurately be described as being "navigated without complying with the provisions of the act."

Taking the words in their ordinary and natural meaning, without any refinement or distortion, they make the vessel as well as the master responsible in penalty for failure to obey such rules of navigation as the statute enumerates. The burden is on the person contending for a restricted meaning to show some good ground for the conclusion that Congress did not mean precisely what it said. We do not find anything persuasive in the arguments advanced to sustain the narrow construction. We see no distinction between the two phrases "observe the provisions" and "comply with the provisions." Nor do we attach any weight to the circumstance that the master is penalized (while the vessel is not) for failure to observe the pilot rules, other than those enumerated in the statute. Nor do we see why it should be assumed that Congress did not intend to make the owner liable for the fault of his employé. He is already liable in damages for such faults when there is a disastrous collision.

The object of this statute was to *prevent* collisions, by punishing disobedience of the requirements of the act whenever it occurred and was discovered, without waiting for disaster to follow. A master may be competent, and may hold a certificate, and yet be repeatedly reckless and disregardful of prescribed rules. Our experience has shown how frequent this is. Congress may well have believed that the best way to make masters comply with the rules of navigation, which they are too prone to modify, would be to punish the owner when the master violated them. To do so would tend to make the owner vigilant and watchful of his employé; not content with general competence and a certificate, but constantly seeking to advise himself, perhaps through others of the crew, as to how the master handled the vessel, and prompt to discharge a master whose habitual conduct was such as to expose the vessel to repeated penalties.

But we do not think it necessary to advance arguments in favor of a construction which seems so plainly to be the natural meaning of common words. The burden is on the other side, and we do not find the arguments advanced by it persuasive to a restricted construction of this section.

The decree includes interest, which the government now concedes should not be included. So much of the recovery being abandoned, the decree, as thus modified, is affirmed.

In re FRASIN et al.

Petition of BECK.

(Circuit Court of Appeals, Second Circuit. November 11, 1912.)

No. 21.

**BANKRUPTCY (§ 268\*)—LEASE—SALE BY TRUSTEE—CAVEAT EMPTOR.**

Where, on a sale of the interest of a bankrupt's trustee in a lease of the premises occupied by the bankrupt, the purchaser was not deceived, but was expressly informed that the trustee was selling only such title as he possessed, and knew that such title was in litigation, and that the trustee assumed no personal responsibility, and did not warrant the lease or its salability, the purchaser could not recover the money paid therefor, on it being subsequently determined that the trustee had no interest he could convey.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372-379; Dec. Dig. § 268.\*]

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

In the matter of bankruptcy proceedings of Louis Frasin and Abraham H. Oppenheim, individually and as copartners composing the firm of Frasin & Oppenheim. Petition by Samuel Beck to revise an order affirming a referee's order denying a petition by Beck to recover from the trustee \$5,150 for his interest in a lease to the bankrupts of the premises occupied by them in the city of New York. Affirmed.

See, also, 183 Fed. 28, 105 C. C. A. 320, 33 L. R. A. (N. S.) 745.

McLaughlin, Russell, Coe & Sprague, of New York City (Frederick C. McLaughlin, of New York City, of counsel), for petitioner.

Guthrie B. Plante, of New York City, for the trustee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. We think that the referee and the District Court were right in refusing the relief demanded by the petitioner and little need be added to their opinions.

Zahm, who was the bidder at the sale and who paid the money the petitioner seeks to recover, was fully informed when he purchased the trustee's interest in the lease of all the facts relating thereto. He was not deceived, he knew what he was buying and was clearly advised of the character of the title. He was expressly informed that the trustee was selling only such title as he possessed, he knew that the trustee's title was in litigation and that an appeal had been taken from the order under which the sale was proceeding and that the order might be reversed. He knew, therefore, that he who bid at the sale would do so at his peril and without recourse in the event of the reversal of the order of the District Court. It was expressly stated at the sale that:

"The trustee assumes no personal responsibility and does not warrant the lease or its salability."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It would be difficult to imagine a statement which could convey to the bidders in plainer language that the trustee sold only such interest as he possessed. This interest might be valuable or it might be worthless and he who purchased it did so at his peril and without recourse. No material fact was withheld, the entire situation was stated, no one could have been misled. To permit a purchaser, who thus speculates upon the value of the property bid in by him, to recover the price paid because subsequent events show that the interest purchased was less valuable than he supposed it to be, seems to us most inequitable.

The doctrine of caveat emptor is clearly applicable. This buyer knew exactly what he was purchasing. From his point of view it was a wise purchase. It enabled his principals to make an advantageous arrangement whereby the old lease was canceled and a new one made. In securing these advantages he put it out of his power to restore the trustee's interest in the old lease.

In other words, petitioner asks to have the money paid for the trustee's interest returned, but does not offer to restore, and cannot restore, to the trustee his interest in the lease which was bid in by Zahm. That lease is gone beyond recall.

The order is affirmed.

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CROWN CORK & SEAL CO. OF BALTIMORE CITY v. BROOKLYN BOTTLE STOPPER CO. et al. SAME v. AMERICAN CORK SPECIALTY CO. et al. SAME v. JOHNSON.

(District Court, E. D. New York. December 2, 1912.)

PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—BOTTLE STOPPER.

The Painter patent No. 792,284, for a method of making bottle stoppers or closures, and the Painter patent No. 887,838 and Wheeler patent No. 887,883, each for a machine for practicing such process, and the latter for an improvement thereon, all held not anticipated, valid, and infringed.

In Equity. Suits by the Crown Cork & Seal Company of Baltimore City against the Brooklyn Bottle Stopper Company and others, against the American Cork Specialty Company and others, and against Aaron Johnson. On final hearing. Decrees for complainant.

For former opinion, see 190 Fed. 323.

Philipp, Sawyer, Rice & Kennedy, of New York City (Robert H. Parkinson, of Chicago, Ill., and James Q. Rice, of New York City, of counsel), for complainant.

Robert B. Killgore, of New York City (Alfred C. Coxe, Jr., of New York City, of counsel), for defendants.

CHATFIELD, District Judge. Final hearing has been had in the present action, and the record has added nothing to change the conclusions which could have been reached upon the application for a preliminary injunction, wherein, among other matters, the defense of laches and the question of public acquiescence were substantially disposed of. The testimony upon final hearing consists almost entirely

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



of opinions and arguments of expert witnesses, more deliberately and carefully presented than upon the application for preliminary injunction, but not changing the questions under consideration thereon, nor offering any new state of facts.

The machines in use by the parties to this action, the patents set forth in the papers upon the preliminary injunction and considered in the former opinion of this court, and, as has been said, the arguments of the experts, have furnished to the court merely a more full and satisfactory opportunity for taking up the precise points which, under the decisions, the court could not consider, in view of the intention of the parties to proceed to a final hearing.

The statement of the various patents involved and of the devices claimed as infringements, together with an analysis of the arguments presented, as set forth in the opinion upon preliminary hearing (reported in [C. C.] 190 Fed. 323), is available, and need not be repeated. We shall proceed at once, embodying that opinion as a part of this decision, with the exception noted below, to analyze the claims of the patents as they are now presented by a completed record.

One statement of the former opinion must be corrected at the outset, as the court described one feature of the Wheeler machine and patent incorrectly, and even, in a way, contradictory to the references to the Wheeler patent in other parts of the opinion.

On page 326 of 190 Fed., in that opinion, at the end of the first paragraph upon the page, the court says that in the Wheeler patent—"the plungers exert pressure while the caps are carried a certain distance. Then, the plungers being released, the caps are expelled upon the outer or cooled portion of the disk, where the temperature is rapidly reduced, under the influence of a water jacket."

The Wheeler patent and drawings show plainly that the plungers are arranged around the outer or cooled portion of this disk, and exert their pressure while the caps are carried a certain distance by the turning of the cooling ring or disk itself, and are released just before the caps are thrown out of the machine. The expulsion from the heated section onto the cooling ring is previous to the application of the plunger.

The corrected statement of fact shows a situation more nearly like that of the defendants' machines, and brings us to the first defense; that is, noninfringement.

As was said in the former opinion, the defendant Johnson has manufactured machines with a knowledge of the use to which they were to be put. He appears by the record to be a contributory infringer, if infringement be shown against the defendants in the other two actions. The defendant the American Cork Specialty Company and Mr. Mundet, who is personally responsible for its acts in this matter, and the defendant the Brooklyn Bottle Stopper Company, with Mr. Alberti, who is responsible for that company's acts, are using machines containing the same elements, and differing only, as was said in the former opinion, in the manner of transferring the caps from the heated plate to the disk or ring where the plungers operate.

The Brooklyn Bottle Stopper Company's machine has the disk (around which the plungers are arranged) placed in a vertical position, so that gravity is used to take the caps from the star or notched ring of the heating plate; whereas in the American Specialty Company's machine the plunger ring is in a horizontal plane, and takes the caps from the star ring by direct contact at the outer edge of the disks. The court can see no substantial difference between the two methods and the two machines, and either of them plainly infringe the complainant's patents, if the claims of those patents be construed as valid and as meaning what the complainant contends.

It is suggested by the defendants that the Painter and Wheeler patents call for a means of transferring the crown corks from the point where pressure is applied to the point where the cooling process under pressure has sufficiently progressed. Claim 6 of patent No. 887,838, Painter, and claims 7 and 23 of patent No. 887,883, Wheeler. In claim 7 of the latter patent the "heating means" serves to move the closures to the "pressing means," and the defendants suggest that in the exhibit machine presented in court and made by the defendant Johnson the heating means, viz., the Bunsen burners, does not convey the closures to the plungers, but that the closures are conveyed by an upper or star disk, which conveys the closures over the heat while the heat is stationary. They point out that in the Painter and Wheeler patents the heat is applied in a so-called oven, of which the lower floor or plate actually transmitting heat moves toward the plungers. But this neither changes the principles, nor would take the defendants' machines out from the claims of the complainant's patents, for one arrangement of these heating disks is merely an equivalent of the other, in that heat is applied through radiation; that is, the conveying means is actually a part of the apparatus for applying the heat, whether or not the conveyer be equipped with a second plate. We must therefore pass to the other questions presented by the defense.

Some attack has been made upon the allegations of ownership by the complainant, in that the formal certified copies of the assignments have not been presented in the testimony. But evidence was given that the complainant was granted these patents, and had the right to manufacture under them, and no objection is made upon the ground that this testimony was not the best evidence. It is useless, therefore, to consider the mere denial upon information and belief of what now appears to be uncontested facts.

Another defense is urged, viz., that the Alberti or Brooklyn Bottle Stopper Company machine is an aggregation and not a combination; that is, that the union of the two parts of the machine, by an appliance depending upon the force of gravity, would take that machine out of the category of a combination, and leave merely two machines or devices reciprocating in function. But unless we go so far as to hold that no machine can be an infringing combination, unless there be an invention involved in the precise difference from other devices, the suggested defense is without meaning. Any combination in which equivalents might be substituted for the original structure could be

called an aggregation rather than a combination, if it is separable into distinct parts at the point where the new mechanical equivalent was used.

The defense of multifariousness was disposed of upon preliminary injunction, and this disposition has not been affected by final hearing, except in so far as the point is involved in the general considerations of validity and invention, when contrast is made of the various claims of the different patents.

The Painter machine for making crown corks, and the Painter method patent, contemplated the exertion of pressure simultaneous with or during the process of heating, and the continuance of the pressure contemporaneous with an increase of temperature of considerable extent and until cooling took place. The Wheeler patent is diametrically opposed to the increase of temperature after pressure has been applied. But Wheeler patented a combination making use, in this particular, of Painter's idea of applying the pressure to the heated crown and continuing the pressure until cooling occurred, but not containing Painter's idea of either simultaneous or further heating with the pressure. If Painter had patented only the one form of operation, viz., to press and then heat, of course that operation could not exist conjointly with the operation of heating and then pressing, for one is the converse of the other; but the teaching of Painter's method patent and its claims are broad enough to cover heating first and then pressure until cooling occurs, and Wheeler could not get a valid patent for a method of that sort, but he could get a valid combination patent for the machine he invented, which used the idea of the Painter method generally, with a new application of means to procure the result, and with a radical departure from Painter's preferred plan of application on the one point.

Therefore joint use of the Painter method patent and the Wheeler patent, and of many claims of the Painter apparatus patent and the Wheeler patent, would leave out this one step of the Painter method patent as he concluded it would operate best; but the court is unable to find the complaint multifarious because some applications of the Painter method and apparatus patents could not be consistently combined in operation with some claims of the Wheeler apparatus patent in one machine.

The court previously held that the prior art was almost entirely barren of patents affecting the issue of this case. The record at final hearing furnishes nothing more than was presented upon preliminary injunction. The case as to the prior art still presents the Zeidler patent No. 373,001, November 8, 1887, the France patent, No. 392,794, November 13, 1888, the Gray patent, No. 575,424, January 19, 1897, and the old Thompson patent, No. 104,794, June 28, 1870, all of which teach, in one form or another, the sole point in respect to this case, that two surfaces set with adhesive, such as carpenter's glue, or with a substance forming a solvent in place of the glue, require time or cooling for the proper setting of the adhesive, and for a permanent holding in place of the surfaces joined. This idea was not patentable, and when used by Painter or Wheeler could not be patented, except

in the sense of reliance thereon merely as a basic or necessary step in the formation of a method or machine which would produce a new product in an original and useful way, or where the application of the old idea was carried out in connection with other ideas to a new result.

The record in the present case does show that the crown cork, as manufactured and as recognized by the public, has produced a useful and new result; and the testimony also shows that its availability and general adoption is dependent upon its satisfactory adaptation, with comparatively perfect results in the use which has been so readily accepted. Hence to hold that no invention is possible, because the well-known principles of evaporation and solidification have been disclosed in other patents for different devices, but with like application of those principles, would prevent the finding of invention in any structure where a similar application might be found in an entirely different art, and where the teaching of that application would not be suggested by any amount of study or familiarity with the other art.

The invention shown in the Painter patents was the result of a study of the needs shown in the making of crown cork seals, and if Painter disclosed invention, and has properly stated it in his claims, and if Wheeler has used that invention and also properly stated his claims, the patents should be upheld, under familiar rules, even though the invention now be shown to be exceedingly simple, when discussed on the same basis as simple inventions in other arts.

The Thompson patent happens to have to do with a durable cork or stopper for bottles, but in other respects has no more to do with the art of making crown corks than have the other patents mentioned.

The Perkins patent, No. 234,423, November 16, 1880, and the Asche patent, No. 620,083, February 21, 1899, are typical of devices employing a number of structures with plungers arranged in a circle, by which multiplication of result, in the soldering of parts of tin cans, is employed for the saving of time and lessening of cost in making the product.

In so far as the Painter and Wheeler patents involve the mere multiplication of plungers, the idea is old, and was old when employed in the Asche and Perkins patents; and in so far as the soldering resembles the use of hot adhesive, the application is somewhat the same. But neither Painter nor Wheeler was attempting to patent this idea of multiplication alone. They were patenting a method and a device in which the same idea was employed as in the Asche and Perkins patents, in the respects named; but nothing was taught by those patents which would make invention impossible by the application of these ideas in making the crown corks in such a way as to have commercial utility and advantage, where novel methods were disclosed in other steps of the process, or in the application of both new and old ideas to achieve a new result.

This leaves us, therefore, with but one patent to consider—that of Painter himself, No. 468,226, February 2, 1892—and the defendants' expert states that this patent is their principal reliance to show dis-



closures anticipating and rendering invalid the claims of the later patents.

In this early patent Painter worked out the idea of the crown cork seal, and directed the use of adhesive between the cork disk and the metallic cap with corrugated flange. He went so far as to provide for the assembling of these seals by subjecting the cork disk to heavy crushing pressure, after the shellac or adhesive substance had been well heated; and he teaches that the cork disk shall be developed into a concavo-convex form, and well confined in the cap by the melted adhesive. He plainly indicates that the momentary pressure used is to follow the heating operation, and in this respect seems to have had in mind the principles which led Wheeler to the same order of steps in improving upon the later Painter patents.

But when Painter described what he claimed as his invention he did not claim the method of construction of the crown cork seal, other than in combination with its use upon the bottle or as a *device* (claim 4) adapted to be used in that way through the interposition of an adhesive between the sealing disk and the cap, so as to secure reliable union of the cap and disk, to protect the cap and prevent tainting of the contents or their escape. He says that other applications had been made (Nos. 323,314 and 355,603) as to these disks.

The application for this earlier Painter patent was made on May 19, 1891, and it was not until June 6, 1902, that Painter attempted to claim invention in making these bottle closures in any particular or original way, to improve upon the simple or general idea of such a cap as disclosed and not claimed in the early patent of 1902, and as distinguished from the device producing the result.

On June 6, 1902, Painter applied for his first method patent of making the closures or crown cork seals, and the Patent Office, on the 30th day of September, 1902, cited the Zeidler and Asche patents, above referred to, as grounds for rejecting the two claims set forth in the application. On the 29th day of September, 1902, or one day before its rejection, Painter filed another application, in which he also claimed a method for making the bottle caps or closures substantially like the method in his application of June 6, 1902, but claimed as well an invention through the use in the metallic sealing cap of a paper collet or disk, which was, when charged with fusible medium, substituted for the "protecting film" of patent No. 468,226, or "the thin fabric reinforced" of patent No. 468,259, of which no copy has been included in the present record, but which is referred to by Painter in his application of June 6, 1902.

In the application for patent No. 792,284, known as the method patent, Painter seems to realize the failure on his part to have applied for a general patent for the crown cork style of seals, and he claims novelty for the method specified by saying that the nearest disclosure had been given in his patent No. 468,226, of 1892. But he claims this novelty through the use of the collet or paper disk, and the employment of pressure during the formation of the complete cap—that is, the cooling of the adhesive mixture—whereas in the earlier

patent the application of the plunger had been momentary, for the purpose of compressing the adhesive parts.

Painter also states in this patent that the crown corks or caps of the early patent had been, in practice, heated subsequent to the application of pressure in their manufacture, and is apparently in this allusion referring to the so-called oven method, which is described by the witness Coale as having been adopted and used by the complainant corporation for a number of years succeeding the original Painter patent No. 468,226. This oven method consisted of baking or heating the disks, after they had been assembled and subjected to momentary pressure with a plunger, in large quantities in pans in an oven, and this method of manufacture was the one from which the difficulties as to "puffers" was particularly observed.

The Patent Office finally granted the application of June 6, 1902, by letters patent No. 792,284, upon the 13th day of June, 1905, and also the application filed September 29, 1902, patent No. 792,285, under date of June 13, 1905. Meanwhile, in the year 1905, on the 24th of May, Painter applied for the machine patent, which, after renewal on the 3d of October, 1907, was issued under No. 887,838, upon the 19th of May, 1908.

The Wheeler patent was issued also upon the 19th of May, 1908, No. 887,883, upon an application filed September 20, 1905, renewed upon the 3d of October, 1907. The dates of these various letters patent are the basis of the defense of double patenting which is urged with reference to the Painter method and machine patents.

Even if valid in other respects, the defendants claim that in the so-called machine patent, No. 887,838, the method of operating shown by the Painter method patent is necessarily involved, and that the methods of the method patent will therefore be protected, if the machine patent be held valid, until 17 years after May 19, 1908, which is nearly 3 years later than the date of expiration of the method patent.

Whether this might be true of certain claims of the machine patent need not be considered; for the defendants' contention is that the entire machine patent shows only a type of the apparatus disclosed in the method patent, and that hence the machine patent is void.

This general defense cannot be sustained; for the Painter patent would teach the method of accomplishing the result. But the Painter method patent does not show the practical and convenient machine for making crown corks on a large scale, such as is illustrated by the drawings of the machine patent, and which is described in its claims. The machine patent is therefore valid as a combination, and must be treated as such; nor did the existence of the application in the Patent Office prevent application for a machine or combination patent before disclosure by the allowance of the patent. *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68; *Badische Anilin & Soda Fabrik v. Klipstein & Co.* (C. C.) 125 Fed. 543.

We therefore come to the most difficult point in the entire matter, and that is the defense of patentability or lack of invention, in view of the disclosures by the various patents of Painter himself.

Upon the motion for a preliminary injunction it was stated that claim 1 of the method patent, No. 792,284, claims 2 and 6 of the machine patent, No. 887,838, and claims 1, 4, 7, 23, and 27 of the Wheeler patent, were relied upon. The case upon final hearing is based upon these same claims, and a statement of the various claims, in order to compare them with each other, must therefore be made.

The earliest or 1892 patent, No. 468,226, claims:

"4. A metallic flanged sealing cap adapted to receive the head of a bottle and containing a concavo-convex sealing disk and an interposed film of inodorous and tasteless adhesive matter which not only secures reliable initial union of the cap and disk, but also protects the interior surface of the cap against corrosion by liquids permeating the disk, and also prevents metallic tainting of the contents of a bottle sealed by means of said cap and disk, substantially as described."

This, as has been said, does not attempt to claim as invention the use of continued pressure, following the heat, to secure the adhesive matter and the various parts while cooling or setting. Lines 97 to 128, page 4, of patent.

Patent No. 792,284, of 1905, the method patent, claims:

"1. In the manufacture of gas-tight bottle-closures composed in part of metal, the method or process which consists: First, in interposing a suitable fusible protecting and binding medium between the packing or sealing gasket and the coincident surfaces of the metal co-operating therewith; secondly, heating the metal, the gasket and the binding medium for properly fusing the latter, and in the meantime subjecting the whole to appropriate pressure; and, thirdly, cooling the metal and avoiding injury to the gasket from undue heating and hardening the fusible medium while maintaining said appropriate pressure, substantially as and for the purposes specified."

This patent assumes the use of a paper collet treated with adhesive substance, as shown by patents Nos. 468,259 and 468,226, and teaches the possibility and availability of applying time and a sudden reduction in temperature to the easily displaced and unfixed parts of the cap as previously assembled. It teaches the advantage of applying the pressure in a way to make the process of manufacturing continuous and the advantageous results in a practical way through the production of more satisfactory caps.

Patent No. 792,285, also a method patent, and issued upon the same date, has no bearing upon the particular question which we are now considering; for, being of the same date of issue and disclosing no more than No. 792,284, unless it be in elongating the raceway and providing for a complete coating of adhesive material in the cap, we need not consider the questions which might have been suggested in the Patent Office upon the two applications.

The machine patent, No. 887,838, claims:

"2. In an organization for uniting the metallic member of a bottle or like closure with its compressible packing with fusible material interposed, heating means and means for engaging the packing to hold it under compression while the closure is cooling, substantially as described."

"6. In combination, means for heating the assembled closure members and means for pressing the said members together and holding the said members under this pressure and while cooling, the said means of compression being movable to convey the closure while its members are maintained under pressure, substantially as described."

Both of these claims are attacked by the defendants because of the alleged disclosure of the method patent of approximately three years before; it being contended that the general claims are invalid, and that no specific machine is attempted to be described so as to secure a combination patent. It will be noted that the words "substantially as described" refer to the Painter machine as perfected by the complainant, or in the factory of the complainant, and as described in the drawings and specifications. This machine is specifically designated in claims 20 and 21, and consists of a disk in the form of a star wheel to carry the crowns from the feeding table beneath pressure plungers, which are in this particular machine arranged in a circle around another disk, working substantially as the defendants' machines in this suit.

It will also be noted that claim 28 of the patent describes:

"A machine for making closures for bottles and the like, comprising means for uniting the crowns with their disks and for holding them under pressure during that operation."

This claim would seem to be open to the criticism made by the defendants, that its general terms exactly fit the necessary means of the method patent, and would seem to be an attempt to patent such a broad device as the pair of pincers and ordinary lamp, which the complainant's expert testifies might be used as one means of carrying out the method patent. Such objection could not be made to the specific claims describing the machine with the star wheel and the rotating set of plungers; and a machine of that sort would seem to have involved valid invention, even taking into consideration the Asche and Perkins patents.

But claims 2 and 6 cannot be disposed of either as entirely in the class of claim 28, nor in that of claim 20. Claim 2 and claim 6, when considered in connection with the drawings of the method patent, can be read upon the structure described, and which would not have been patented as a separate device in the drawing labeled "Fig. 4" patent No. 792,284, and "Fig. 3," in the drawing of patent No. 792,285, if those patents had issued before the application or invention of the machine patent. In those drawings we have, as in claim 2, "an organization for uniting the metallic member of a bottle or like closure with its compressible packing with fusible material interposed," "means for heating," viz., the lamps, "means for engaging the packing," viz., the plungers and blocks, and "means for holding the packing under compression while the closure is cooling," viz., the continued pressure of a plunger upon the presser block while the plunger and the closure are both being moved along the raceway described, and said to be composed of two foot rails "along which can be advanced by hand or otherwise the blocks or plungers."

Also, in claim 6 we have, as stated, "in combination, means for heating the assembled closure members" (that is, the closures after the plungers have been applied), "means for pressing these members together" (that is, the plungers and presser blocks), and "for holding the members under this pressure while cooling" (also the plungers and



presser blocks), while the said means of compression are movable to convey the closure while its members are maintained under pressure, substantially as described. But before these ideas were disclosed by the issuance of the patent Painter filed the further application, in which he claimed invention for a machine made up of these same parts, or equivalents therefor.

In this machine patent Painter describes the placing of the metal caps with suitable interior binding medium upon the revolving feed table, to which a carrier brings, one at a time, the cork disk, at the point where the filled caps are taken into the circular path of the table around which the presser blocks are arranged. The heat is to be supplied after the engagement of the presser block and the plunger upon the closure containing the disk, and the specifications say:

"With some materials requiring but little heat, it will only be necessary to provide for the transit of the heated closures beyond the heater for a long enough time to enable them to be cooled by the atmosphere at normal temperature before they are released from the presser blocks. For meeting all requirements however, an artificial cooling operation is important."

The machine, therefore, as described contains additional means for artificially cooling. The defendants do not use artificial cooling, either in the form of air jets, as described by Painter, or a water-cooled chill ring, as described by Wheeler. But they do use a ring, described by the defendants' expert as a plate intended to support the thrust of the plungers, and which in effect would at first help the radiation of heat and be at the temperature of the surrounding atmosphere. As the machine is used, the heat derived from the closures, together with the proximity of the heating means, would raise the temperature of this heating ring; but the complainant's and defendants' experts both agree that the temperature of the caps while on the heating ring upon the defendants' machine is sufficient to melt sulphur—that is, 239 degrees. The temperature of the caps as they leave the plunger ring, and the temperature of the plunger ring itself, is merely uncomfortably hot, or something like 110 or 120 degrees. The use of an adhesive material solidifying at about 150 degrees shows a sufficient drop in temperature between the heating ring and the plunger ring to come within the description of both the Painter and Wheeler patents, as maintaining the closures under pressure while cooling; that is, while cooling (as Painter says in the machine patent) so as to harden the fusible medium, and also to assure a prompt contraction of the metal cap after a sudden cessation of the supply of heat before the packing is entirely cooled. In the defendants' machines both of these results are accomplished, to a sufficient extent, in their operation as shown in the testimony, so as to bring these machines within the claims of the patents in suit.

The Painter method patent does not describe a mere function of the machine shown in the machine patent, nor a mere function of the operation of heating the closure while within the grasp of a pair of pincers and held over a lamp. The defendants seem to be infringing the Painter method patent, even assuming that claims 2 and 6 of the machine patent are not sufficiently definite to be valid. But claims 2 and 6 state that the general means of performing functions are "in

an organization" and "in combination" "substantially as described," and thus the claims are made valid, if patentable novelty is shown.

But the defendants urge that the difficulty does not end here; for the Painter method and the Painter machine patent are said to be based upon a heating simultaneous with or while the closures are under pressure, and never prior to pressure. In his original patent Painter described the momentary use of a plunger upon a heated fusible medium. By the oven method he applied heat to the assembled closures after using the plunger upon the fusible heated medium. By his method patent and by his machine patent he applied pressure to the assembled closure, and then applied further heat, continuing the pressure while cooling. The defendants, on the other hand, assemble the parts of a closure which is not covered by patent at the present time, then carry the closures to a machine which applies heat to the assembled closures, free from pressure, and then applies pressure to this heated assemblage of parts.

The defendants are using almost the precise form of machine described by Painter in his drawings in the machine patent—that is, with a star wheel and series of plungers arranged around a circular disk—and they might be held for infringement of the claims of this patent, even if they cannot be held upon a charge of making closures by the patented method, to be operated on that machine. But if so, then the Wheeler patent can be only for a new combination or improvement on Painter. Further, as Wheeler used pressure only after heating, the defendants are not liable on this theory, unless they come within the provisions of the Wheeler patent. Wheeler claims:

"1. In an organization for uniting the metallic member of a bottle or like closure with its compressible packing having a fusible material interposed between it and said metallic member, means for heating the assembled members of the closures while free to allow the expanding air to escape, and means for pressing the parts together while cooling, substantially as described."

"4. In an organization for uniting the metallic member of a bottle or like closure with its compressible packing having a fusible material interposed between it and said metallic member, a plunger, a support on which the closure rests and between which and the plunger the closure is pressed, and means for heating the assembled parts of the closure for fusing the interposed material before the compression takes place, said compression taking place during the cooling of the parts and the hardening of the interposed binding material, substantially as described."

"7. In an organization of the class described, means for pressing the parts of the closures together and means for heating the closures with their interposed fusible binding material, said heating means serving to move the closures to the pressing means, substantially as described."

"23. In apparatus of the class described, a revolving series of plungers, means for previously heating and then delivering the closures thereto and means for discharging the closures from beneath the plungers at one point, substantially as described."

"27. In combination in apparatus of the class described, means for heating the closures while free from pressure, a chill plate and plunger for receiving the heated closures for cooling and uniting the parts thereof, said plunger pressing the closures between itself and the chill plate, substantially as described."

Claim 1 would seem to be valid and to be an improvement upon the Painter method and machine. Claim 4 is also valid, and describes a

similar improvement upon the Painter method. Claim 7 provides for the moving of the closures by the heating means, and is valid in the form described, i. e., as an improvement on Painter. Claim 23 applies the methods of claims 1 and 4 to an apparatus with the revolving series of plungers, with means—

“for previously heating and then delivering the closures thereto and means for discharging the closures from beneath the plungers at one point, substantially as described.”

This claim is apparently valid, and surely removes the criticism previously noted as to the lack in the defendants' machines of any motion on the part of the oven itself, if that lack could be found. Claim 27 adds to claim 23 the chill plate or artificially cooled ring, and this, again, would seem to be valid.

The defendants contend that their ring is not a chill ring, in the sense that it is not artificially cooled; nor does it produce a sudden chill. But the whole scope of the patent and the statements of the specifications show that, whether artificial means of cooling is provided, or whether the chill ring is merely a metal ring to reduce temperature to a moderate degree, the use of the ring is to produce the contraction of the metal cap before release of pressure and the solidification and setting of the adhesive material to the desirable point, also before the pressure is removed. Such use brings the ring within the definition of a “chill,” although the purpose of “hardening” the metal surface by rapid reduction of temperature is not needed or intended.

The defendants have offered testimony as to a second burner, placed under the plunger ring and intended to maintain the heat of the closures at substantially the temperature at which they were before the plungers were applied. They have even used the heat under the plunger ring, when no heat was under the oven or “star” ring. This last experiment closely resembles the Painter method patent, and does not affect the issues of the case based upon the defendants' machines and proven commercial methods. But if, in such a way, they can escape the provisions of the Wheeler claim 27—that is, so as to dispense with the chill ring—they would still be infringing the combination shown in claim 23, and, unless the temperature of the plunger ring were such as to prevent any cooling, would be infringing claims 1 and 7.

It must be held, therefore, that upon the entire case the defendants' devices infringe the claims mentioned of the Wheeler patent, the claims of the Painter method patent, and claims 2 and 6 of the Painter machine patent, and that the complainant is entitled to a decree.

**JOHNS-PRATT CO. v. E. H. FREEMAN ELECTRIC CO.**

(District Court, D. New Jersey. December 13, 1912.)

**1. PATENTS (§ 26\*)—INVENTION—COMBINATION OF OLD ELEMENTS.**

Each and every separate element of a combination may be old, and yet the combination as a whole may show patentable novelty and invention if the several elements so coact as to produce a result which is either new in itself, or by means of such coaction is produced in a novel or improved way.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.\*]

Patentability of combinations of old elements as dependent on results attained, see note to *National Tube Co. v. Aiken*, 91 C. C. A. 123.]

**2. PATENTS (§ 66\*)—ANTICIPATION—PRIOR ART.**

A patent is not in the prior art with respect to another which at the time of its issuance was pending on application in the Patent Office.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. § 66.\*]

**3. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—SAFETY-FUSE.**

The Sachs patent, No. 660,341, for a safety-fuse, consisting of a combination of elements, the most important of which is a thin, flat safety strip of rapidly oxidizing metal, of extended area, and maximum contact with the nonconducting filling in the case, was not anticipated, and discloses patentable novelty and invention; also *held* infringed.

Suit in equity by the Johns-Pratt Company against the E. H. Freeman Electric Company. On final hearing. Decree for complainant.

Wetmore & Jenner, of New York City (Edmund Wetmore, of New York City, of counsel), for complainant.

D. P. Wolhaupter, of Washington, D. C., for defendant.

CROSS, District Judge. The complainant is the undisputed owner by assignment from one Joseph Sachs of letters patent No. 660,341, bearing date October 23, 1900, for a safety-fuse. This patent the complainant by its bill of complaint herein alleges the defendant has infringed. This allegation the defendant denies, and it also denies the validity of the complainant's patent. Sachs, the patentee, in his application, speaking of the prior art and generally of the nature and character of his invention, says:

"Safety-fuses have usually been heretofore inclosed in a tubular case, and surrounded with a filling of nonconducting material. These fuses have consisted of a wire which, when fused by an excess current, was maintained in place in a melted state by the surrounding filling material, and the fused metal still served to carry the current for a period until the same gradually became dispersed in the interstices of the filling and the circuit broken. The fuse-wires used in such fuses have been of lead or lead-tin alloy, and, since this metal has a low conductivity, a very large section of metal was used for the fuse-wires to carry the current, and this large section when fused was difficult to disperse in the filling material. This hanging of the fuse-wire in a melted state made such fuses inaccurate as to their carrying capacity. I have discovered that the nonarcing qualities or action of a fuse depends upon the disposition, character, and amount of the metal, and that for this purpose a fuse-strip having a relatively small quantity of metal will give the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



best results. I have also discovered that the best results are obtained from the use of a metal which when melted or fused rapidly oxidizes even if the melting point of the metal is not comparatively low.

"My invention relates to a safety-fuse of metal made thin and fine and disposed through an appreciable area of the tube-section, and the same preferably consists of a flat thin strip held between terminals having a better conductivity than the fuse itself, said strip being preferably of a rapidly oxidizing metal. A fuse of this character placed in a tubular case and surrounded with a nonconducting filling and fused by an excess current will not only rapidly oxidize, but become quickly dispersed in the interstices of the filling material. Where the surrounding material combines with the fused wire, the combination is more readily accomplished because of the greater surface of material exposed in the fuse-wire and in contact with the surrounding material. I have found that zinc or an alloy of zinc is best suited to my purpose, and that the thinner and finer the metal and the greater the spread thereof, the better. When the nonconducting filling material is of a character to combine with the fuse-strip when melted, the thin strip of increased melting point is an advantage. The thin fine strip of metal is distributed through a larger section of the inclosed filling, and thus on disruption more readily dispersed through the interstices of the filling than if the strip were of compact sectional area."

Later, and speaking more particularly of the fuse-strip, he adds:

"The strip *c* is of a very thin flat metal, occupying considerable area across the case, and in the same there is a relatively small quantity of metal, and the metal is preferably one that rapidly oxidizes. This I prefer to be a strip of zinc or an alloy of zinc, the terminals *d*, connected therewith, being of greater size and better conductivity, and, of course, being so far distant from one another within the case that when the strip *c* is fused and disperses in the interstices of the filling said terminals are too far apart for the passage of any current or spark or for the existence of any arcing condition. If this thin strip is melted by an excess current instead of remaining in place in the filling, as would a wire of compact section, it is dispersed quickly in the interstices of the filling upon either side of the thin strip, so that the circuit is broken immediately."

The patent has six claims, all of which it is alleged have been infringed by the defendant. It will be unnecessary, however, to set forth more than the second of them, in order to give a sufficiently clear conception of them all. That claim is as follows:

"2. The combination in a safety-fuse with a tubular case and a nonconducting filling material, of end terminals within the case of relatively ample conductivity, and a fuse-strip of thin flat metal of extended area connected to and between the said terminals, substantially as and for the purposes set forth."

The patent in suit was indirectly considered by the Circuit Court of Appeals for the Second Circuit, in *Johns-Pratt Co. v. Sachs Co. et al.*, 175 Fed. 70, 99 C. C. A. 92, in which Sachs was a defendant, as was also a corporation organized by him, and in which he was found to have been a large stockholder and a moving spirit. The defendants therein were alleged to have infringed the Sachs patent, an allegation which they denied; but inasmuch as Sachs, the patentee, had assigned his patent for a valuable consideration to the complainant, he was held to be estopped from denying its validity, thereby rendering it unnecessary to adjudicate that point. Consequently whatever was said by the court in relation thereto was entirely obiter. Nevertheless its high standing and reputation necessarily give great weight

to all of its utterances. It is not surprising, therefore, that the defendant's counsel at the argument urged upon the attention of this court the following expression by Judge Lacombe, who delivered the opinion of the court in the case referred to, and who, after quoting from the specification of the patent and setting forth its various claims, added:

"Eliminating these preferentials, it is manifest that the novelty which the patentee sought to secure consisted in making the fuse-strip of thin flat metal of extended area instead of a wire or other strip having a compact sectional area; the object being to increase the surface of the metal with which the filling is in contact, so as to insure its immediate dispersion, when fused, in the filling material. The difference between such a strip thus brought in contact over an extended surface and wires, and strips of compact cross-sections which were found in the earlier art, was emphasized in correspondence with the examiner, who allowed the claims after requiring the applicant to withdraw an alternative form in which the fuse-strip consisted of a series of slender wire-like strands, the members of which were parallel with one another forming a flat series. The examiner evidently considered that form not patentably different from the wires of the prior art, and pointed out that the filling could not with such a structure be brought in contact with the metal over an extended area.

"We do not find it necessary in this suit to search the prior art to see if it discloses the existence of a thin flat metal fuse-strip of extended area in contact over its surface with nonconducting filling, because, if such a structure were shown to be old, there would be no patentable novelty in the device described in the specifications and passed by the Patent Office, and the patent would be void for lack of invention."

[1] The defendant's counsel in the present suit, seizing and relying upon so much of the foregoing extract as relates to fuse-strips, and upon the additional fact that fuse-strips are repeatedly referred to in the prior art, strenuously argued at the hearing that the Sachs patent is invalid for want of novelty and invention. This argument, however, leaves out of sight the special characterization of the fuse-strip of the patent in suit, viz., that it is a strip of a thin, flat, rapidly oxidizing metal of extended superficial area, which is so peculiarly located and so peculiarly connected with the other elements in the combination that it is enabled thereby to coact with them in the production of a novel and useful result. It should be noted, moreover, and special emphasis laid upon the fact, that the patent is for a combination and that the claims are combination claims; hence, while it is not denied that the several elements in the combination are old, it does not follow therefrom that the patent is invalid. Each and every separate element of a combination may be old, and yet the combination as a whole show novelty and invention. The question in all such cases is whether the several elements so coact as to produce a result which is either new in itself or one which by means of such coaction is produced in a novel or improved way. Twenty-five or more patents and various publications of the prior art are set out in the defendant's answer, and claimed fully and conclusively to establish the invalidity of the patent in suit for lack of novelty and invention.

The patents just referred to were issued between May, 1880, and June, 1900, but the record does not show whether any of them, or, if, any, which of them, were commercially successful. For all that appears, they may have been merely paper patents. It does, however,

clearly appear in the record that in May, 1895, at a meeting of the American Institute of Electrical Engineers, great dissatisfaction was expressed among the members at the state of the fuse art, and it was said, among other things, "that fuse-metals are under no circumstances to be considered in the light or nature of a protection." And, again, that the commercial fuses then on the market had been tested, and it was found "that none of them came anywhere near doing what they were advertised to do," and that there were "innumerable objections that could be stated to the use of fuse-metal for the protection of wires and preventing of overheating the same." The foregoing remarks were made, as already stated, at the May, 1895, meeting of the Institute. Again, at its October meeting of the same year, in speaking of the safety-fuse, acting by heat, it was said, notwithstanding its use was universal, "that it is still one of the most unreliable of the many devices employed on electric circuits," and of fuse-wires in general "that they are by no means relied upon, indeed the very term 'fuse-wire' is almost synonymous with unreliability." More remarks of the same derogatory character were made at those meetings, but it seems unnecessary to reproduce them. It is sufficient to say that the discussion of the safety-fuse and of fuse-metals by the members of the society on those occasions clearly shows that up to that time nothing reasonably safe or reliable had been produced in the safety-fuse art. Safety-fuses were unquestionably in common use, but they were unsatisfactory, and especially unsatisfactory to persons skilled in the art. Something far better was demanded. It is well to note at this point that between the date of the last-mentioned meeting of the Institute of Electrical Engineers and the date of the patent in suit but five of the numerous patents set forth in the defendant's answer were issued, and of them one was issued to Sachs, the patentee of the patent in suit, and another to one Downes, which, for a reason that will subsequently be referred to, cannot be considered as forming a part of the prior art. The consideration of those later patents is important with a view to ascertaining what advance, if any, they had made in the art, and to what extent, if at all, they had solved the defects which prior to that time had admittedly existed therein, and been deemed of sufficient importance to engage the serious attention and thought of electrical engineers. The first of the five patents just referred to is No. 597,969, issued to one Ferguson in 1898. It covers an open link fuse, and is not designed to be used, or capable of being used, as an inclosed fuse. The fuse strip is arched, and by narrowing the fuse at the crown of the arch the patentee made certain its rupture at that point. Ferguson's idea and the scope and purpose of his patent are so entirely different from that disclosed by the patent in suit as to render any further or extended consideration of his patent unnecessary.

Next we have a patent to Hadaway, No. 620,309 (1899). While one or two of the drawings of this patent are not unlike those of the patent in suit, a study of the specification fails to show any substantial likeness to the underlying principle of that patent. Hadaway states that his object was "to secure the conversion of the fuse-wire or strip into

an insulating substance below the temperature at which the fuse will melt, and to thus avoid the formation and dispersion of heated particles, which may do injury to surrounding objects." Later he says:

"The primary feature of my invention is the use in an electric fuse of magnesium which oxidizes below the point of fusion, and the secondary features of the invention are the use of such magnesium as a coating for copper or other metal and the combination with the magnesium of a coating of manganese binoxid to effect the oxidation of the magnesium, at a perfectly definite temperature dependent upon the heat of the binoxid."

The fuse thus described is somewhat similar to one disclosed in a prior patent to Sachs, both of which, as testified to by complainant's expert, undertake to convert the conductor by chemical action into a nonconductor. Hadaway's first claim shows the nature and character of his invention and its complete unlikeness to the patent in suit. That claim reads as follows:

"1. In an electric fuse, a magnesium wire or strip employed to conduct and to break the current, and adapted to oxidize below the point of fusion, and thus forming an infusible conductor under such conditions, substantially as set forth."

The next of the five patents above referred to is No. 635,395, issued to Sachs in 1899. Whatever may be said for or against this patent, it is certainly true that it nowhere suggests the fuse of the patent in suit. The idea of a fuse-strip of thin, flat, rapidly oxidizing metal of extended area, or, as expressed in another place, of relatively large area, entirely surrounded by a pulverized material in combination as stated, is nowhere suggested by this earlier patent of Sachs. Moreover, this patent, although granted just prior to the patent in suit, was not cited or referred to by the examiner, and defendant's counsel did not specially rely upon it at the argument.

[2] The last of the patents referred to is No. 640,371, which was issued to one Downes in 1900. By this patent Downes suggests the employment of a plurality of wires of tin, copper, or lead alloy, so that by separating the metal composing the fuse into smaller divisions greater opportunity would be afforded when the metal composing the same is volatilized for the gases to expand and mingle in the filling surrounding the fuse-wires. This patent notwithstanding it was cited by the examiner as an anticipation of the patent in suit as a matter of fact is not found in the prior art. It was issued in January, 1900, which, although prior to the date of the issue of the patent in suit, was subsequent to the filing of the application therefor, and consequently Downes cannot properly be cited as an anticipation of it. *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68; *Diamond Drill Co. v. Kelly Bros.* (C. C.) 120 Fed. 282; *Union Typewriter Co. v. L. C. Smith & Bros.* (C. C.) 173 Fed. 288; *General Electric Co. v. Allis-Chalmers Co.* (C. C.) 190 Fed. 165. At all events, so much of the patent in suit as was deemed by the examiner to have been anticipated by Downes was eliminated by Sachs upon objection by the examiner, and this was done without detracting from that which remained, and also without estopping the applicant from claiming the full benefit of what he was finally allowed. The Downes patent called, as already stated, for a



fuse consisting of a plurality of wires. Sachs in his original specification, in addition to what was finally allowed him, asked for a fuse composed of a "series of slender strips or wire-like strands," and it was this form, and this only, which in view of Downes was denied him and to which denial he yielded.

[3] This brief examination of such of the alleged anticipatory patents as were issued between 1895 and 1900 does not show any particular advancement of the art, certainly not any advancement at all approximating that made by the patent in suit; nor does the record show that a single fuse was ever made under any of those patents. Apparently the members of the Institute of Electrical Engineers could at any time down to the issue of the Sachs patent in suit have met and bemoaned the unprogressive and unsatisfactory condition of the fuse art with as much genuine concern as they did in 1895. Once, however, the patent in suit was issued, we find that a long-felt want had apparently been met, since undisputed testimony shows that the annual sales of fuses made under that patent have ranged between 200,000 and 400,000 since the date of its issue.

But if, as has just been determined, none of the patents issued after the meetings of the Electrical Engineers above referred to were held anticipated the patent in suit, it is manifest, if the defendant's position that it had been completely anticipated is well taken, that at the very time the Electrical Engineers were bemoaning the stagnant and unsatisfactory state of the fuse art there were, and had been for years, patents in existence which met their most exacting demands. One of these is a British patent, No. 19,076, issued in 1880 to one Mordey, and an American patent, No. 622,511, issued to him for the same invention in 1899. Before considering somewhat in detail the character and scope of this invention, it should be said of it that it comes nearer to anticipating the Sachs patent than any other, and that, if it does not anticipate it, no other of those cited does. But the Mordey patent as an anticipation must be judged by the knowledge of the art which existed at the time when the British patent was issued. Mordey in his specification describes a fuse consisting of a thin wire or strip of tin foil, or sheet of metal, but he nowhere speaks of the strip as having extended or superficial area, nor does he assert for the strip form any peculiar or special advantage. The drawings show nothing but a small copper wire fuse. And just here it may be remarked that the prior art shows numerous patents wherein the fuse is spoken of as a wire or strip. The word "strip" apparently being used as synonymous with wire, certainly no especial advantage was ever attached in the prior art to a fuse of the strip form. On the contrary, in the present case, the combination between the "extended area" of the fuse-strip of the patent in suit and the surrounding filling is set forth in the specification as follows:

"The thin fine strip of metal is distributed through a larger section of the inclosed filling, and thus, on disruption, more readily dispersed through the interstices of the filling than if the strip were of compact sectional area."

And again in claim 5 the fuse-strip is spoken of, not only as being imbedded in a filling of nonconducting material, but as consist-

ing of a single flat strip of thin metal of extended area and maximum contact with the filling material and terminals at the ends of the fuse-strip and case. The idea of giving to the fuse-strip extended superficial area so that it might have maximum contact with the filling material and terminals is novel to the patent in suit, and cannot be found elsewhere. But it may be said there is no invention in all this; that it relates merely to a matter of size or degree. But this is clearly not so. It is rather a matter of invention as pointed out by Judge Platt in *Johns-Pratt Co. v. Sachs Co. et al.* (C. C.) 168 Fed. 311, where, in sustaining this patent, he said:

"That such a novel strip is patentable has been decided in the *Incandescent Lamp Case*, 52 Fed. 309, 3 C. C. A. 83. There a rod was reduced to a filament, and it is held that such a change in dimension produced a new result and was therefore a difference in kind rather than in degree."

Furthermore, the Mordey fuse wire or strip is not attached to inner terminals of relatively ample, and better conductivity, as demanded for the Sachs fuse. Indeed, the ends of the Mordey fuse are not within the tube at all, and consequently the fuse is not, and cannot be, completely surrounded by the filling, and this notwithstanding it is provided that the tube may be wholly filled with a finely divided nonconducting material. Again, while Mordey at first says that the tube may be wholly filled by a nonconducting filling surrounding the conductor, which we have just seen it does not, and cannot do because the ends of the conductor are not within the tube, he later admits that that is only an inferior method of construction, and that, after all, it is better to surround the fuse in whole or in part by an air-space which will both afford means for observation and also serve as a heat nonconducting medium. These ideas are expressed in the specification of his patent as follows:

"In the construction Fig. 4 the air-space likewise is shown as completely surrounding the conductor, notwithstanding the observation can be had from the top of the sheath or vessel only when the cover is removed. This is because I consider that for the best results in the practical use and operation of the fuse and the maintenance of a substantially uniform fusing point of temperature the air-space should completely surround the conductor even though the inspection, if provided for, be restricted to one side only. It will also be noted that in both the constructions Figs. 1 to 4, inclusive, the air-space is central of the length of the tube, and is relatively short as compared with the length of the tube. I have found this length and location of air-space to produce the best results, it best tends to concentrate the first blowing or rupturing point of the fuse within the air-space."

From what has been said of the Mordey patent, it is perfectly obvious that he had no conception of the Sachs invention. Practically the only features common to both Mordey and Sachs are an inclosed fuse-strip and a filling material, which latter Mordey says may be either of nonconducting material or air, preferably the latter. However, the severest criticism which can be made of the Mordey patent is that, although it had been published to the world for 10 years, its teachings did not appreciably advance the art, and the production of a reasonably safe and efficient safety-fuse remained an unsolved problem until Sachs after repeated efforts evolved the patent in suit,

whereupon the not uncommon attempt is made to interpret Mordey in the light of Sachs, which is not permissible.

More might be said, and indeed much more has been said by complainant's counsel, in distinguishing the patent in suit from the Mordey patent and others in the prior art, but it seems unnecessary to prolong this opinion for that purpose. As already intimated, the elements of Sachs combination claims were all old. Indeed, several of them had appeared in numerous prior patents; but the patentable novelty of such claims cannot be destroyed by merely showing that their several elements are old, and of this patent as an entirety complainant's expert has well said:

"No one in the art prior to the conception of Sachs set forth in the patent in suit had combined in one structure a thin flat strip of rapidly oxidizing metal embedded within and entirely surrounded and isolated by a filling material, which was in contact with a maximum amount of surface of the strip as the result of its thinness and wideness, and which strip was connected to terminals of relatively greater conductivity within the case which held the filling material about the strip."

That extract sums up the situation and fully expresses the ultimate opinion and finding of the court. The patent will be sustained.

Very little need be said upon the question of infringement. Apparently any fair-minded observer must upon inspection be satisfied that the defendant's fuses infringe the several claims of the patent in suit. Indeed, the devices which were held by the Circuit Court of Appeals of the Second Circuit, in *Johns-Pratt Co. v. Sachs Co.*, supra, to infringe the patent in suit, and which are in evidence here, are so much like those of the defendant's manufacture as to be well-nigh indistinguishable.

A decree in the usual form will accordingly be entered in favor of the complainant, with costs.

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## AMERICAN CARAMEL CO. v. GLEN ROCK STAMPING CO.

(District Court, M. D. Pennsylvania. December 30, 1912.)

No. 127.

### 1. PATENTS (§ 235\*)—"INFRINGEMENT"—CHANGES IN FORM.

A device which is constructed on the same principle as that of a patent, has the same mode of operation, and accomplishes the same result by the same or equivalent mechanical means, infringes the patent, although it may differ in form.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 371; Dec. Dig. § 235.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3590-3594.]

### 2. PATENTS (§§ 45, 49\*)—NOVELTY AND UTILITY—ADMISSION BY INFRINGEMENT.

An infringement of an improvement patent is a practical admission of the utility and novelty of the patented improvement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 51-53, 59-62; Dec. Dig. §§ 45, 49.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. PATENTS (§ 112\*)—VALIDITY—PRESUMPTION FROM GRANT.**

The presumption that the subject-matter of a patent is new, useful, and embodies invention, arising from the grant, is strengthened in an infringement suit, where the prior patents cited by defendant were considered by the Patent Office.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162-165; Dec. Dig. § 112.\*]

**4. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—CARAMEL HOLDER.**

The Lafean patent, No. 945,788, for an improvement in caramel holders, was not anticipated and discloses patentable invention; also *held* infringed.

In Equity. Suit by the American Caramel Company against the Glen Rock Stamping Company. On final hearing. Decree for complainant.

John M. Coit, of Washington, D. C., for complainant.

C. T. Belt, of Washington, D. C., and H. C. Brenneman, and John J. Bollinger, both of York, Pa., for defendant.

WITMER, District Judge. This is a suit in equity, praying for an injunction and an accounting, based upon an alleged infringement by defendant of letters patent No. 945,788, dated January 11, 1910, for a certain improvement in caramel holders, issued to Stuart B. Lafean and assigned to complainant. The defendant denies the validity of the patent in suit, and, furthermore, contends that, if such is valid, it has not been infringed by the admitted manufacture and sale of defendant's holders.

The patent belongs to a class of inventions known and described as caramel holders, used and designed to hold a multiplicity of caramels, or like confections, in parallel rows, disposed on a sheet of tin or the like, so that the caramels or confections are held separated from each other, but may be quickly emptied or thrown from the holder when desired; the individual holders for multiple caramels being stacked up in series for packing or shipping, without danger of the caramels in the individual layers being brought in contact with each other. The Lafean invention accomplished this by retaining in position on the plate by a flange on each side of the caramels, which flanges are in pairs and are separated by a small intervening space. As indicated in the patent, the construction is of the same general type as that disclosed in the patent to P. C. Wiest, No. 428,765, which was formerly owned and in use by the complainant, upon which it is apparently intended as a mechanical improvement; it furthermore appearing from the specifications that:

"The object of the invention is to simplify the manufacture of the plates designed to contain the caramels in rows separated from each other, and at the same time to provide means for preventing the caramels from being accidentally displaced."

This is to be accomplished, as claimed, by—

1. A caramel holder, consisting of a sheet having rows of rectangular caramel receiving spaces, each space having central at its sides and ends vertical

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



flanges extending throughout a part of its length, cut independently from the sheet within the space and bent at right angles thereto.

2. A caramel holder, consisting of a sheet having rows of rectangular caramel receiving spaces, each space having at its sides and ends vertical flanges cut from the sheet within the space and bent at right angles thereto, whereby there will be openings through the sheet within the caramel spaces.

[1] The holder manufactured and sold by the defendant is clearly within the range of these claims. Neither of the defendant's experts have denied that the holder embodied the construction claimed, while both of complainant's experts have found that this holder embodies the structure and all of the advantages described and claimed in the patent. True, it has some features not described in the patent; but these are added to those described in the patent, and not substituted for them. The defendant's holder has certain ribs or creases across its surface and about its margin, no doubt intended to stiffen it; otherwise it has the flanges as claimed by the complainant's patent, which necessarily are produced by like operation. The idea covered by the patent is completely embraced in the idea expressed in the infringement, although the later is more comprehensive than the former.

"Identity exists with reference to the question of infringement, if the idea of means protected by the patent is found, substantially existing, in the invention practised by the alleged infringer." Robinson on Patents, vol. 3, par. 892; *Lourie Implement Co. v. Lenhart et al.*, 130 Fed. 122, 64 C. C. A. 456; *Columbia Wire Co. v. Kokomo Steel & Wire Co.*, 143 Fed. 116, 74 C. C. A. 310.

That the flanges of defendant's holders are segmental or almost semicircular in outline, while in the patent they are shown as rectangular, is not of importance, since they perform the same functions in either, and their form has, therefore, nothing to do with the essence of the invention. Neither technical distinctions nor differences of appearance are as important in determining questions of identity as the substance of the matter in controversy in arriving at the conclusion whether real inventive thought has been appropriated by the defendant.

"The court will look through the disguises, however ingenious, to see whether the inventive idea of the original patentee has been appropriated, and whether the defendant's device contains the material features of the patent in suit, and will declare infringement, even when those features have been supplemented and modified to such an extent that the defendant may be entitled to a patent for the improvement. *Crown v. Aluminum Stopper Co.*, 108 Fed. 845, 48 C. C. A. 72; *Robins v. American Road Mach. Co.*, 145 Fed. 923, 76 C. C. A. 461; *Norton v. Jensen*, 49 Fed. 859, 1 C. C. A. 452; *Dowagiac v. Superior Drill Co.*, 115 Fed. 886, 53 C. C. A. 36."

It is very apparent that the defendant's holder presents the mechanical subject-matter embodied in the claims of the complainant's patent in the order, relation, and purpose therein set forth, evidencing an invasion of the exclusive right conferred by the patent.

May the patent be disregarded in view of the prior art? Regarding the latter, the Wiest holder, on which it was intended as an improvement, embodies as a whole the nearest approach to it. In the Wiest holder the two adjacent flanges are punched from a single opening

between the caramel holding spaces; the material being cut apart where the two flanges separate and are bent upwardly. In the Lafean patent, on the contrary, the flanges are punched from the material within the candy holding space, and as a consequence each flange is separately punched from the material, having no connection, edge to edge, with some other flange, as in the former. To make the holder with one punching operation, instead of two, and thus economizing in space and its manufacture, and to prevent accidental displacement of caramels, is the object of the improvement. The specifications set forth that:

"It is cheaper to make the plate where all of the flanges can be punched by one operation than where separate strokes are required for different flanges."

Again:

"In addition to the advantage in the process of manufacture, the punching of the flanges separately from the sheet within the margin of the caramel space has the additional advantage of providing openings in the sheet beneath the caramel which serve to hold the caramel more firmly in place on the sheet, so as to prevent accidental displacement."

[2] That the Lafean holder is of such a construction as to enable all of the flanges to be produced by a single operation will not be disputed; hence it can be made more easily and with less cost than a plate requiring double operation. Of course, the claim of the patent is not for the operation, but for the plate, for which novelty is claimed, permitting such operation. I am not persuaded, as contended by defendant, that the flanges in the Wiest holder can be successfully produced by one operation. It appears very plausible, as stated by Lafean in testifying on this subject, that when the sharpened cutting knives of the die are brought down to bear on the tin plate, in the center of the opening permitting the die to pass through, it would tend to tear rather than cut a smooth edge, for want of surface to support the pressure of the cutting die. That Lafean has solved and overcome this objection and produced something by way of improvement is not for the respondent to deny, having adopted his idea of punching the flanges from within the caramel space and applied it to their own invention. If it is not a useful improvement over the holder of Wiest, which defendants are at liberty to use, why do they insist on using it instead? They praise Wiest and imitate Lafean. And, if not novel, why did they not adopt it before?

"An infringement of an invention amounts to an admission of utility, because use implies utility. It is fair to presume that the person using an invention would not do so if he thought it of no utility, and he is estopped to deny that it possesses utility." Cyc. vol. 30, p. 846; *Goss v. Scott*, 108 Fed. 253, 47 C. C. A. 302; *Hillard v. Fisher*, 159 Fed. 439, 86 C. C. A. 469.

[3] The presumption is that the subject-matter of the patent is new, useful, and embodies invention, having the approval of the Patent Office in the grant. This presumption comes with great force in the present instance, where it appears that the same patents, Wiest, Hershey, and Bisler, of the prior art, here cited, were considered by the examiner. While the deliberate judgment of the expert tribunals of

the Patent Office is not absolutely binding on the court, it certainly is entitled to great weight.

"The officials of the Patent Office, with the prior art before them, so found and granted a patent. This action on their part creates a presumption of patentable novelty, which presumption can be overcome only by clear proof that they were mistaken, and that the combination lacks patentable novelty. *Fairbanks v. Stickney*, 123 Fed. 79, 59 C. C. A. 209; *Cantrell v. Wallick*, 117 U. S. 689 [6 Sup. Ct. 970, 29 L. Ed. 1017]; *Coffin v. Ogden*, 18 Wall. 120 [21 L. Ed. 821]; *Streator v. Wire Glass Co.*, 97 Fed. 950 [38 C. C. A. 573]; *Fraim v. Keen* [C. C.] 25 Fed. 820; *Osborne v. Glazier* [C. C.] 31 Fed. 402."

"There is the presumption arising from the granting of the patent, which, in this case, was issued, as the proceedings in Patent Office show, after full and critical examination, and this after rejections and references to previous patents of a character very similar to those we have in the present record—indeed, some of them are the same. *Canda v. Michigan Malleable Iron Co.*, 124 Fed. 486, 61 C. C. A. 194."

[4] The required proof to invalidate the patent is wanting here, and the patent, which has been found infringed, is affirmed. It follows that the complainant is entitled to the relief sought by the bill, and that the defendant should be enjoined from further infringement, which is accordingly so ordered and adjudged, with costs of suit to be taxed against the defendant. The usual reference may be had by complainant, if desired. An exception is noted for the defendant.

Let a decree be submitted accordingly.

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#### AMERICAN CARAMEL CO. v. WILLIAMS et al.

(District Court, M. D. Pennsylvania. December 30, 1912.)

No. 128.

PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—CARAMEL HOLDER.

The Lafean patent, No. 945,788, for an improvement in caramel holders, held valid and infringed.

In Equity. Suit by the American Caramel Company against George W. Williams and R. C. Boeckel, copartners as R. C. Boeckel & Co. On final hearing. Decree for complainant.

John M. Coit, of Washington, D. C., for complainant.

C. T. Belt, of Washington, D. C., and H. C. Brenneman and John J. Bollinger, both of York, Pa., for defendants.

WITMER, District Judge. The defendants having admitted the purchase and use, without license from complainant, of the holders manufactured by the Glen Rock Stamping Company, for reasons expressed in my opinion in the complainant's case against said Glen Rock Stamping Company, 201 Fed. 363, No. 127 in equity, it is ordered that the defendant be enjoined from further infringement of complainant's patent No. 945,788, with costs of suit to be taxed against the defendant. The usual reference may be had by complainant, if desired. An exception is noted for the defendant.

Let a decree be submitted accordingly.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## JOHNSTON et al. v. BRASS GOODS MFG. CO.

(District Court, E. D. New York. December 20, 1912.)

## COURTS (§ 299\*)—FEDERAL COURTS—JURISDICTION.

A bill, alleging infringement of a patent in the manufacture and sale of filters and unfair competition in selling filters, and praying for an injunction restraining the infringement and the sale of filters in the types of packages complained of, is demurrable, where both parties are citizens of the same state, on the ground that the court has no jurisdiction over the unfair competition; and complainant will be given leave to amend, so as to stand on alleged infringement alone.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. § 299.\*]

In Equity. Suit by George W. Johnston and others against the Brass Goods Manufacturing Company. Demurrer to complaint sustained, with leave to amend.

The bill of complaint alleged infringement of a patent in the manufacture and sale of filters, and also alleged unfair competition in selling the filters in packages alleged to have the same shape, size, color, and printing as those of the complainants. The bill of complaint prayed for an injunction restraining the alleged infringement, and also prayed for an injunction or injunctions restraining the sale of filters of any kind in the types of packages or boxes complained of. Both parties were citizens of the same state, and the demurrer was sustained, on the ground that the court had no jurisdiction over the unfair competition, and that its jurisdiction of the alleged infringement did not bring into the case or give the court jurisdiction of the alleged unfair competition.

Charles McC. Chapman, of New York City, for complainants.

Henry C. Townsend, of New York City (C. F. J. Tischner, of New York City, of counsel), for defendant.

CHATFIELD, District Judge. The demurrer must be sustained. *Burt et al. v. Smith*, 71 Fed. 161, 17 C. C. A. 573, *Hutchinson, Pierce & Co. v. Loewy*, 163 Fed. 42, 90 C. C. A. 1, and *National Casket Co. v. New York & Brooklyn Casket Co.* (C. C.) 185 Fed. 533, settle the law in this circuit. As well could infringement and an action for specific performance of contract to sell real estate between the parties to the patent suit be united, on the ground that the court had jurisdiction of the parties. See, also, *Cushman v. Atlantis Fountain Pen Co. et al.* (C. C.) 164 Fed. 94; *Keasbey & Mattison Co. v. Philip Carey Mfg. Co.* (C. C.) 113 Fed. 432; *C. L. King & Co. v. Inlander* (C. C.) 133 Fed. 416.

The case of *Ball & Socket Fastener Co. v. Cohn et al.* (C. C.) 90 Fed. 664, which is cited by complainant, following *Adee v. Peck Bros. & Co.* (C. C.) 39 Fed. 209, cannot be considered as sufficient to support the contrary view. The *Adee Case*, *supra*, as well as *Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co.* (C. C.) 60 Fed. 622, and *Dennison Mfg. Co. v. Thomas Mfg. Co.* (C. C.) 94 Fed. 651, seem, in so far as they affect the question, to have had other

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



grounds of federal jurisdiction in the cause of action joined to the patent right.

Complainant may have 10 days to amend, so as to stand on alleged infringement alone.

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In re MERRY.

(District Court, D. Maine. January 4, 1913.)

No. 292.

**1. BANKRUPTCY (§ 400\*)—SCHEDULES—AMENDMENTS SO AS TO ENLARGE EXEMPTIONS.**

The bankruptcy court does not favor the extension by amendment of exemptions of the bankrupt where such extension will work solely for the benefit of a creditor, though the court as a rule exercises great liberality in permitting amendments.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 671-675; Dec. Dig. § 400.\*]

**2. BANKRUPTCY (§ 400\*)—SCHEDULES—AMENDMENTS SO AS TO ENLARGE EXEMPTIONS.**

Where a bankrupt did not assert a claim for exemption under Rev. St. Me. c. 83, § 64, subsec. 7, of a horse bought from a seller retaining title by unrecorded notes, an amendment of the bankrupt's schedules so as to enlarge his exemptions by including the horse, and thereby benefit the seller, and prevent general creditors from holding the horse by attachment, would not be granted, since under Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended in 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1500]), the trustee, as to all property in the custody or coming into the custody of the bankruptcy court, is vested with the rights and remedies of a creditor holding a lien by legal or equitable proceedings thereon.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 671-675; Dec. Dig. § 400.\*]

In the matter of the bankruptcy of Edward C. Merry, a bankrupt. Decision of the referee denying to the bankrupt right to amend his schedules so as to enlarge his exemptions, and question certified to the District Court. Affirmed.

Barrett Potter, of Brunswick, Me., for bankrupt.

Clement F. Robinson, of Portland, Me., for trustee in bankruptcy.

HALE, District Judge. The referee certifies to this court a question relating to the right of the bankrupt to amend his schedules so as to enlarge the exemptions beyond those claimed by him in his schedules. In his first examination before the referee, the bankrupt testified:

"I have made no claim for exemptions, being a single man 34 years of age, with nothing to claim as exempt, unless my clothing."

[1] He now claims that he inadvertently omitted to claim an exemption for "one black horse worth less than three hundred dollars, heretofore used by the bankrupt in his grocery business, an exemption under Revised Statutes of Maine, c. 83, § 64, subsec. 7; said

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

horse being the same on which, according to the bankrupt's schedule of assets, one I. R. Morrill holds one or more Holmes notes." It appears in testimony that the horse in question originally belonged to Morrill, who sold it to Merry, retaining the title, however, by certain Holmes notes which he did not record; that the horse is the only horse Merry had any claim on; that he owned no other animals of the kind mentioned in the Revised Statutes of Maine, c. 83, § 64, subsec. 7, relating to exemptions. Under that section, the horse was exempt from attachment and execution. The Holmes notes were not recorded as provided in Revised Statutes of Maine, c. 113, § 5. Hence, they were valid only as between the original parties thereto. In his schedules Merry did not call the attention of the court to the fact that the horse was exempt. He says he did not know the horse was exempt, and his counsel did not tell him the horse was exempt; that, when he discovered the fact of the exemption, he made the petition for amendment. At the time his amendment was brought before the court it became evident that the exemption would work no benefit to the bankrupt or his family, but would at once give the horse to Morrill upon his Holmes notes. The courts in bankruptcy as a rule exercise great liberality in permitting amendments; and, when the matter was first brought to my attention, I was under the impression that, under the general rule of granting amendments, I ought to allow this extension of the right of exemption from attachment and execution. But it is clear that bankruptcy courts do not favor the extension of exemptions by amendment, when such extension works solely for the benefit of a creditor, and not for the benefit of the bankrupt and his family. In *Moran v. King*, 111 Fed. 730, 733, 49 C. C. A. 578, the Circuit Court of Appeals of the Fourth Circuit had before it a case where the bankrupt attempted to enlarge his claim for exemption for the purpose of carrying out an agreement with certain creditors; and the court held that to grant the bankrupt's petition would not be consistent with the objects of the law, or in furtherance of the administration of his estate under the Bankruptcy Law.

[2] In the case now before me, it is unnecessary to discuss whether the failure to assert his exemption in his schedule was a technical waiver on the part of the bankrupt. When the bankrupt did assert his claim for the exemption of the horse in question, it was apparent that such assertion would inure entirely to the benefit of the creditor, and would be of no advantage to himself or his family. After a careful examination of the law, I am satisfied that in refusing to allow the amendment the referee ruled in accordance with the decisions of the courts. *Moran v. King*, *supra*; *Mitchell v. Mitchell* (D. C.) 147 Fed. 280; *Re Schuller* (D. C.) 108 Fed. 591; *Re Kaufman* (D. C.) 142 Fed. 898; *Re Maxson* (D. C.) 170 Fed. 356; *Collier on Bankruptcy* (9th Ed.) p. 192, and notes, p. 659, etc., and notes.

The learned counsel for the bankrupt, and for the creditor Morrill, now makes the further contention that prior to bankruptcy Merry's creditors had no interest in the Morrill horse, and could not acquire any interest by attachment, execution, or by other equitable or legal proceeding, whether the notes were recorded or not, and that the

trustee now has no such interest, inasmuch as he has taken the property in the same plight in which the bankrupt held it at the date of bankruptcy, and that it necessarily follows that nothing the bankrupt puts in or leaves out of his schedules can deprive Morrill of his vested rights under his notes. The learned counsel has argued this proposition with great clearness and force, but, upon a careful examination of the case, it is clear that the only thing which prevented general creditors from holding the Morrill horse by attachment was the fact that the horse was exempt under the state law. If the bankrupt asserted his right of exemption, an attaching creditor could not hold the horse. If the bankrupt did not assert his right of exemption, a creditor could hold the horse under an attachment. Collier, p. 192, *supra*. It appears in testimony that the bankrupt did not assert his right to his exemption when an attachment was actually made upon the horse. He did not assert his right of exemption in his schedules in bankruptcy. When he did assert his right of exemption, it became apparent that such assertion inured to the benefit of Morrill, the holder of the Holmes notes, and of him alone.

By the amendment of 1910, § 47a (2), as to all property in the custody, or coming into the custody of the bankruptcy court, trustees in bankruptcy shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceeding thereon. Act July 1, 1898, c. 541, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1500]). This amendment makes the trustee's position somewhat stronger; but, even before the amendment, there is strong reason to hold that the result would have been the same in reference to the trustee's right to assert title to this property.

The decision of the referee is affirmed.

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UNITED STATES v. CURRY et al.

(District Court, D. Maryland. December 27, 1912.)

1. EQUITY (§ 150\*)—BILL—MULTIFARIOUSNESS.

Where certain oleomargarine taxes assessed against C. became a lien on certain real estate held by her at the time of the levy and also on certain leasehold interests, a bill to enforce the assessment against C. and also against separate grantees of the real estate and of the leaseholds was not multifarious because the grantees of the real estate had no interest in the leasehold property, and vice versa; the tax not being apportionable among the land or terms of years held by the grantor.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 371-379; Dec. Dig. § 150.\*]

2. INTERNAL REVENUE (§ 26\*)—OLEOMARGARINE TAX—LIEN—ENFORCEMENT.

The United States is not compelled to resort to a sale of chattels and personal effects of a delinquent internal revenue taxpayer, authorized by Rev. St. §§ 3187-3196 (U. S. Comp. St. 1901, pp. 2073-2077), before instituting proceedings to enforce the lien of such taxes on the taxpayer's real estate and leaseholds.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 74; Dec. Dig. § 26.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. INTERNAL REVENUE (§ 26\*)—ASSESSMENTS—LIEN—BONA FIDE GRANTEEES.**

Under Rev. St. § 3186 (U. S. Comp. St. 1901, p. 2073), providing that a delinquent internal revenue tax shall be a lien after demand in favor of the United States from the time the assessment list was received by the collector, except when otherwise provided, until paid, with interest, etc., on all property and rights to property belonging to such person, such lien was enforceable against grantees of the delinquent's real property and leaseholds subsequent to the filing of the list with the collector and demand upon the taxpayer, though they had no notice of the lien.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 74; Dec. Dig. § 26.\*]

Action by the United States against Mary E. Curry and others. On demurrer to bill. Overruled.

John Philip Hill and J. Craig McLanahan, both of Baltimore, Md., U. S. Attys.

William F. Broening, of Baltimore, Md., for defendant Charles G. Wanner, Jr.

Harry K. Brooks, of Baltimore, Md., for defendant George Romoser.

ROSE, District Judge. The government, by its amended bill of complaint, charges that in August, 1910, an assessment of \$7,344 was made against the defendant Mary E. Curry on account of stamp and special taxes due and unpaid, incurred by her as a manufacturer of oleomargarine; that on the 26th of September, 1910, she was notified by the collector of internal revenue for the district of Maryland of such assessment; that on the 7th of October, 1910, formal demand for the payment thereof was served on her; that on and after the time said assessment was received by the collector of internal revenue, and thence continuously until the 7th day of October, 1910, when demand was made upon her, she was possessed of the leasehold interest in certain real estate in Baltimore City and was seized in fee of certain real estate in Baltimore county. All this property is particularly described by metes and bounds. The bill then sets forth that at various dates thereafter, the earliest being the 25th of November, 1910, Mrs. Curry conveyed all of such property, some of it by way of mortgage and some absolutely, to some of the other defendants, and that by various mesne assignments some of such defendants conveyed their interest absolutely or by way of mortgage to still other of the defendants. The bill alleges that on account of the lien on the property aforesaid, which had arisen from the assessment of said tax, the said conveyances of the property were null and void in so far as the lien of the United States was concerned, and that the government was entitled to have the interest of the said Mary E. Curry in said real estate held by her at the time of the levy of said taxes and the demand for the payment thereof sold, and the proceeds of sale devoted to the payment of the said assessment, and for said purpose to have determined the merits of all claims and liens upon the real estate or interests therein in question.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



[1] The defendants demurred to the bill on two grounds, one, that the bill was multifarious. It is said that those defendants other than Mrs. Curry who were interested in the real estate formerly belonging to her have no interest in the leasehold property, and those who have claims upon the leasehold property have no concern with the real estate.

In the brief filed by the defendants they did not rely upon this ground of demurrer, nor do I think that it is sustainable. If the government acquired a lien by the assessment of the tax and the demand for its payment, that lien attached to all the property of Mrs. Curry. It was not apportionable among the various tracts of land or terms of years then held by her. It is hard to see how, under such circumstances, justice could be done to those who might have acquired interests in the property junior to the lien of the government without making them all parties to one suit.

The other ground of demurrer is that the bill does not state any case which entitles the government to any relief in equity against defendants other than Mrs. Curry.

In argument two reasons why the bill is wanting in equity are alleged:

[2] First, it is said that, before resort to the sale of real estate owned by a delinquent taxpayer can be had, proceedings should be taken to recover the amount due the United States from the sale of the chattels and personal effects of such delinquents under sections 3187 to 3196 of the Revised Statutes (U. S. Comp. St. 1901, pp. 2073-2077). This objection is completely answered by the cases of *Mansfield v. Excelsior Refining Co.*, 135 U. S. 326, 10 Sup. Ct. 825, 34 L. Ed. 162, and by *Blacklock v. United States*, 208 U. S. 75, 28 Sup. Ct. 228, 52 L. Ed. 396.

[3] The contention most earnestly made by the defendants, however, is that the bill does not allege that, at the time the defendants other than Mrs. Curry acquired their interest in the real or leasehold estate in question, they had any knowledge or notice of the government's lien upon it.

The hardship which the enforcement of such a lien would entail upon the defendants is strongly represented. It is admitted that the express language of the statute (section 3186) is:

"That if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person."

The loss to which the enforcement of this statute in its literal terms may expose perfectly innocent people is obvious and has been strongly stated by Judge McCrary in *United States v. Pacific Railroad (C. C.)* 1 Fed. 97. In that case, as in all others which have been called to my attention or which I have myself found, it has been held that, when the requirements of the assessment and the demand have been complied with, the lien of the government is superior to that of any one

acquiring any interests in the property after the date of demand. The government's lien is unaffected by the fact that a subsequent incumbrancer or purchaser became such without knowledge that the government had any interest in the property or claim upon it.

One of the earliest cases was that decided by Mr. Justice Swayne on Circuit. *United States v. Turner*, 28 Fed. Cas. 232.

The rule as stated has been expressly recognized and enforced by the Supreme Court of the United States in *United States v. Snyder*, 149 U. S. 210, 13 Sup. Ct. 846, 37 L. Ed. 705, and in *Blacklock v. United States*, *supra*.

It would seem that by a comparatively slight change of the statute law the rights of the United States could be sufficiently protected without endangering the interests of other persons. The collector of internal revenue at the time he makes demand upon the taxpayer might be required to transmit a copy of the demand to some office in which judgments and other recognized liens upon real estate are recorded and the records of which are consequently carefully examined by conveyancers. Whether public policy does or does not require that section 3186 shall be repealed or amended in some such way as that above suggested is a question of policy for Congress. The present state of the law was called to its attention at least six years ago. Part 1, Proceedings American Bar Ass'n 1906, p. 598.

It has, however, not taken any action. The courts must enforce the law as they find it.

The demurrer must therefore be overruled, and it is so ordered.

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**MCCORMACK BROS. CO. v. CITY OF TACOMA, WASH., et al.**

(District Court, W. D. Washington, S. D. January 4, 1913.)

No. 1,226.

**1. INJUNCTION (§ 85\*)—CRIMINAL PROSECUTION—ORDINANCE—ADEQUATE REMEDY AT LAW.**

Setting up the unconstitutionality of a city ordinance on which a criminal prosecution is based in defense thereof in general affords an adequate remedy at law which will preclude equitable relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.\*]

**2. INJUNCTION (§ 118\*)—CITY ORDINANCE—INVALIDITY—ENFORCEMENT—CRIMINAL PROSECUTION.**

Plaintiff corporation sued to set aside an alleged unconstitutional city ordinance imposing a license tax on trading stamp users, alleging that complainant had a contract with the furnisher of such stamps to use the same, that the ordinance had been declared void by the federal Circuit Court of the district as in violation of the federal Constitution, but that the Supreme Court of the state had held it valid, whereby it was useless for complainant to defend or prosecute an action in a state court, or pay the license, and sue to recover the same, for which reason plaintiff had no remedy at law or in equity in the courts of the state, that the city officials had threatened that, unless plaintiff paid the tax under the ordinance, its officers would be arrested, and that the ordinance impaired the obligation

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of plaintiff's contract, deprived it of its liberty of contract and of its liberty and property without due process of law, and denied plaintiff the equal protection of law. *Held* that, since the constitutionality of the ordinance could be finally determined by the United States Supreme Court in proceedings to review a conviction for violation of the ordinance in the state courts, the bill did not state a cause of action for relief in equity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.\*]

Restraining criminal proceedings, see note to *Arbuckle v. Blackburn*, 51 O. C. A. 133.]

In Equity. Suit by the McCormack Bros. Company against the City of Tacoma, Wash., and others to restrain the enforcement of a license tax ordinance on persons dealing in trading stamps. Demurrer to complaint sustained, and preliminary injunction denied.

Tucker & Hyland, of Seattle, Wash., for plaintiff.

T. L. Stiles and Frank M. Carnahan, both of Tacoma, Wash., for defendants.

CUSHMAN, District Judge. This suit was brought by plaintiff, a Washington corporation, against the city of Tacoma, a city of that state, and its officers, praying that the defendants be enjoined from bringing any proceeding for the collection from plaintiff of a tax, under a certain ordinance of said city imposing a license tax of \$100 a year upon every firm, person, or corporation within the city which uses any stamps, cards, or coupons, or other similar device for the sale of goods, wares, and merchandise, which said stamps, coupons, tickets, or other similar device shall entitle the purchaser receiving the same to procure from another person, firm, or corporation any goods, wares, or merchandise free of charge upon production of a number of the said stamps, tickets, coupons, cards, or other similar devices.

The cause is now before the court upon defendants' demurrer to the bill of complaint. The bill alleges that plaintiff carries on a department store in said city; that the Sperry & Hutchinson Company maintains a store in Tacoma in which articles of merchandise are offered in exchange for trading stamps, which company sells these stamps to merchants, and the merchants give them to their cash customers, as an inducement for cash payments; that the plaintiff, knowing the desire on the part of many persons for these stamps, and that they were induced to trade where they could get them, entered into a contract with the Sperry & Hutchinson Company to furnish plaintiff with trading stamps, one of which, under this contract, plaintiff agrees to give each of its customers for each 10 cents represented in cash value. There are further allegations of the advertising value of plaintiff's use of these stamps and the co-operation secured with other merchants in other lines of trade using these stamps, and the saving made in not having to carry articles of trade for gift purposes. It is alleged that the city ordinance was heretofore in the United States Circuit Court for this District decreed null and void as in violation of the Constitution of the United States; that this decree has never been appealed from, modified, or reversed; that the Supreme Court of the state of Wash-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ington has held such ordinance valid, and, by reason of said decision, it would be useless for plaintiff to defend, or prosecute an action in the state court, or pay the license and sue to recover the same; that plaintiff has no remedy in law or equity in the courts of the state; that the city and its officials, the defendants herein, have threatened, unless plaintiff pays for a license under the ordinance, that it will arrest the officers of plaintiff; that the ordinance impairs the obligation of plaintiff's contract with the Sperry & Hutchinson Company, in violation of article 1, § 10, of the Constitution of the United States; that, in violation of the fourteenth amendment to the Constitution of the United States, it deprives plaintiff of its liberty of contract, of its liberty and property, without due process of law, and that it denies plaintiff the equal protection of the law; that the giving, in connection with the sale of merchandise, of a stamp which entitles the holder thereof, on presentation, to obtain, from a third person, an article of merchandise, is but an incident of plaintiff's business, and is not a proper subject-matter of a tax; that the classification attempted by the ordinance is improper, discriminatory, and arbitrary, and therefore unreasonable; that the ordinance does not impose an occupation tax on plaintiff's business, but merely on one of plaintiff's methods of advertising; that it is denied the equal protection of the law, as its method of advertising is taxed and that of its competitors advertising in other ways is not taxed.

[1] Setting up the unconstitutionality of an ordinance in defense of a criminal prosecution affords an adequate remedy at law, and, as a general rule, will preclude equitable relief. *Poyer v. Des Plaines*, 123 Ill. 11, 13 N. E. 819, 5 Am. St. Rep. 494; *Rogers v. Cincinnati*, 5 McLean, 337, Fed. Cas. No. 12,008; *Torpedo Co. v. Borough of Clarendon* (C. C.) 19 Fed. 231; *State ex rel. Kenamore v. Wood*, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596; *Paulk v. Sycamore*, 104 Ga. 24, 30 S. E. 417, 41 L. R. A. 772, 69 Am. St. Rep. 128; *Burnett v. Craig*, 30 Ala. 135, 68 Am. Dec. 115; *Wallack v. New York Society*, 67 N. Y. 23; 22 Cyc. 807, 815; *Dillon, Mun. Corp.* (5th Ed.) §§ 612n, 646, 650, 1573n; *McQuillin, Mun. Ord.* pp. 435, 436.

[2] The case now before the court is not brought within any exception to the foregoing rule. The complainant has not been prosecuted in former suits. No multiplicity of suits or prosecutions is threatened or alleged as imminent. The court does not mean that bare allegations of this character would suffice to take this case out of the general rule; but so states to show how far removed it is from any recognized exception.

The allegation that the ordinance has been held invalid by the Circuit Court of this District and held valid by the courts of the state, and that by reason of the decision of the Supreme Court of the state, upholding the ordinance, it would be useless for the plaintiff to defend or prosecute an action in the state court, is not sufficient to make it an exception to the rule. The Supreme Court is the final, but not the sole, interpreter of the federal Constitution. If the courts of the state do not protect the plaintiff in all its constitutional rights, an appeal lies to the Supreme Court of the United States, and the District Court



will not now presume but that the constitutional questions involved will be fairly met and passed upon by the state courts, if they are afforded the opportunity, passed upon in such wise as to enable the plaintiff to secure a review, if the decision is adverse to it, by the Supreme Court of the United States, which is vested with authority to review alike decisions of the state Supreme Courts and those of this on such questions.

The allegation that the ordinance has been upheld by the state courts and the intimation that it would be upheld by those courts might render it advantageous to the complainant to have the question of the validity of the ordinance passed upon by this court in preference to the state court, in that the costs and uncertainty of an appeal to the Supreme Court of the United States might be thereby shifted from the complainant to the respondents; but that consideration alone will not afford a ground for equitable relief.

The demurrer to the bill of complaint is sustained, and the motion for a preliminary injunction denied.

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In re TOKLAS BROS.

(District Court, E. D. New York. December 7, 1912.)

**BANKRUPTCY (§ 421\*)—DEBTS AFFECTED BY DISCHARGE.**

Where bankrupts pledged accounts due them for merchandise sold to secure a loan, and also agreed to hold any goods returned by customers whose accounts were assigned as the property of the creditor or resell the same as his agents, and account for the proceeds, a failure to pay over proceeds of goods so resold did not create a liability for willful and malicious injury to the property of the creditor, or one created by their fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity, within the meaning of Bankr. Act July 1, 1898, c. 541, § 17a (2), (4), 30 Stat. 550, 551 (U. S. Comp. St. 1901, p. 3428), as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1911, p. 1496), and is provable and dischargeable in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 772-774; 779-786; Dec. Dig. § 421.\*]

In the matter of Toklas Bros., bankrupts. On motion to vacate stay of action in state court. Motion denied.

I. Gainsburg, of New York City, for claimants.

Horwitz & Rosenstein, of New York City, for bankrupts.

CHATFIELD, District Judge. Subsequent to adjudication, an action has been started against the bankrupts upon a complaint charging conversion of personal property. This action was brought in the City Court of the state of New York, and was stayed by this court during the statutory period, upon an affidavit alleging that the action had been brought to recover a sum of money only for advances by the plaintiffs to the bankrupts when in business as copartners, and that the debt was dischargeable in bankruptcy. Application has been made to vacate this stay; the creditors asserting that the debt in question

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was a liability arising from willful injury to the property of another, or from fraud or misrepresentation while acting in a fiduciary capacity.

It appears by the record that the bankrupts had secured loans at various times from the creditors who have brought the action in question, and had assigned or pledged as security for these loans certain accounts for merchandise sold; that they entered into an agreement pledging these accounts, by which they bound themselves to turn over any proceeds of the accounts received by them, and also to hold, as the property of the pledgees, any merchandise returned to the bankrupts, in trust for the plaintiffs. Such returned merchandise was to be delivered to the plaintiffs, or, if not, they were to be considered as having sole title thereto, unless the defendants (the bankrupts) should pay to the plaintiffs for these goods so returned, or resell them and pay over the proceeds. If such payments were made, then title was to revert in the defendants. In other words, the accounts were not only assigned to the creditors, but the debtors agreed to act as bailees for the creditors with respect to any goods which might be returned from customers whose accounts were among those assigned, or to sell such goods as agents for the creditors, and to hold the proceeds for payment of the debt.

We need not, however, consider the extent to which such a contract would be valid as against other creditors. The affidavits show that from time to time some merchandise was returned and was sold by the bankrupts in the ordinary course of business, and accounted for to the pledgees as settlements were had. Some merchandise, returned from parties whose accounts had been assigned, had been sold by the bankrupts some two years previous, and the proceeds of the particular sale had not been paid over. The suit stayed was to recover this amount. If such a claim against a person (assuming that he could, in the capacity of bailee, hold property which belonged equitably to a pledgee, but with right in the bailee to sell the same and immediately account for the proceeds, or substitute other goods or proceeds therefor) constitutes a claim dischargeable in bankruptcy, the present motion must be denied.

The creditors cite *In re McIntyre*, 128 App. Div. 722, 112 N. Y. Supp. 987, in which the court held that a willful and intentional breach of trust, by the selling of pledged shares of stock, was a wrongful conversion by a person in a fiduciary capacity, and distinguished between conversions wrongful in law and those wrongful and intentionally fraudulent. But it has been held that the bankruptcy statute does not refer, when using the words "fiduciary capacity," to a debt "founded upon an open contract, or upon a contract express or implied," even though suit may be brought in trover thereon. *Crawford v. Burke*, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147.

The bankrupts have cited the cases of *Maxwell v. Martin*, 130 App. Div. 80, 114 N. Y. Supp. 349, and *Matter of Floyd, Crawford & Co.*, 15 Am. Bankr. Rep. 277, to show that a claim for conversion of personal property, not obtained by false representation or pretense, is provable and is dischargeable in bankruptcy. The creditors argue that a conversion such as is charged herein is a willful injury to personal

property, following some of the language of *In re McIntyre*, supra; but this contention cannot be sustained, for the wrongful conversion of property is an injury to the individual, but not to his property, in the sense meant by that provision of the statute. The motion to vacate the stay will be denied.

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**LUM BING WEY v. UNITED STATES.**

(District Court, W. D. Texas, El Paso Division. December 24, 1912.)

No. 382.

**1. ALIENS (§ 32\*)—CHINESE EXCLUSION ACTS—DEPORTATION—EVIDENCE.**

In proceedings to deport a Chinese person in the United States, a certificate of a United States commissioner certifying that such person is entitled to remain in the United States by reason of being born in the United States made in prior deportation proceedings is inadmissible in evidence.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 84, 93-95; Dec. Dig. § 32.\*]

**2. ALIENS (§ 32\*)—CHINESE EXCLUSION ACTS—DEPORTATION—EVIDENCE.**

The certificates of the clerk of the District Court of docket entries and records in proceedings under the Chinese exclusion acts, including the discharge of the Chinese person, if admissible in subsequent deportation proceedings, are without effect, in the absence of evidence that the Chinese person arrested and discharged in the prior proceedings is the person sought to be deported in the present proceedings.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 84, 93-95; Dec. Dig. § 32.\*]

**3. ALIENS (§ 32\*)—DEPORTATION OF CHINESE PERSONS—BURDEN OF PROOF.**

In Chinese deportation proceedings, the Chinese person asserting his right to remain in the United States has the burden of establishing the right by affirmative proof.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 84, 93-95; Dec. Dig. § 32.\*]

What Chinese persons are excluded from the United States, see note to *Wong You v. United States*, 104 C. C. A. 538.]

Proceedings by the United States for the deportation of Lum Bing Wey, a Chinese. From an order of deportation, defendant appeals. Affirmed.

This is an appeal by Lum Bing Wey from an order of deportation passed by United States Commissioner Oliver. There is no testimony in the case except three certificates, of which the following are copies:

**1. Certificate of United States commissioner, George E. Johnson:**

"United States of America, District of Vermont.

"I, George E. Johnson, United States commissioner, within and for the District of Vermont, hereby certify that a complaint was exhibited before me by John H. Senter, United States attorney within and for said district, on the 13th day of October, A. D. 1897, charging, in substance, that on or about the 12th day of October, A. D. 1897, at Richford, in said district, one Lum Bing Wey, a person of Chinese descent, did unlawfully come into and was within the United States, in violation of section \_\_\_\_\_ of the Revised Statutes of the United States; and on the thirteenth day of October, A. D. 1897,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the defendant was brought before me, at my office in the city of Burlington, in said district, and, after a full hearing on said charge, the said United States attorney being present, it was adjudged by me that said Lum Bing Wey had the lawful right to be and remain in the United States, having found that he is an American citizen by reason of having been born in the United States, and he was thereupon discharged from custody.

"Given under my hand and official seal at the city of Burlington, in the district of Vermont, this thirteenth day of October, A. D. 1897.

"[Signed] Geo. E. Johnson,

"United States Commissioner, District of Vermont. [Seal.]"

2. Certificate of Frederick S. Platt, clerk, as to docket entries:

"United States v. Lum Bing Wey.

"District Attorney Brown, J. A.

"1897

Oct. 13 Filed complaint of United States attorney for violation of Chinese exclusion acts.

" " Issued warrant of arrest.

" " Warrant of arrest returned served—respondent in court.

" " Hearing.

" " Discharged.

"United States District Court, District of Vermont.

"I, Frederick S. Platt, clerk of the District Court of the United States within and for the District of Vermont, hereby certify that the foregoing is a true copy of the docket entries in the cause United States v. Lum Bing Wey, taken from the dockets of former United States commissioner, George E. Johnson, which dockets, with other dockets, papers, files, and records of said former United States commissioner, George E. Johnson, were deposited in the office of the clerk of said District Court, at the decease of the said former United States commissioner, George E. Johnson, on the 19th day of November, 1907.

"Witness my hand, as such clerk, and the seal of said court, at the office of said clerk, in the city of Rutland, in said district, on this 4th day of October, A. D. 1912.

[Signed] Frederick S. Platt, Clerk. [Seal.]"

3. Certificate of Clerk Platt touching the filing of complaint, issuance of warrant, etc., in the case of United States v. Lum Bing Wey:

"United States District Court, District of Vermont.

"I, Frederick S. Platt, clerk of the District Court of the United States within and for the District of Vermont, hereby certify that the foregoing is a true copy of the original complaint and warrant with the officer's return thereon, and the filings thereon, in case United States v. Lum Bing Wey, which complaint, warrant, officer's return, and filing, with other papers, files, records, and dockets of former United States commissioner, George E. Johnson, were deposited in the office of the said clerk, at the decease of the said United States commissioner, George E. Johnson, on the 19th day of November, 1907.

"Witness my hand as such clerk, and the seal of said court at the office of the clerk of said court in the city of Rutland, in said district of Vermont, this 4th day of October, A. D. 1912.

"[Signed] Frederick S. Platt, Clerk. [Seal.]"

Upon these certificates the appellant bases his right to remain in the United States.

W. B. Ware, of El Paso, Tex., for appellant.

Charles A. Boynton, U. S. Atty., of Waco, Tex.

MAXEY, District Judge (after stating the facts as above). [1, 2]  
In this case the court is of the opinion (1) that the certificate of George E. Johnson is inadmissible in evidence; (2) that if the certificates of



Frederick S. Platt, clerk, be admissible, there is nothing in the record to show that the appellant is the person who was arrested and discharged by Commissioner Johnson on October 13, 1897.

[3] In Chinese cases the burden is upon the one asserting his right to remain in the United States to establish such right by affirmative proof. Neither the appellant himself nor any other person attempted to show that he is the Chinese person named in the certificates of Clerk Platt. For the reason stated, the order of the commissioner, deporting the appellant, should be, and it is hereby, affirmed. Ordered accordingly.

In re J. B. & J. M. CORNELL CO.

(District Court, S. D. New York. November 15, 1912.)

**1. RECEIVERS (§ 128\*)—RIGHT OF MORTGAGE BONDHOLDERS.**

The lien of mortgage bondholders of an industrial corporation cannot be displaced by a court without their explicit consent.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 205, 210, 219-222; Dec. Dig. § 128.\*]

**2. RECEIVERS (§ 127\*)—RECEIVERS' CERTIFICATES—RIGHTS OF HOLDER.**

The rights of a purchaser of receivers' certificates issued under proper authority are determined and limited by the court's order authorizing their issuance aided in interpretation somewhat by the petition on which it is based and such other documentary evidence as may be relevant.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 216-218; Dec. Dig. § 127.\*]

Receivers' certificates, see notes to *Postal Telegraph Cable Co. v. Vane*, 26 C. C. A. 350; *Nowell v. International Trust Co.*, 94 C. C. A. 601.]

**3. RECEIVERS (§ 128\*)—RECEIVERS' CERTIFICATES—RIGHTS OF HOLDERS.**

Receivers for a bankrupt industrial corporation having a valuable good will were authorized to continue the business for a specified time and to purchase necessary materials on credit; also to borrow \$50,000 for stated purposes, and to apply later for authority to issue receivers' certificates. Their authority to continue the business was extended from time to time with the same powers. They petitioned for authority to issue receivers' certificates to the amount of \$250,000, but reduced the amount asked for to \$100,000, and the petition was granted with the consent of the mortgage bondholders, and with permission to apply for leave to issue additional certificates to the amount of \$150,000. The order provided that the certificates authorized, known as series A, should be a lien on all the property prior to that of the mortgage. They afterward applied for and obtained authority to issue \$100,000 additional in certificates, known as series B. To this order the bondholders did not consent, nor did it provide that the certificates should be a lien. *Held*, that they were not entitled to rank with series A to the displacement of the mortgage, but ranked the same as debts for materials purchased by the receivers on credit, either before or after their issuance.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 205, 210, 219-222; Dec. Dig. § 128.\*]

**4. RECEIVERS (§ 155\*)—INDEBTEDNESS CONTRACTED BY RECEIVERS—RIGHT OF PRIORITY.**

Where receivers are authorized to continue the business of an insolvent or bankrupt corporation for a definite time and to purchase materials on credit, persons extending credit, without security, for materials or otherwise, are charged with notice of a practice of the court to extend such

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

authority from time to time, and are not entitled to priority over later creditors of the same class.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 283-292; Dec. Dig. § 155.\*]

In the matter of the J. B. & J. M. Cornell Company, bankrupt. On exceptions to report of special master determining priority of claims. Modified and confirmed.

See, also, 186 Fed. 859.

Murray, Prentice & Howland, Charles P. Howland, Lemuel Skidmore, and Luke Vincent Lockwood, all of New York City, for the motion.

Russell Lord Tarbox, Van Wyck & Mygatt, Albert T. Scharps, Kiddle, Wendell & Margeson, Floyd K. Diefendorf, and Edwin C. Ward, all of New York City, opposed.

MAYER, District Judge. By order of this court, dated June 9, 1911, it was provided:

"(1) That both of the bids of the New York Trust Company and Sarah K. Cornell, and of the bondholders of the bankrupt, both dated April 24, 1911, are accepted according to their respective terms and the conditions contained therein, and the receivers, the trustee, and the bankrupt are hereby directed to convey, transfer, and deliver forthwith to the bidders or their assignee the property, real and personal, described in their respective bids, free and clear from all liens and incumbrances of any character by whomsoever asserted, except as in said bids and hereinafter provided.

"(2) That, in full consideration for the purchase by the New York Trust Company and Sarah K. Cornell, the receivers accept the following: (a) The surrender for ultimate cancellation of the outstanding receivers' certificates, aggregating the principal sum of \$175,000, with all accrued and unpaid interest thereon. (b) The undertaking of such bidders, as expressed in their bid, to pay in cash up to the sum of \$16,000 the unpaid fees of the receivers, trustee, and their counsel; and also the fees of the referee and appraisers as and when the same shall be fixed by this court. (c) The undertaking of such bidders contained in their joint and several bond filed in this court and hereinbefore referred to.

"(3) The receivers are hereby directed, pursuant to the proviso contained in the bid of the New York Trust Company and Sarah K. Cornell, to use their best efforts diligently to collect and to realize upon all assets now in or hereafter coming into their hands not directed to be sold by this order and to pay over the proceeds of the same up to the amount of cash paid by such bidders under subdivision 'b' of the foregoing clause of this order to such bidders or their assignee.

"(4) That, in consideration for the purchase by the bondholders, the receivers accept the surrender for ultimate cancellation of the entire amount of outstanding bonds of the bankrupt, secured by mortgage to the United States Mortgage & Trust Company, aggregating \$630,000, with all unpaid coupons attached and the offer of said bondholders that such creditors as shall under the terms of their bid of April 24, 1911, establish a right to share in the proceeds of sale if the same were paid in cash, shall have respective liens in such amounts and with such respective priorities as they would have been entitled to if the purchase price had been paid in cash, subject as to the amount of such respective claims to the deduction of the amounts of cash respectively received by such creditors from any other source.

"(5) That all claims against the receivers, present or inchoate, of creditors entitled to participation in the purchase price payable under either bid be filed, in writing and duly verified, with William Allen, Esq., referee in this

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proceeding. \* \* \* That said referee take proof of the validity, effect, and relative priority in respect of any of the items or assets of each claim so filed, and report the same, with his decision thereon, to this court with convenient speed, with the right in all claimants, including all the bidders, to contest the validity, effect, or relative priority of the claim of any other creditor until final adjudication as defined in said bids. That the receivers' certificates of indebtedness and the bonds of the bankrupt secured by its mortgage to the United States Mortgage & Trust Company, although surrendered to the receivers hereunder, shall be regarded as outstanding for the purpose in the case of the receivers' certificates of enabling the New York Trust Company and Sarah K. Cornell to prove before the referee the claims represented thereby, and in the case of the bonds of enabling the holders of said bonds to prove before the referee the lien of the mortgage securing said bonds and the claims of such bidders to the purchase price payable under their bid if the same had been in cash, and in the case of both sets of bidders for the purpose of enabling them to contest the validity, effect, and relative priority of the claim of any creditor of the receivers; and such certificates of indebtedness and such bonds shall be canceled only upon the final adjudication of such of said claims of creditors as may be filed with the referee as in this order provided, or at the expiration of the time for filing such claims as herein provided if no such claim shall then have been filed. Neither such certificates of indebtedness nor such bonds shall be canceled in the event that a review should be prayed for or appeal taken from this order, nor until the time for praying such review or taking such appeal shall have expired; and in the event that this order should be reversed or should be so modified as to invalidate either bid or either sale in whole or in part, or to provide for the payment of the purchase price of either bid in any manner or upon any other terms than as in said bid contained, then the certificates of indebtedness of the receivers and the bonds of the bankrupt shall be by the receivers returned to the respective persons who shall have surrendered the same, and the rights of the owners thereof both as to principal and interest shall be in all respects revived and restored with the same effect as if said certificates of indebtedness and said bonds had never been surrendered.

"(6) This court retains jurisdiction of the cause and of the parties, and of the property and assets directed to be sold to the bondholders of the bankrupt, in order to enforce compliance with the terms of this order and to protect the rights of the parties to this proceeding. In the event of any controversy, the manner of determination of which is not herein provided for, the parties may present the controversy to this court or to the referee herein, and the receivers or the trustee may at any time apply to this court or to the referee for instructions with regard to their or his conduct in the premises."

Notice pursuant to the order was duly advertised, and was duly given to those entitled thereto.

The special master has made a painstaking inquiry into the merit and priority of claims, and, having reported, motion is now made to confirm that report, and for such other relief as may seem just. Confirmation is opposed by several merchandise creditors.

To understand clearly the somewhat difficult questions presented, it is desirable to follow the proceedings in chronological sequence. It is only in this way that the orders of court can be satisfactorily interpreted. When the bankrupt company was petitioned into bankruptcy, it was engaged in the fabrication of structural steel and iron work. It had long enjoyed a high reputation for efficiency and integrity. Its repute and business were well worth preserving as a good will asset. The petition having been filed March 20, 1909, receivers

were appointed by order dated that day and bearing file date two days later. They duly qualified, and authority was given to continue the business for 60 days.

By petition verified March 24, 1909, the receivers stated to the court as follows:

"Fifth. The company has outstanding contracts for work amounting to about \$1,200,000, on some of which no work has as yet been done, while in others the work has reached various stages of completion. There are contracts aggregating in amount \$780,816 for structural work to be performed in connection with the barge canal improvements for the state, and the remaining contracts are mainly for structural steelwork on buildings in the course of construction in the city of New York. Work has been wholly or partly suspended on practically all of said contracts for lack of funds necessary to provide the necessary labor. A part of the material necessary to complete the work under certain of said contracts is in stock, and as your petitioners are informed and believe, can, with moderate outlay, be worked into shape. It will be necessary from time to time to purchase additional raw material for fabrication, and your petitioners desire authority of this court to make such purchases on credit, on such terms as they may be able to secure. It has been estimated by an expert connected with one of the creditors of the company that there is an equity of at least \$200,000 in said contracts. • • •"

"Seventh. It is absolutely necessary, therefore, that your petitioners should be authorized to negotiate immediately a temporary loan of at least \$50,000 on such terms as to time of payment as they may be able to secure at 6 per cent. interest, in order that the property and assets committed to their care may be properly protected and preserved, and that the business of the company may be continued. It is the intention of your petitioners to apply as soon as possible to this court on proper notice for authority to issue receivers' certificates, to be a first lien on the property, ahead of the mortgage indebtedness, for the purpose of funding these temporary obligations, and also to provide additional working capital for the company, but in the present condition of affairs, and from lack of definite information necessary to present such an application, your petitioners desire authority to negotiate a temporary loan of at least \$50,000.

"Wherefore, your petitioners pray that they may be authorized to borrow a sum not exceeding \$50,000 at 6 per cent. and upon such terms as to time of payment as they may be able to secure, and to purchase materials upon credit; and, further, that they may be authorized to pay the accrued rent on the Cold Spring property, and the premises at 590 and 601 West Twenty-Sixth street, accrued taxes, and back wages of employes, and that they may have such other and further relief in the premises as may be just."

Summarized, this petition would be construed as stating: (a) That working capital was needed to pay off rent and taxes, failure to pay which might cause a stoppage of the plant and disorganize the working force. (b) That continuance of business with the aid of payments and reserve margins on contracts of the bankrupt would be at a profit rather than at a loss, so that there would be no question as to the future repayment of the moneys borrowed for working capital. (c) That it would be unnecessary to attempt to displace the lien of the mortgage bondholders, the unmortgaged assets coming to the hands of the receivers being ample security for the receivers' certificates. (d) That, as soon as possible, authority would be asked to issue receivers' certificates which were to be a first lien on the property and ahead of the mortgage indebtedness.



Upon this petition the court made an order on March 25, 1909, which contained the following provisions:

"Ordered that A. Gordan Murray and Michael Blake (receivers) be, and they hereby are, authorized and empowered to borrow \$50,000 at 6 per cent. on such terms as to time of payment as they may be able to secure; and also to purchase necessary materials on credit; and it is further

"Ordered, that said receivers be, and they hereby are, authorized and directed to pay (1) the accrued and past-due rent on the Cold Spring property, \* \* \* (2) the accrued and past-due rent on premises 590 and 601 West Twenty-Sixth street, \* \* \* and all taxes on property owned or leased by the company; (3) the installment of rent on the Cold Spring property due April 1, 1909; \* \* \* (4) all back wages due to workmen and other employes which would be entitled to priority under provisions of bankruptcy law; and it is further

"Ordered that said receivers be, and they hereby are, authorized to apply to this court for permission to issue receivers' certificates to fund the obligation hereinbefore authorized."

It will be noted that this order authorized the borrowing of \$50,000, and also the purchase of materials on credit. The receivers borrowed only \$25,000, and did not at once fund their loans by the issue of certificates as permitted by the order of March 25th. Later, on April 12, 1909, receivers filed a petition which contains the following statements and prayer:

"Second. Your petitioners on March 25, 1909, were by an order of this court authorized to borrow a sum not exceeding \$50,000, with permission to apply thereafter for an issuance of receivers' certificates to fund the indebtedness incurred by virtue thereof.

"Third. Pursuant to the authority contained in such order, your petitioners purchased material necessary to enable them to carry on the business of the company and borrowed \$25,000, a large part of which is still unused, and on deposit to the credit of their account. Bills for the material as purchased on credit will soon mature, and should be promptly met. Funds will have to be provided for this purpose, and also to pay for the materials ordered, but not yet delivered. It is also necessary for your petitioners to have sufficient working capital to enable them to purchase steel and other materials for the pending contracts, as soon as required, in order that they may proceed promptly with the prosecution of the work thereunder. Under practically all the contracts, payments are made to the company during the progress of the work, so that but a short time will elapse between the maturity of the bills for raw material and the time when payments will be made to the company on account of the work done. A number of contracts, on which little, if any work, has as yet been done, will soon become active, and ready funds will be needed to carry them out successfully. The weekly receipts, as your petitioners are informed and believe, should be more than sufficient to meet the pay rolls as they fall due, and provide for other fixed charges, such as rent, taxes, and insurance.

"Fourth. (Amount of bonds outstanding.)

"Fifth. Your petitioners are informed and believe that the good will of the company has a substantial value, and that it is to the best interest of the bondholders, secured and unsecured creditors, that the business should be continued as a going concern. It is as much for the preservation and protection of the bondholders that this should be done as it is for the interest of unsecured creditors. The security for the bonds will be protected by a continuance of operations, while under a liquidation the plant would bring nothing like its face value. Unless the contracts can be carried out, default will necessarily occur, thus subjecting the estate to large claims for damages.

"Sixth. Your petitioners are unable to state at this time just how much working capital they will require, but they are informed and believe that

\$250,000 will leave a safe margin. It is hoped and expected that it will not be necessary to use the greater part of this amount, but the permission of the court to issue certificates to that extent is sought, so that your petitioners can in their discretion borrow funds when and as the occasion arises. If the business is to continue, your petitioners will have to have authority to issue these certificates, and the amount above named has been determined upon by those connected with the company as furnishing a safe working basis. Collections are being pressed upon all of the outstanding accounts and bills receivable, and these will have to supply the working capital required. It will not be possible for your petitioners to raise funds necessary to operate the plant properly unless receivers' certificates are issued and declared to be liens upon the property and assets of the company prior to the lien of the general mortgage.

"Wherefore your petitioners pray that they may be given authority to issue receivers' certificates, bearing interest at the rate of 6 per cent., and upon such terms as to time of payment and otherwise as they may be able to secure, except that said certificates shall not mature at a date later than six months after the issue thereof, and that such certificates, when issued, shall be a lien upon all the property and assets of the company prior to the lien of the general mortgage dated March 1, 1903, to the United States Trust Company."

From this petition it is apparent that the receivers had examined the assets and studied the business as best they could. Their desire to issue receivers' certificates for a fixed sum indicated that they regarded that sum as adequate for all the purposes of their application. As indicated in the petition, there was a mortgage indebtedness. This was \$660,000 in amount, and the trustee was the United States Mortgage & Trust Company.

The court, upon this petition, made its order dated April 14, 1909, as follows:

"On reading and filing the petition of A. Gordan Murray and Michael Blake, receivers of the above-named alleged bankrupt, verified April 8, 1909, praying that they be allowed to issue receivers' certificates to an amount not exceeding \$250,000, to be a lien upon the property and assets of the alleged bankrupt prior to the lien of the general mortgage dated March 1, 1903, the affidavits of Irwin H. Cornell and of John M. Cornell, both verified April 8, 1909, the notice of motion dated April 9, 1909, with proof of due service thereof, together with a copy of the petition and accompanying affidavits upon the United States Mortgage & Trust Company, trustee under the general mortgage, Lemuel Skidmore, solicitor for the alleged bankrupt, John S. Huyler, Samuel W. Bowne, Carnegie Steel Company, and estate of Anderson Fowler, holders of certain of the company's bonds, secured by the general mortgage aforesaid, and on reading and filing the consents of S. K. Cornell, John M. Cornell, Mary C. Leffingwell, Sherman National Bank, Phoenix Iron Company, Bodine & Sons Company, and Carnegie Steel Company to the issuance of said certificates; and on reading and filing the answer of the United States Mortgage & Trust Company, verified April 12, 1909, and upon all the papers and proceedings in this matter, and after hearing Morgan J. O'Brien, of counsel for the receivers, in support of said motion, and William Greenough, of counsel, for the United States Mortgage & Trust Company, opposed, and John D. Beals, of counsel for John S. Huyler, Samuel W. Bowne, and the estate of Anderson Fowler, and William B. Symmes, Jr., of counsel for John M. Cornell and S. K. Cornell, appearing and joining in the prayer of the petition, and it further appearing that \$630,000 out of \$660,000 of the bonds issued and outstanding under the general mortgage, consent to the granting of this application, and counsel for the receivers having consented in open court to reduce the amount of the application from \$250,000 to \$100,000, with permission to apply hereafter for authority to issue certificates for the balance, and due notice of the settlement of this order having been given, it is, on motion of

O'Brien, Boardman, Platt & Littleton, solicitors for the receivers, ordered that A. Gordan Murray and Michael Blake, as receivers of J. B. & J. M. Cornell Company, be, and they hereby are, authorized and empowered to issue their certificates of indebtedness to an amount not exceeding the sum of one hundred thousand dollars (\$100,000) for the purpose of providing working capital, so as to enable them to carry out and complete the outstanding contracts of the company, and undertake new business, and to protect and preserve the assets and property in their hands, and

"It is further ordered that said certificates shall bear interest at the rate of not to exceed six per cent. (6%) per annum, and shall be issued upon such terms as to time of payment as the receivers may determine, except that they shall mature not later than six months from their date. Said certificates shall be substantially in the form annexed hereto and marked 'Schedule A,' and may be sold by the receivers, for cash, or for materials delivered, or may be pledged by them to secure the payment for necessary materials ordered, but said certificates shall not be sold for less than the par value thereof. So much of said certificates as may be necessary shall be used to redeem any and all outstanding notes or certificates issued by the receivers pursuant to the order of this court dated March 25, 1909, and

"It is further ordered that said certificates, to the amount of the principal and interest thereof, shall constitute a lien upon all the property and assets, of every nature and description, of the J. B. & J. M. Cornell Company, and upon all net earnings and profits derived from the pending contracts or which may hereafter result from the conduct of the business of the company in charge of said receivers, which lien shall be prior to the lien of the general mortgage, dated March 1, 1903, made by J. B. & J. M. Cornell Company to the United States Mortgage & Trust Company, as trustee. The net profits and income derived from all pending contracts or contracts which may be hereafter undertaken shall be primarily charged with the lien of all certificates, and the interest thereon, issued under this order. If the net income and profits derived from said contracts be insufficient to provide for the payment of said certificates, and the interest thereon, or any part thereof, the assets and property of the company not covered by the general mortgage shall be resorted to for the payment thereof. If either of the above-mentioned funds shall be insufficient to provide for the payment of the principal and interest of said certificates, or any part thereof, they shall be payable out of the property and assets of the company covered by the general mortgage as aforesaid.

"The receivers are authorized to apply to this court for permission to issue additional certificates to the extent of one hundred and fifty thousand dollars (\$150,000) when and as the occasion may arise."

From this order it appears that (a) the consent was obtained from all the bondholders to issue receivers' certificates (the \$30,000 outstanding having been taken care of in due course); (b) the receivers through counsel consented to reduce the amount of certificates from \$250,000 as asked for to \$100,000; (c) the lien accorded to the certificates was carefully and clearly set forth; (d) further application might be made for the issuance of additional certificates to the extent of \$150,000 when and as needed. Let us stop here on April 14, 1909, to consider the rights of the bondholders and of the purchasers of these receivers' certificates designated as series A.

[1] The lien of bondholders of an industrial corporation, indeed, of any but a so-called public service corporation, cannot be displaced without their explicit consent. A moment's consideration will show the fundamental wisdom of this rule. A mortgage loan to an industrial corporation is made upon the security of its property. It does not differ in principle from a loan on real or personal property. (Here

the mortgage was on real property, chattels, real and personal property then owned, and to be after acquired. Income was merely incidental.) Such a mortgage is rarely made, as are some railroad loans, on income in part or in whole. The lender is dealing with a strictly commercial proposition. He looks to the plant, the property real and personal, and, generally speaking, has in mind what the plant will sell for under the hammer. He is not concerned, and should not be asked to be concerned with the success of the business thereafter. If the business fails, he has the right to repose on his judgment of the value of tangible things, and he is not remitted to the possibility of earning power or other elements of personal equation. Having made his loan, he may rest easy until the day of reckoning, and then, out of the tangible assets, if his judgment was good, he recoups his investment, and, if not, he takes his loss. No court without his consent can lessen his security a dollar's worth. It is true (and on this head many authorities are cited by objecting merchandise creditors) that insolvent public service corporations come under another rule. But, there again, experience and good sense come into play. Without detailing all the reasons, it may be said that the authority to displace bondholders' liens in the case of public service corporations rests broadly on two propositions: (1) The necessity of conserving the convenience of the public by preventing the stopping of transportation of passengers or freight on land or water or both, and (2) the necessity of preserving franchises, the saving of which obviously must inure to the benefit of the bondholders. But, if it ever be declared that the lien of the bondholders of an industrial corporation may be displaced, without consent by a court order, the result would be that such corporations could not obtain loans from responsible institutions or investors, hence disaster and a destructive blow at legitimate business enterprises.

[2] So, too, with receivers' certificates when properly and carefully issued. The receivers' certificate is defined within the corners of the court's order, aided, in interpretation, somewhat by the petition on which issued and such other documentary evidence as may be relevant. The investor in receivers' certificates is usually the banker, individual or institution. His or its profit is the interest on the investment. He or it risks the output for a fixed interest return. If such an investor reads the court's order correctly, and it provides that the certificates shall be a lien on the property of the estate, there is no further responsibility placed upon him. He is not called upon to watch what happens thereafter. He has made his loan, risked his money on the terms of an order of court, and, if his security is good, it is a matter of indifference to him what thereafter happens. Thus, when the New York Trust Company in this case bought the certificates issued under the authority hereinbefore set forth, it had the right to rely upon the representations of the petition and upon the force of the court's order. The certificates were constituted "a lien upon all the property and assets of every nature and description" of the bankrupt, "\* \* \* which lien shall be prior to the lien" of the general mortgage. It was unnecessary to provide that the



certificates were a "first" lien because obviously, if they were to be ahead of the mortgage, they would be a first lien.

Not for the purpose of protecting the purchasers of these certificates, but to assure an equitable plan of liquidation, the order provided a method of marshaling the claims of the certificate holders, so that they might be collected, in order, out of (1) the net profits and income of the pending or new contracts; (2) the personal property not covered by the mortgage; (3) the real and personal property covered by the mortgage. Any merchant thereafter selling goods to the receivers was charged with the knowledge that the mortgage debt and the series A receivers' certificates were prior to his claims, and, under such circumstances, he took his chances as to whether the enterprise would work out so that his bill would be paid. The purchaser of series A, on the other hand, could only lose its lien by formal consent or by acquiescent conduct equivalent to estoppel. Neither is to be found. In view of the situation in the spring of 1909, the receivers were keen to preserve what they had the right to believe was a valuable business and plant, and they applied for further extensions to do business, and the court granted these applications for an aggregate period of 150 days, until we come to the issue of the so-called series B certificates.

The first order dated March 20, 1909, appointing the receivers, authorized them to continue business for 60 days. The next order (March 25, 1909, *supra*) not only authorized the borrowing of \$50,000, but also the purchase of necessary materials on credit. At the expiration of the 60 days, for the continuance of business as provided in the order of March 20, 1909, an order was made dated May 19, 1909, as follows:

"It is ordered that A. Gordan Murray and Michael Blake, receivers of the above-named alleged bankrupt, be, and they hereby are, authorized and empowered to continue the business of the J. B. & J. M. Cornell Company for a further period of 30 days, *with all of the powers heretofore conferred upon them.*"

The orders of June 18, 1909 (60 days), and of August 17, 1909 (60 days), are in substantially the same form, and empower the receivers to continue the business "with all of the powers heretofore conferred upon them."

[3] Thus the power conferred by the order of March 25, 1909, was continued in each and every order thereafter made which authorized the continuance of the business. The order of October 15, 1909, providing for the issuance of the so-called series B certificates, is as follows:

"On reading and filing the annexed petition of A. Gordan Murray and Michael Blake, receivers of the above-named alleged bankrupt, the annexed petition of Bethlehem Steel Company, the annexed affidavit of John M. Cornell, all verified October 14, 1909, and the stipulation of Lemuel Skidmore, Esq., solicitor for the alleged bankrupt, consenting to the entry of this order, and on motion of O'Brien, Boardman, Platt & Littleton, solicitors for the petitioning creditors and the receivers, it is ordered that A. Gordan Murray and Michael Blake, as receivers of the above-named alleged bankrupt, be, and they hereby are, authorized and empowered to continue the business of J. B.

& J. M. Cornell Company for a further period of four months with all the powers heretofore conferred upon them.

"It is further ordered that said receivers be, and they hereby are, authorized and empowered to borrow a sum or sums of money not exceeding the sum of \$100,000, in addition to the sum of \$100,000 heretofore authorized by an order of this court dated April 14, 1909, at not to exceed 6 per cent. interest, and upon such terms as to time of payment as they may be able to secure, for the purpose of providing additional working capital for the conduct of the business and to protect and preserve the assets and property in their hands.

"And it is further ordered that said receivers be, and they hereby are, authorized and empowered to issue their certificates of indebtedness therefor in such denominations and numbers as they may in their discretion determine, and sell the same, or any part thereof, for cash; but said certificates shall not be sold for less than the par value thereof."

Upon the issuance of this order, and the amendatory order of October 22, 1909, I am unable to discover either (1) consent of the bondholders or (2) provision for any lien whatsoever on the property or income of the bankrupt. The order itself does not so provide. The purchaser of these certificates was put on notice that there was not any consent of the bondholders to the issuance of the certificates, and also that the receivers were authorized to purchase necessary materials on credit.

It is claimed by the certificate holders of series B that this order of October 15, 1909, must be regarded as at the foot of the order of April 14, 1909, but that claim is without merit. The order does not so state nor could it be at the foot of the order of April, 1909, without the consent of the bondholders, and that consent was not given.<sup>1</sup>

What, then, was the situation on October 15, 1909? The petition of the receivers upon which the order was based showed that the receivers had contracted bills for materials necessary in the prosecution of the work under various contracts and these bills were rapidly maturing. (Petition of receivers dated October 14, 1909, paragraph 3.) The receivers set forth that it was difficult to ascertain the exact condition of the receivership; that the \$100,000 of series A certificates were still outstanding; that it had been stated that the reorganization of the affairs of the company was probable; and that they, the receivers, believed that the business should be kept alive pending the culmination of efforts in that direction; and that they recommended that authority be given to them to borrow \$100,000 as additional capital, and that they be empowered to continue the business of the company for a further period of four months with all the powers theretofore conferred upon them (petition October 14, 1909, *supra*, paragraphs 3, 4, 5). At this time it is also apparent that the weekly pay roll requiring liquid cash ran into large figures, and that both cash money and credit for materials were necessary if the business were to be kept as a going concern until a reorganization was effectuated. If the order of October 15, 1909, or the order of October 22, 1909, authorizing the issue of the series B certificates, had

<sup>1</sup> Note.—The position of the bondholders is stated in answer of United States Mortgage & Trust Company, dated November 12, 1910, and especially in paragraph 11 thereof.

provided a lien for these certificates, then the series B certificates would have been in the same position as to after-contracted debts as were the series A certificates.

[4] But the orders of October 15 and October 22, 1909, made no provision for a lien, and I am unable to see how the series B certificates represent an indebtedness any different in principle from the indebtedness to merchants who sold goods on credit. In the one case the banker individual loaned money without security, and in the other case the merchant sold his goods on credit without security. Both must be presumed to have known the orders of court and the character of the credit. Being the same in principle, these two classes were on a parity, and neither could expect priority over the other. If, therefore, the debts of the objecting merchandise creditors had been contracted by the receivers prior to the expiration of the four months on February 15, 1910, the question under consideration would not be hard of solution.

Some of the claims of the objecting merchandise creditors arose as late as February, 1911, and it is urged on behalf of the holder of series B certificates that, in any event, payment of these certificates must be made prior to claims arising subsequent to February 15, 1910. Orders subsequent to February 15, 1910, authorizing the receivers to do business "with all the powers hereafter conferred upon them," were made as follows: February 6, 1910 (4 months); June 16, 1910 (3 months); and September 16, 1910 (60 days). Upon a petition verified October 31, 1910, the receivers moved for leave to sell the property and assets of the bankrupt. This motion was strenuously contested, as appears from the papers and from the memorandum of Judge Hough, dated November 22, 1910. Among those in opposition was John M. Cornell, who in his affidavit verified November 19, 1910, clearly showed that he represented his wife, who was then the owner of the series B certificates. Mr. Cornell had been the president of the bankrupt, and prior to its incorporation the owner of the business, and had been employed by the receivers for a considerable period as the general manager for them. Presumably no more could be more familiar with the situation. His affidavit indicates beyond question that, when the money was loaned for which the series B certificates were issued, Mrs. Cornell and her husband expected this business to be continued, not merely for four months, but until such time as a reorganization would be accomplished.

Attention is especially called to paragraph 3 of the affidavit as follows:

"(3) That when he and his said wife consented to the borrowing by the said receivers of \$200,000 upon their certificates, both he and his said wife understood that the purpose of such loan was to enable the receivers to work out to payment certain contracts entered into by the J. B. & J. M. Cornell Company for the erection of bridges on the state barge canal and other contracts in order that the company might be kept a going concern to the end of reorganization and the obtaining of reserved percentages upon these contracts. He is informed and believes that the other bondholders who consented to the borrowing of said two hundred thousand dollars (\$200,000) by the receivers and the committee of unsecured creditors consented for a like purpose."

In paragraph 12 Mr. Cornell shows from his point of view that the business should be continued for a few months, and, in short, this affidavit makes clear beyond peradventure that Mrs. Cornell invested this money in these series B certificates, not alone with the knowledge that the business might be continued beyond the four months, but with the expectation that, if necessary, it would be continued so as to keep it alive as a going concern if the reorganization was not consummated within the four months. In the order of December 19, 1910, denying the receivers' petition for leave to sell, Mrs. Cornell is recited as in opposition, and so her attitude was understood by Judge Hough, as appears from his memorandum above referred to. The assignment of these certificates to the present holder was not made until June, 1911, and its status is necessarily that of its assignor. The order to show cause of October 31, 1910, authorized the receivers to continue the business of the bankrupt and the performance of certain contracts until the disposition of the motion, and in the order of December 19, 1910, deciding the motion, authority was further given "to continue work upon such contracts now in the course of performance \* \* \* as in the opinion of said receivers it may be advisable and profitable for said receivers to complete." And, finally, by order of March 28, 1911, the receivers were empowered to continue the business "with all the powers theretofore granted to them" and to proceed with the contracts which they had under way until further order of the court. Thus authority was conferred upon the receivers to make purchases of goods on credit for which the various claims have been filed.

In determining the equities, it must be remembered that this is not one of those cases where the court specifically limited the receivers as to the amount of credit, but the case is in many particulars similar to those which are constantly arising in this district. It is well known in this district that authority to do business is granted from time to time in order to give receivers an opportunity to save a business as a going concern, and to develop the situation, and that the granting of one extension does not imply that further extensions will not be granted. It would be destructive of the effort of the court to save a business in an important commercial community to hold that if there was an extension, for instance, to do business for thirty days, the merchandise creditors who sold goods on credit, within that period, must be paid before the merchandise creditors who sold goods in a succeeding period during which receivers were duly authorized to do business and buy on credit. How can the court or any one else know how long the business should be continued? As each period draws to a close, the court, upon a proper showing, makes further orders, and everybody knows, or should know, this practice—justified from a practical standpoint by the necessities of the case. The merchandise creditor who, to illustrate, has sold goods during the first period, may, at any time, oppose the granting of a further extension on the ground that continuance of the business will result in waste or imperil his claim. But, when he sells to the receivers, he takes all the hazard that the court may further extend the time to do business, and, if he does



not like that kind of a hazard, he need not sell his goods. To hold otherwise would as effectually cripple the efforts of the bankruptcy court to rescue a valuable plant and business as to hold that receivers' certificates, providing for a lien, were to be on a parity with subsequent debts. If I am right in this conclusion, the series B certificates have no better footing than the merchandise claims, because, as heretofore pointed out, the money was lent without security and on precisely the same basis as the goods were sold on credit. If the series B certificate holders at any time were fearful that collection at par was being imperiled, they could have made application to the court, but they took a contrary position. Under all the circumstances, I hold that equity requires the holder of certificates series B and the merchandise creditors to be treated alike.

Finally, it is urged that the claim of the Davies & Thomas Company, for goods sold between July and December, 1909, should not be paid, but that they should look to the receivers. The record shows that both the receivers and these claimants did all that each could be expected to do in the premises. The receivers having resisted payment, suit was brought and judgment recovered by the Davies & Thomas Company against the receivers. An order was made in March, 1911, enjoining the issuance of an execution; the judge stating that this creditor must wait and be treated like other creditors of the same class. A motion for an order directing the receivers to pay the judgment was denied, and certainly, under these circumstances, this claimant is entitled to the same standing as the other merchandise creditors, and as the series B certificate holders.

Briefly, to summarize, the order of priority is fixed as follows: (1) All taxes due; (2) cost of administration; (3) claim of New York Trust Company as holder of certificates series A; (4) claims of bondholders of bankrupt; (5) claim of Sarah K. Cornell as holder of certificates series B, and claims of merchandise creditors enumerated in special master's report under paragraph 6; (6) claims for damages for breach of contract; (7) claims for injuries. June 9, 1911, is fixed as the interest-due date because that is the date of the order authorizing acceptance of the bids. Except as herein indicated, and except as to some details noted in my June memoranda, the report of the special master is in all respects confirmed. Notice of settlement of order should be on five days' notice.

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### BURNES v. EPSTEIN.

(District Court, D. Connecticut. January 6, 1913.)

No. 1,660.

#### 1. BANKRUPTCY (§ 178\*)—TRANSFERS BY BANKRUPT—COLLATERAL SECURITY—INSOLVENCY—KNOWLEDGE BY TRANSFEREE.

Where defendant sold a bankrupt a car of metal, which became a part of the assets of the bankrupt's estate, but for which he was unable to pay, defendant was entitled to retain certain notes of third persons

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and a check received from the bankrupt either as payment for the metal or as collateral security, whether he knew of the bankrupt's insolvency at the time or not.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.\*]

**2. BANKRUPTCY (§ 250\*)—ASSETS—CHECKS.**

A bankrupt, being indebted to defendant, sent him a check for \$4,300, but, being unable to meet it requested defendant to send his check for \$1,325 for that purpose. This having been done, the bankrupt again telephoned defendant that he could not meet the \$4,300 check by the use of defendant's check, and suggested that defendant might as well stop payment on his own check, which he did, and when it was presented it was protested. *Held*, that such protested check was not an asset of the bankrupt's estate which the trustee could enforce against defendant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 235, 350; Dec. Dig. § 250.\*]

**8. BANKRUPTCY (§ 303\*)—TRANSFERS—PREFERENCES.**

Evidence *held* insufficient to show that defendant had reasonable cause to believe that a bankrupt was insolvent at the time he delivered certain securities to defendant, either as collateral or payment on his indebtedness to defendant, or that the bankrupt intended thereby to create a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.\*]

**At Law.** Action by George R. Burnes against Benjamin Epstein. Judgment for defendant.

Slade, Slade & Slade, of New Haven, Conn., for plaintiff.  
Bronson & Lewis, of Waterbury, Conn., for defendant.

MARTIN, District Judge. The declaration and stipulation are referred to and made a part hereof.

Charles W. Moore of Bridgeport filed in this court his voluntary petition in bankruptcy on the 10th day of August, 1907, and adjudication immediately followed. Hereafter I refer to said bankrupt by using his name. The said Moore was a dealer in junk and metals, and had been for several years. The defendant came to this country from Russia about 16 years ago, uneducated and unable to speak our language. After being here a few years he began dealing in metals and junk, formed the acquaintance of Mr. Moore, and carried on quite an extensive business with him. The defendant knew nothing about bookkeeping and kept no regular books, but had a small book which he carried in his pocket and made some memoranda thereon in aid of his memory. Mr. Moore employed Mrs. Graves, his sister, as a bookkeeper, and he also had a stenographer. On the 12th day of July, 1907, Mr. Moore was indebted to the defendant, for merchandise and loans of money, about \$14,000, which indebtedness was for checks and notes that had been given for purchases and loans of the defendant. The notes were time notes, some of which were due in a few days and others in a longer time. There is no claim by the plaintiff that anything had occurred prior to the 12th day of July relating to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Mr. Moore's financial affairs that was brought to the attention of the defendant which should charge him with notice of the insolvent condition of Mr. Moore, but he does claim that on that day things transpired which should charge him, both in fact and in law, with such notice, and prior to his obtaining certain promissory notes and a check, being choses in action owned by Mr. Moore and received by him from parties to whom he had sold goods, which were then and there indorsed over by Mr. Moore to the defendant and thereafter indorsed by the defendant and collected and the proceeds appropriated to his own use. It is claimed that this, being within four months of the adjudication, was either a preferential payment or a conversion of a part of the estate of the bankrupt.

Mrs. Graves, Mr. Moore's bookkeeper, testified that on said 12th day of July she had examined the books of Mr. Moore and ascertained that he was in an insolvent condition, and, when the defendant came there on that day, she made known to him what she had discovered; that thereafter an arrangement was made whereby the defendant was to take said notes and check to a friend of his at New Haven, get them discounted, and bring back the avails thereof to Mr. Moore.

Mr. Moore testified that Mrs. Graves had not, at that time, said anything to him as to what she had discovered as to his insolvency, and that he did not hear that part of the talk between her and the defendant; but he gives the same version as to the passing over of the notes to the defendant as a bailee that Mrs. Graves gives.

The stenographer, Mrs. Reynolds, states that she heard the conversation between Mr. Moore and the defendant and gives the same version as to the agreement relating to said notes.

The plaintiff's evidence further tends to show that on the following day the defendant returned to Moore's office and informed Mr. Moore that this friend of his, a Mr. Price of New Haven, Conn., refused to pass over to him (the defendant) the proceeds of said notes and check because he (the defendant) was indebted to Mr. Price, and the best he could do was to get Mr. Price to give him (the defendant) credit for said notes, and that Mr. Moore was indignant and told the defendant that he could not hold the avails of those notes and check because, if he (Moore) should go into insolvency, the defendant would have to pay it back to Moore's estate. The same three witnesses, viz., the said Moore, Mrs. Graves, and Mrs. Reynolds, testified substantially alike relating to that talk.

The plaintiff also claims to recover for a check of \$1,325, given by the defendant to said Moore, the payment of which was protested on the 15th of the same July. Mrs. Graves and Mr. Moore testified that the defendant and Mr. Moore exchanged checks at the time of the giving of the check in question, on the 10th day of July, and that Mr. Moore paid his check, but the defendant suffered his to go to protest.

The plaintiff also claims to recover for a car load of brass which the said Moore sold to the defendant and for which it is claimed the defendant received \$4,140.80.

The testimony of the plaintiff as to the car load of brass is that of the same three witnesses, Mrs. Graves, Mr. Moore, and Mrs. Reynolds.

Mrs. Graves testified that she charged the defendant with a car load of brass, 24,767 pounds, on the 8th of July, at \$4,140.80, but upon examination of the books, evidently the first entry that the witness referred to is upon page 248 where the defendant is credited with this car of brass at \$3,962.72; that on page 266 of the same book he is charged with the car load of brass "not returned" at \$4,140.80, under date of July 23d. I quote from her evidence:

"Q. I call your attention to page 248 (Exhibit K). That is where he rejected it. This gives the number of pounds again at 24,767. (No answer.)

"Q. That is under date July 8th, is it not? A. Yes.

"Q. Is that the original entry charging it to him? A. Yes, sir."

But the entry on the book credits it to him. Quoting again:

"Q. I call your attention to page 262, under date of July 8th. Will you read that entry, please? A. By invoice car of new scrap brass rejected July 10, \$4,140.80."

The entry reads, as near as I can pick it out:

B. Epstein.

July 8.	By invoice for car		
	new scrap rejected.....	\$3,962.72	
	" July 10 invoice reject.....	178.08	\$4,140.80

Just what this entry means the witness did not explain. The next entry below is a deal with another party under date of July 22d. On page 266 is an entry:

"To car of brass amounting to.....	\$4,140.80	
not returned .....		\$4,140.80

She further testified that the defendant notified Mr. Moore on July 10th that the car of brass was rejected by the American Pin Company, and that Mr. Moore directed him to ship it to a party in Boston.

Mr. Moore testified that the brass was to be 16 cents a pound, was to be high brass scrap and thin; but, while it was thin, it was not actually thin enough for the purposes wanted.

"I asked him for an advance on the car load of brass, and I think the first time I asked him he put me off; he didn't know about it. Then the next time I asked him he said they couldn't use it on account of it being too thick. That was about the 10th or the 9th or the 12th or 13th of July. (He couldn't tell exactly when it was.)

"Q. Your book shows shipment was made on the 8th day of July? A. Then I should say it was possibly back a couple of days more: must have been between the 10th and 11th. I think it must have been on the 11th anyway.

"Q. What did you say to him when he canceled the order? A. I was very much disappointed. I told him if he couldn't use it to ship the car to Boston to my order. He said all right, he would do it. Then I immediately called up another party in Boston."

Testified that he received from that Boston party, James Stewart & Co., \$3,000 on that car.

Mrs. Reynolds remembers just enough to bear upon the contention



that the title went back to Mr. Moore. She testifies that she heard the talk whereby the defendant said the car was rejected and Mr. Moore told him to ship it to Boston and he agreed so to do.

The defendant's testimony upon these several claims of the plaintiff is substantially as follows:

That on the 10th day of July he shipped to Mr. Moore a car load of different classes of metal, which invoiced at \$3,828.27, and that at the time of said shipment Mr. Moore was indebted to him for quite a large amount. That just prior to the shipment of said merchandise, and about the 8th of July, Mrs. Graves sent to him Mr. Moore's check in blank, which she afterwards explained by phone, saying that at the time the check was sent Moore was away and she did not know for what amount the check should be, but that Mr. Moore had then returned and stated to her that it might be from \$4,000 to \$4,500. That they finally agreed by phone that it should be \$4,300, and the check was so filled out and deposited by the defendant for collection. That soon after Mr. Moore called the defendant by phone and said to him: "I can't meet that \$4,300 check. If you can help me out with a small check, I will be able to meet it." So it was arranged that the defendant should give to Mr. Moore a check for \$1,325 to help him meet the check for \$4,300 that Moore had given to the defendant, but on the 11th of July Mr. Moore called him again by phone and said he could not meet the check for \$4,300 even with the use of the \$1,325 check of the defendant, and then said to him, using the language of the witness:

"'Come down; I have got some papers, and we will straighten it out.' I asked if I should stop payment on the check, and he said, 'Yes, and I will give the check back to you when I get it.'"

So on the 12th he went to Mr. Moore's place of business at Bridgeport, arriving there about noon; but before going he notified the bank to stop payment on that check. That on his arrival at Mr. Moore's office Mr. Moore called him into his private office and took out four notes, one for \$1,350, one for \$3,601.20, one for \$418.18, and one for \$2,000, and a check on the Cheshire Brass Company for \$1,800, and that Mr. Moore stated that he had some papers there, some notes, that he could not discount at his own bank because he was, using the language of the witness, "full up" at his bank, and that, if the defendant wanted them, he might have them, whereupon they were indorsed over to him. That the Cheshire Brass Company check was not in the original package that was first passed over, but Mr. Moore went out into the other office and got that later on and handed that to him and told him that the Cheshire Brass Company was doubtful, and that he wanted him to collect that as soon as possible. That later Mr. Moore handed him Exhibit 14, which exhibit is a sheet of note-size paper, with the following printing thereon:

Statement.

M

To U. W. Moore,  
Dealer in Metals, Drosses, etc.  
418 Housatonic Avenue.  
Terms, Cash.

Bridgeport, Conn.

190

Below a heavy red line on said paper is written, in the handwriting of Mrs. Graves, the words and figures:

B. Lissberger note.....	3,601.20	
Sterling Smelting.....	2,000.00	
" " .....	480.18	
M. M. Robinson.....	1,350.00	7,431.38

Notes given B. Epstein.

That he then went to New Haven, but did not arrive there until after banking hours, and he interviewed Mr. Price, a friend of his, and gave him said check for \$1,800 with instructions to collect it as soon as possible. That he stayed there overnight, and on the next day went to New York, stopping off a train at Bridgeport, and called on Mr. Moore and explained to him what he had done about the check, which Mr. Moore said was all right. He denies ever having exchanged checks with Mr. Moore or receiving any information, prior to or on the 12th day of July, that Mr. Moore was insolvent, or that he ever became a bailee of said notes. He denies having any talk with Mrs. Graves about Mr. Moore's financial standing on said 12th day of July, and affirms that when he received those notes he understood that they were passed over to him as part payment for the general indebtedness of Mr. Moore to him.

This raises a serious question of fact, about which I have had much trouble and to which I have devoted a great deal of time in an effort to satisfy myself as to the truth. As it stands at first sight, it is three witnesses against one; but that weight of evidence is met with a serious inconsistency and improbability. The defendant, while not a scholar, is a thrifty, active, bright man, and in the handling of business, with which he is familiar, is considerably above the average. He well knew the effect of indorsing paper, which he must do to get the cash on said notes and check. He had accumulated a substantial sum of money, and on the occasion in question had a balance in the bank of upwards of \$20,000, and was not indebted to Mr. Price and did not leave the notes with him, but put them into the bank for collection. If the plaintiff's evidence is true, he did a decidedly foolish thing. That is to say, he accepted of choses in action, the face value of which exceeded \$9,000, knowing that he must indorse them and become personally responsible thereon, and carry the funds back and deliver them to Mr. Moore, who was his debtor for about \$14,000, and not get a dollar in hand for it himself—only a promise of the payment of that note of \$3,000 due July 17th—and all this after being informed by Mrs. Graves that Mr. Moore was a bankrupt; hence the defendant was liable to lose the whole of said \$14,000 and be holden in addition for over \$9,000, some of it, at least, questionable paper, and permit a car of scrap worth \$3,828.27 to be delivered to Mr. Moore that he might stop in transitu. Besides this, Mrs. Graves testified that the check for \$1,325 was obtained by an exchange of checks of the same amount; that Mr. Moore paid his check, but the defendant suffered his to go to protest; and that the exchanging of checks between Mr. Moore and the defendant was of frequent oc-

currence. If that is true, the books, checks, and check stubs ought to show it. The defendant says that, while he had made loans to Mr. Moore and checked them out of his bank account, he never swapped or exchanged checks with him, so on the trial it was apparent that this was an important issue, as Mr. Moore and Mrs. Graves were swearing one way and the defendant another. If Mr. Moore gave the defendant a check in exchange for this \$1,325 check, Mr. Moore's check stub and the paid check must have been in his hands, and both he and Mrs. Graves say that all their papers were turned over to the trustee, therefore they must now be in the trustee's (plaintiff's) hands; and yet that check or the stub is not produced, nor any other check or check stub that tends to establish the fact that these parties ever exchanged or "kited" checks.

As to this particular transaction, the defendant is corroborated by the \$4,300 check that Mrs. Graves sent to him, signed by Mr. Moore in blank, and which she authorized the defendant, over the phone, to fill out for that amount. That check was in the bank unpaid when the defendant says he talked with Mr. Moore over the phone about it on July 11th. It was still in the same condition on the 12th, at the time of the transaction relative to the notes, and on the 13th, when the plaintiff's evidence tends to show that Moore was offended because the defendant did not bring back the avails of the notes and check that were handed to him on the 12th. The defendant is further corroborated by the entries that Mrs. Graves made upon the books of Mr. Moore. On the ledger, so called, under date of July 12th, and on B. Epstein's page, this entry appears:

To notes 253 (referring to the page journal) \$7,432.38

This entry is made in a solid column of writing and figures, with an entry below it, indicating it was charged that day, and turning to the journal, on the page referred to, we find said page to be filled, with only one blank line between the accounts of different parties, and under date of July 12th the following appears:

B. Epstein.			
To Cheshire check.....	\$1,800.00		
Lissberger note.....	3,601.20		
Sterling .....	2,000.00		
" .....	480.18		
M. M. Robinson note.....	1,350.00	\$7,432.38	

In her footing she did not include the check of \$1,800 and made an error of \$1. It is a straight charge to Mr. Epstein and made that day, as there are entries of debit and credit with other parties above and below this entry under that same date. There is no entry on the book indicating that he was made a bailee.

Again, I have searched these books carefully for a corroboration of Mrs. Graves' statement that from the books she discovered that her brother was insolvent on said 12th day of July, and on that day told the defendant what she had learned. I am unable to discover how she, or any one else, could, from an examination of those books, form

any idea as to the financial standing of Mr. Moore at that time or at any other time. I refer to the testimony of William Moore, an accountant, and find his testimony bearing upon the value of said books to be correct.

Again, if Mrs. Graves' version is true, she told the defendant, to whom they were heavily indebted, what she had discovered in searching the books, yet did not make it known to Mr. Moore, though she was his sister and in his employ.

Besides, the appearance of these witnesses upon the stand impressed me unfavorably. Mr. Moore swore in his examination before the referee in bankruptcy that he had no idea that he was insolvent until about the 1st of August, 1907. In the trial of this cause, he said he began to be suspicious as to his solvency within two or three days of the 12th of July, and then finally concluded that it was two or three, or three or four days before the 12th of July. He further swore that he never mentioned that to any one until about the 15th or 16th of July; yet he corroborates the story that Mrs. Graves tells as to what occurred on the 13th of July, when it is claimed that he was offended because the defendant did not bring the avails of said notes and check. He claimed, on this trial, that the reason he swore before the magistrate that he had no suspicion of his solvency until the 1st of August was to protect James S. Stewart & Co., to whom he had made payments all through said July, so the question arises whether he may not be swearing falsely now to protect that firm or some other creditor who may now be his favorite.

Counsel for the plaintiff strongly relied, in argument and brief, upon the testimony of the stenographer, Mrs. Reynolds. She was testifying to a matter that occurred between five and six years ago and which was of no interest to her; no reason why she should listen to it or remember it for any length of time; no entry or memoranda to help her memory. She said:

"Mrs. Graves and I looked over the books. I remember we went over the books together and found the liabilities were over \$200,000 and the assets between \$70,000 and \$80,000."

In my opinion, neither she nor Mrs. Graves could find from the books anything of that sort. I am quite sure that Mrs. Reynolds could find no more than William Moore, the accountant, or the court. I am not inclined to think she did not intend to tell the truth; my belief is that Mr. Moore and his bookkeeper, Mrs. Graves, were unwilling to admit to other creditors that they had made this large payment to Mr. Epstein, so they concocted this story to shield Moore from the criticism and attacks of his other creditors, and that they talked in the presence of Mrs. Reynolds as to what occurred, calling her attention to the fact that she was present, and thus she was led to believe that she was present; but, whatever may have caused her to give this testimony, my conclusion is that it is not reliable.

The defendant testified that Mr. Moore told him, while the market was on a decline in the summer of 1907, that he could stand a drop of \$50,000. Mr. Moore testified that that talk was the year before, but it does not appear that there was any drop in the metal market in 1906.



Mr. Moore's appearance upon the stand, his testimony before the referee in bankruptcy, his dealings with other customers than the defendant all along from May 1st to the last of July, the total lack of impersonal accounts, or accounts of profit and loss, and the nondescript character of the books that Mrs. Graves kept, the fact that he did not claim that he consulted those books at all, and that when he did ascertain his insolvent condition it was by going over it in his own mind and not from any information imparted to him by his book-keeper, and the fact that he never mentioned the subject to any one until several days after the 12th of July, lead me to the conclusion, and I so find the fact, that he did not know or believe on either the 12th or 13th of July that he was in an insolvent condition and could not have intended a preference July 12th.

I have considered the testimony of Lapidès and Shares as to the sayings and conduct of the defendant soon after the occurrence of said July 12th. They were testifying to things that occurred several years ago, and such evidence must be weighed by first considering whether they correctly understood what the party said, whether they have correctly kept it in mind from thence to the present time, and whether they have truthfully reproduced it in court.

Mr. Shares' testimony relates more particularly to the silence of the defendant on a certain meeting of Mr. Moore's creditors and his talk with him thereafter about his silence, and what he said, which, as it seems to me, is not very material.

The testimony of Mr. Lapidès presents another peculiar state of things. Mrs. Graves testified to telling the defendant that Mr. Moore was insolvent, and, further, that the defendant came to her soon thereafter and asked her to keep private everything that occurred in relation to those notes and checks, and both she and Mr. Moore testified that on the 13th of said July Mr. Moore told the defendant that he was liable to have to pay the avails of those notes over to his estate in bankruptcy, yet, according to Lapidès, within a very few days thereafter the defendant was telling him, knowing that his father was a heavy creditor of Moore, that he (Epstein) was not a creditor of Moore; that he heard of Moore's financial condition and purchased a car of metal from him, exchanged checks with him, and stopped the payment of his own check, and got a lot of notes from Moore and kept them, thus giving away what he was asking others to keep secret, and telling of exchanging checks with Moore when, as I find the fact to be, there never was any exchange or "kiting" of checks between the defendant and Moore. It appears to me that the witness got that statement from Mr. Moore or Mrs. Graves, instead of from the defendant.

From an examination of the evidence relating to the note that became due July 17th, I find a statement of facts that is not discussed by counsel except as bearing upon other issues. The defendant says that Mr. Moore called him by telephone on the 18th of July and told him:

"He slipped through that note without paying it, and he sent two checks to cover that note. The two checks was made out to the Hurlburt National

Bank, and it was somebody's check. One check was the B. Lissberger check for \$2,700, and the other one I don't know whose it was.

"Q. What did you do with those checks? A. I gave them to Mr. Phelps, the cashier of the Hurlburt National Bank, where the note was."

Defendant's Exhibit 10 is a letter from William H. Phelps, cashier of the Hurlburt National Bank, to Mr. Moore, under date of July 20th, and reads as follows:

"Mr. B. Epstein has delivered to us checks to the amount of \$3,002.10, to cover your note and fees of that amount, which I return you herewith."

The note is produced by the plaintiff and is Exhibit 1. Defendant's Exhibit 11 shows the two checks for \$2,700 and \$302.10 that were received by that bank. The cashier's letter was probably dated the day or the day after the receipt of the checks, so it appears that Mr. Moore, on the 18th, voluntarily paid the defendant that note with these checks, and on the 19th or 20th the defendant had those checks discounted and the note canceled.

Mrs. Graves and Mr. Moore testified that the arrangement on the 12th of July, when the notes and check were delivered to the defendant, was that the \$3,000 note which was to become due on the 17th of July was to be paid out of the proceeds thereof. I am unable to reconcile this story with the voluntary act of Mr. Moore, with the full knowledge of Mrs. Graves, in giving the defendant two checks, one for \$2,700 and the other for \$302.10, within a week, to pay that same note and the protest fees thereon. If their story was correct, Mr. Moore would naturally say, "You have kept the proceeds of those notes, and out of it this note was to be paid and canceled."

There is no allegation in the complaint that the delivery to the defendant of those two checks was a preferential payment, and no such claim in the brief of counsel for the plaintiff, so I give that matter no further consideration except as a circumstance bearing upon the testimony of Mr. Moore and Mrs. Graves.

At the time that the defendant sold to Mr. Moore the car load of scrap for \$3,828.27, he had this check that was sent to him in blank and subsequently agreed over the telephone should be \$4,300. He had shipped the car, and, as near as I can gather from the evidence, it was not delivered until after July 12th, so, when Moore informed Epstein that even the defendant's check for \$1,325 would not enable him (Moore) to meet the check for \$4,300, the defendant might then have stopped the car in transitu, but, instead of taking that course, he went to Mr. Moore's office to ascertain what papers he proposed to turn over to him. This car of scrap had not passed beyond the defendant's control, but he would not care to stop its delivery if he received an amount equivalent to the value of said car of scrap. He did receive that amount and more.

[1] I find that, at the time the defendant received these notes in question and the check, he received them to apply as payment or as collateral security. He had a right to take the value of that car in collateral whether he knew Mr. Moore was insolvent or not. Mr. Moore's insolvent estate was benefited by the receipt of that car, and it became a part of the assets of the estate, and the estate suffers nothing by the defendant receiving from the estate its value. Accord-

ing to the plaintiff's evidence, the defendant was to have the payment of the note of \$3,000 due July 17th out of the avails of said notes; hence, on the undisputed facts, the defendant could hold at least \$3,000 for the note and \$3,828.27 for the car of scrap. The check for \$1,800 was adjusted between the plaintiff trustee and the defendant, so there can be no recovery for that.

As to the car of brass for which the plaintiff claims to recover, I find that it was bought by the defendant July 3d. I have examined the evidence on the plaintiff's claim that said car was rejected on account of part of it being of inferior quality. On that question I find that the defendant never rejected the car nor canceled the contract. The most that the evidence tends to show is that the American Pin Company wrote the letter, plaintiff's Exhibit C, and thereupon the defendant notified Mr. Moore of the contents of that letter, but did not notify him, as the purchaser of the car, that he (the defendant) rejected it. The transaction relating to this car is the same as that of other cars of merchandise bought and sold by these parties in their dealings with each other. When anything was found deficient as to quantity or quality, the parties made it right. There was no reason why the defendant should reject this car unless Mr. Moore refused to make it right. There is no claim that he did refuse so to do.

[2] As to the check for \$1,325, I find that it was given by the defendant upon Mr. Moore's request that he might thereby be enabled to meet the check for \$4,300. I further find that Mr. Moore telephoned the defendant, on July 11th, that he could not meet the \$4,300 check, given by the use of the \$1,325 check, and suggested that the defendant might as well stop the payment, and the defendant did stop the payment on the morning of the 12th, and it got around to his bank on the 15th, when it was protested, so my conclusion is that there is no liability on the part of the defendant for the check of \$1,325, nor for the \$400 on the \$1,800 check, as that was adjusted between these parties when the defendant proved his account in the bankruptcy court.

[3] I find that, while the evidence satisfies me that the defendant, in the exercise of his habit of thrift, believed it was safer to get Moore's indebtedness to him reduced, and was anxious to do so, his desire in that regard being stimulated by the fall in the market prices of metals in which these parties were dealing, there is not sufficient evidence to hold that the defendant, on said July 12th, knew, or ought to have known, that Mr. Moore was insolvent, and that the transfer of those notes and the check was intended as a preference over other creditors.

I think I have considered and discussed all the essential evidence adduced bearing upon the defendant's knowledge of the bankrupt's financial condition at the time of the acts set out in this complaint.

I find that the plaintiff made no demand of the defendant for any of the merchandise or choses in action for which a recovery is sought under this complaint.

All the exhibits are referred to and made a part of this finding of facts, so far as the same are material.

Upon the foregoing facts, judgment for the defendant with costs is hereby directed.

**KERN v. CHICAGO, M. & P. S. RY. CO.**

(District Court, W. D. Washington, S. D. December 31, 1912.)

No. 1,224.

**1. ATTORNEY AND CLIENT (§ 190\*)—COMPENSATION OF ATTORNEY—LIEN—PROCEEDINGS TO PROTECT.**

On a motion by attorneys for plaintiff in an action for personal injuries to strike from the answer allegations of a settlement with plaintiff, and of a dismissal by plaintiff, the court will not try, upon conflicting affidavits, either the charge by plaintiff's attorneys of collusion between plaintiff and defendant to deprive the attorneys of their right to compensation, nor the charge by defendant's attorney of champertous conduct of the attorney securing the contract of employment from plaintiff to prosecute the action.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 412-417; Dec. Dig. § 190.\*]

**2. COURTS (§ 289\*)—UNITED STATES COURTS—JURISDICTION.**

In an action by an employé against a railroad engaged in interstate commerce for personal injuries, the objection to the jurisdiction of the federal court that the plaintiff, being a workman on a bridge of defendant's line, his injuries could not affect, hinder, delay, or interfere with interstate commerce, will not be sustained.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830; Dec. Dig. § 289.\*]

**3. ATTORNEY AND CLIENT (§ 190\*)—COMPENSATION—PROTECTION AGAINST SETTLEMENT—REMEDY.**

A motion to strike from the answer, in an action for personal injuries, defenses alleging a settlement between defendant and plaintiff and a statement by plaintiff that he dismissed the action made to protect the rights of plaintiff's attorneys to compensation under their employment by plaintiff, will not be sustained.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 412-417; Dec. Dig. § 190.\*]

**4. ATTORNEY AND CLIENT (§ 180\*)—COMPENSATION OF ATTORNEY—LIEN—NOTICE.**

Under Ballinger's Ann. Codes & St. Wash. § 4772, giving an attorney a lien for his compensation on money in the hands of the adverse party from the time of giving notice of the lien to that party, and on a judgment from the time of filing notice of the lien with the clerk of court, the failure of plaintiff's attorneys to give the notice provided for defeats their lien on any money of the plaintiff in the hands of defendant, at least so far as defendant is concerned, notwithstanding a provision in the plaintiff's agreement with his attorneys that the latter should have a lien on the cause of action.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 390-392; Dec. Dig. § 180.\*]

**5. ATTORNEY AND CLIENT (§ 190\*)—AUTHORITY OF ATTORNEY—CONTROL OF LITIGATION.**

Under District Court rule 3, providing that whenever a party has appeared by attorney or solicitor he cannot appear or act on his own behalf unless an order of substitution shall first have been made by the court, and rule 4, providing that the attorney or solicitor who has appeared of record shall represent the party and have control of the case, and his au-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



thority shall continue till there shall be a substitution of some other person or solicitor of record, attorneys for plaintiff in an action for personal injuries will be permitted to continue the action notwithstanding an allegation in the answer of settlement and dismissal by plaintiff.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 412-417; Dec. Dig. § 190.\*]

Action by A. D. Kern against the Chicago, Milwaukee & Puget Sound Railway Company. On motion of plaintiff's attorneys to strike from defendant's answer one of the defenses. Motion denied. Plaintiff's attorneys allowed to continue action, notwithstanding the allegation of settlement.

E. F. Masterson and Boyle, Warburton & Brockway, all of Tacoma, Wash., for plaintiff.

George W. Korte, of Seattle, Wash., for defendant.

CUSHMAN, District Judge. This suit is brought by the plaintiff, a citizen of Washington, against the Chicago, Milwaukee & Puget Sound Railway Company, a Washington corporation, alleged to be engaged in interstate commerce, for injuries received by the plaintiff while returning at night, from his work on a bridge of defendant's line, to a construction camp where the plaintiff and his fellow laborers boarded, upon a hand car furnished by the defendant for that purpose, and which bridge and line were used by the defendant in hauling great quantities of interstate traffic.

The cause is now before the court upon plaintiff's motion to strike from defendant's answer one of the defenses set out therein, in which defense it is alleged that, for a valuable consideration, \$4,000, the plaintiff had, since the bringing of the suit, fully released and discharged the defendant from all liability on account of such injuries. A copy of the alleged release is set out, which is as follows:

Chicago, Milwaukee and Puget Sound Railway Company to A. D. Kern,  
Bridge Carpenter, Dr.

FMA-2209

1912

Nov. 4th To this amount paid in full settlement of all claims, demands or causes of action that I now have or may hereafter have growing out of personal injuries sustained by me on or about October 1st, 1912, at Sumner, Wash., as stated below..... \$4,000.00

"I have this day received of the Chicago, Milwaukee and Puget Sound Railway Company, the sum of four thousand dollars, in full payment of the above account, and in consideration of the payment of said sum of money, I hereby release and forever discharge the said railway company of any and all claims and demands whatsoever, which I now have or may hereafter have on account of personal injuries sustained by me on or about October 1st, 1912, near Sumner, Wn., wherein I was on a hand car with the other men going in from work, when I fell from hand car and the second hand car, which was following very

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

closely, ran over me and I sustained a fracture of the spinal cord, which has resulted in permanent paralysis of the lower limbs and other bruises.

"Additions and Betterments

"Coast Div. Wash.

"In witness whereof, I have hereunto set my hand and seal this 6th day of November, 1912.

"[Signed]

A. D. Kern. [Seal.]

"Witness: J. E. Corlett.

"F. M. Adams."

It is alleged:

"That, upon executing said release, said plaintiff executed the following further written cancellation or dismissal of the within entitled cause of action, a copy of which is as follows, to wit:

" 'In District Court of the United States for the Northern District of Washington, Southern Division.

" 'A. D. Kern, Plff., v. Chicago, Milwaukee & Puget Sound Railway Company.

" 'No. 1,224.

" 'Dismissal.

" 'To Above Court and All Concerned: Having voluntarily settled all claims I might have against said railway company and never having knowingly authorized commencement of any suit for damages or otherwise, I hereby dismiss said pending action and direct the court or clerk to make proper entry accordingly.

A. D. Kern.

" 'Dated this 6 day of November, 1912.

" 'Witness: J. E. Corlett.'

"That, upon the execution and delivery of said release to the said defendant, the plaintiff accepted and retained, and has since retained and now retains, the said sum of \$4,000, for the purposes and consideration contained and expressed in said release, as hereinabove set forth. And that said plaintiff herein is barred and estopped from any claim or redress in this action against said defendant."

The court is asked to strike these allegations from the answer, because it is alleged that the settlement pleaded was made without knowledge of the plaintiff's attorneys, to evade paying their fees. The plaintiff's attorneys ask to be permitted to continue the action, notwithstanding the alleged settlement and defense.

The motion is supplemented by affidavits, setting out the employment of an attorney by the plaintiff and the employing by him of other attorneys to assist him. The terms of his employment are contained in the following written agreement:

"This agreement, made and entered into this 26th day October, 1912, between Edwin F. Masterson, attorney at law, of Tacoma, Wash., party of the first part, and A. D. Kern, of Tacoma, Wash., party of the second part, witnesseth:

"That whereas the said party of the second part has retained and does hereby employ and retain, as agent and attorney at law, the said party of the first part, for the purpose of representing the party of the second part as attorney and agent in taking all necessary steps as attorney and agent, in his own name as such, and in the name, place and stead of the party of the second part, should he so elect, to secure to the party of the second part compensation in damages by reason of an injury sustained by the said party of the second part in the following manner, to wit: 'By an injury to his spine, said injury being sustained on the 1st day of October, 1912, at or near the town of Sumner, Pierce county, Wash., and being occasioned by the negligence of the Chicago, Milwaukee and Puget Sound Railway Company.'

"Now, therefore, by reason of said retainer and appointment as agent, and for services performed and to be performed, it is agreed by and between the

said parties of the first part and second part that the said party of the first part shall be entitled to receive of the moneys and funds or equivalent collected in any manner growing out of the said cause or action, a sum equal to thirty-three and one-third per cent of the amount received by the second party.

"It is further agreed that the said second party shall have no right to make settlement or compromise, either directly or through any third person, of said cause of action, without first agreeing with the party of the first part, and protecting said party in his fee.

"It is further agreed that the said first party shall have a lien upon the said cause of action and all money paid by virtue thereof.

"It is further agreed by the second party that the first party shall have the sole and exclusive right to settle and adjust said cause of action, and upon such terms as he deems to be just.

"It is further agreed by the first party, that he will make no compromise or settlement of said cause of action that shall bring to the said second party any sum less than twenty-five hundred dollars, without the further express consent of said second party.

"Witness our hands, this 26th day of Oct., 1912. A. D. Kern.

"Witnesses: John W. Marvin.

Edwin F. Masterson."

"I accept this agreement.

"E. F. Masterson."

This suit was begun by service of process on the defendant October 30, 1912. The affidavits presented by the attorneys for the plaintiff set out that on November 1st these attorneys went to the hospital where plaintiff was being cared for, and plaintiff informed them that he did not want to go further with the suit, giving no reason why he wanted it dismissed; that on November 6, 1912, there was served upon plaintiff's attorneys a notice, of which the following is a copy:

"To E. F. Masterson, Boyle, Warburton & Brockway, Attys.

"Tacoma, Wash.

"Gentlemen: You are hereby notified that the pretended contract you procured or claimed to procure from me was so obtained under misrepresentations and misunderstanding on my part and I now repudiate the same and declare it of no longer force and effect and you are directed to take no further steps in my behalf in any respect. Further you are directed to dismiss or discontinue the above-entitled action.

"Dated this 6 day of Nov. 1912.

A. D. Kern."

All misrepresentations on the part of plaintiff's attorneys and any misunderstanding on the part of the plaintiff concerning the agreement is denied. It is alleged that the above notice to dismiss was procured from the plaintiff by undue influence. It is further charged that there was collusion in the settlement between the plaintiff and the defendant for the purpose of defrauding plaintiff's attorneys of their fees; that, on November 9th, plaintiff's attorneys informed one of the attorneys subsequently appearing for the defendant that their contract of employment by the plaintiff was such as to prevent any settlement by the plaintiff alone and, if made, would be resisted by the attorneys. It is alleged that the defendant knew of the terms of their employment at the time of defendant's making the settlement with plaintiff.

Defendant objects to the consideration of plaintiff's motion because:

"(1) This court has no jurisdiction over the subject-matter or cause of action plead in the complaint.

"(2) The court has no jurisdiction to entertain the motion to strike, because

at the time said motion was served and filed there was no cause of action pending to which said motion could relate.

"(3) The said motion, on its face, fails to show this court has jurisdiction to entertain whatever is prayed for therein."

Defendant has also filed a number of affidavits in reply to those filed by plaintiff's attorneys. In these affidavits all knowledge of the terms of employment of the plaintiff's attorneys is denied. It is set out that the settlement with plaintiff was made by the claim agent of the defendant and not by its solicitor; that the settlement was made before plaintiff's attorney informed the attorney subsequently appearing for the defendant of the terms of his employment; that, at the time of receiving this information, this attorney had not been retained by the defendant; that his employment by the defendant was not a general one, but from time to time in particular cases; that no notice of an attorney's lien was ever served upon the defendant, and no knowledge of the contract of employment, above set out, was obtained by the defendant until November 15th.

Among the affidavits filed by the defendant are one by its claim agent and one by the plaintiff. In both of which it is averred that, before the settlement, the plaintiff told the claim agent that he had directed his attorneys to dismiss his case against the defendant.

[1] The court will not undertake, upon affidavits, to try either the charge made by the plaintiff's attorneys of collusion between the plaintiff and the defendant, or the charge made by defendant's attorney of champertous conduct on the part of the attorney securing the contract of employment from the plaintiff.

Rules 3 and 4 of this court provide:

"Rule 3. No Appearance in Person After Appearance by Attorney or Solicitor.—Whenever a party has appeared by attorney or solicitor, he cannot thereafter appear or act on his own behalf in the cause, or take any step therein, unless an order of substitution shall first have been made by the court, after notice to the attorney or solicitor of such party, and to the opposite party; provided, that the court may in its discretion hear a party in open court, notwithstanding the fact that he has appeared, or is represented by attorney or solicitor.

"Rule 4. Attorney or Solicitor of Record to Have Control of Cause.—The attorney or solicitor who has appeared of record for any party shall represent such party in the cause, whether at law or in equity, and shall be recognized by the court and by all the parties to the cause as having control of his client's case in all proper ways, and shall, as such attorney or solicitor sign all papers which are to be signed on behalf of his client; and all papers affecting or relating to his client, and which require service, shall be served upon him, except such papers as are required by law to be served on his client personally. \* \* \* The authority of attorneys and solicitors of record shall continue until there shall be a substitution of some other attorney or solicitor of record, except as herein otherwise expressly provided and shall continue after final judgment for all proper purposes."

The statute of the state of Washington provides:

"An attorney has a lien for his compensation, whether specially agreed upon or implied, as hereinafter provided: \* \* \* (3) Upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party; (4) Upon a judgment to the extent of the value of any services performed by him in the action, or if the services were rendered under a special agreement, for the



sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice." Section 3194, Pierce's Code; 2 Ballinger's Ann. Codes & St. § 4772.

[2] The court's jurisdiction over this action and motion is challenged by defendant on the ground that, the plaintiff being a workman on a bridge of this defendant's line, his injuries could not affect, hinder, delay, or interfere with interstate commerce carried on over the line. *Lamphere v. O. R. & N. Co.* (C. C. A.) 196 Fed. 336.

Whether plaintiff's injuries would have such effect is one of the facts to be determined in the trial of the case, and, until its determination, the court's jurisdiction is complete under the allegations of the complaint. The defendant's objection in this particular is overruled.

[3] In support of their motion, plaintiff's attorneys have cited *Lipscomb v. Adams*, 193 Mo. 530, 91 S. W. 1046, 112 Am. St. Rep. 500; *Weeks v. Wayne Circuit Judges*, 73 Mich. 256, 41 N. W. 269; *Howard v. Town of Osceola*, 22 Wis. 453; *Miedreich v. Rank*, 40 Ind. App. 393, 82 N. E. 117; *Potter v. Ajax Mining Co.*, 19 Utah, 421, 57 Pac. 270.

In *Lipscomb v. Adams*, 193 Mo. 530, 91 S. W. 1046, 112 Am. St. Rep. 500, the suit was to recover certain lands, half of which plaintiff's attorneys were to receive for their services. This agreement was enforced in an action brought for that purpose.

In *Weeks v. Wayne Circuit Judges*, 73 Mich. 256, 41 N. W. 269, it is said, "Parties cannot assume that attorneys have no rights without inquiry"; but that was a suit brought to have set aside the satisfaction of a judgment, in the suing for which it was shown that the defendant knew that plaintiff's attorneys were, by agreement with plaintiff, to be paid a reasonable compensation from the proceeds of the judgment. There was no denial of knowledge upon defendant's part, and it was held an equitable assignment of the judgment to the extent of the attorneys' claims.

In *Howard v. Town of Osceola*, 22 Wis. 453, there is language used which, if taken by itself, supports the motion to strike; but the facts in the case were that the suit was one upon a town warrant or order which "was given to the attorney of the plaintiff at the commencement of the action and has remained in his possession ever since." In that connection it is said, "And we have no doubt that he has a lien for compensation upon the order." The judgment of discontinuance therein involved was made upon plaintiff's personal application, after her attorney had begun suit.

In *Miedreich v. Rank*, 40 Ind. App. 393, 82 N. E. 117, suit had been brought upon a contract—a life insurance policy. Defendant had appeared and answered. Thereafter the attorneys for defendant brought into court and filed a paper signed by the plaintiff, directing the dismissal of the action. Plaintiff's attorneys objected to the dismissal of the action and asked leave to prosecute the suit to final judgment.

The objection was overruled, defendant's motion to dismiss sustained, and judgment given for defendant. It was held that the suit should not have been dismissed, but the settlement pleaded in bar; that the attorney has a lien for his fees upon the judgment he obtains, but ordinarily he acquires no lien until the judgment is obtained.

Potter v. Ajax Mining Co., 19 Utah, 421, 57 Pac. 270, was a case in which suit was brought on account of personal injuries. There was a written agreement between the plaintiff and his attorneys that the latter, for their services, were to receive half of any amount recovered by way of judgment or settlement. After issue joined, while the cause was undetermined, an attorney for a guaranty company, which had secured the defendant against loss on account of such injuries, effected a settlement with the plaintiff, without the knowledge of plaintiff's attorneys. The attorney for the guaranty company secured a judgment of dismissal. On motion of plaintiff's attorneys, this dismissal was set aside. The court held the settlement collusive and allowed the attorneys to conduct the suit to judgment in the name of the client, to determine the amount to which the attorneys were entitled under their contract. The Supreme Court of Utah, while upholding the court's finding as to collusion and the procedure adopted, reversed the case on another point.

This case was again before the Supreme Court of Utah, 22 Utah, 273, 61 Pac. 999. On the second trial of the case, the lower court did not undertake to decide that there had been collusion in the settlement by the parties to deprive plaintiff's attorneys of their fees, but submitted that question to the jury. In the second opinion, the court admits that part of what was said in its former opinion was obiter dicta, and adds:

"While that decision was a little too broad to come within the decisions of some courts as to attorney's liens on the cause of action for fees and compensation, under the common-law rule, before judgment, yet it is clearly within the rule as applied to the costs of attorneys."

Again:

"We are not unaware of the line of authorities at common law holding that a lien for costs only attaches to the cause of action before judgment and for fees and compensation after judgment."

The defendant, contending against the motion, cites the following authorities: *Swanston v. Morning Star Min. Co.* (C. C.) 13 Fed. 216; *Cline Piano Co. v. Sherwood*, 57 Wash. 244, 106 Pac. 742; *Courtney v. McGavock*, 23 Wis. 619; *Coughlin v. Railway Co.*, 71 N. Y. 443, 27 Am. Rep. 75; *Humptulips Driv. Co. v. Cross*, 65 Wash. 638, 118 Pac. 827, 37 L. R. A. (N. S.) 226; *Hillman v. Hillman*, 42 Wash. 596, 85 Pac. 61, 114 Am. St. Rep. 135; *McRea v. Warehime*, 49 Wash. 196, 94 Pac. 924; *Dumowith v. Marks* (Sup.) 84 N. Y. Supp. 453; *McKay v. Morris*, 35 Misc. Rep. 571, 72 N. Y. Supp. 23; *Hutchinson v. Pettes*, 18 Vt. 614.

It is not necessary to review the latter authorities, as it is clear that the motion to strike will not lie. As shown by the review of the

authorities cited by plaintiff, none of them go as far as the court is asked to go by this motion.

The charges of collusion and fraud in the settlement made by the plaintiff's attorneys and the charges of champerty and maintenance made against plaintiff's counsel by defendant will not be summarily disposed of on affidavits, where the facts are so in dispute, without the aid of cross-examination.

The setting up by the defendant in its answer of plaintiff's motion to dismiss will be treated merely as pleading part of the settlement. Even in the absence of rules 3 and 4, the plaintiff's original motion would only be considered as a pleading—certainly not a mere copy set forth in defendant's pleading.

[4] In the absence of actual fraud on the part of the defendant, the failure to give the notice provided by section 4772, 2 Ballinger's Ann. Codes & St., supra, defeats the lien of plaintiff's attorneys upon any money of the plaintiff in the hands of the defendant, at least so far as the defendant is concerned, despite the terms of plaintiff's agreement with his attorney that the latter should have a lien upon the cause of action.

[5] Under rules of court 3 and 4, supra, attorneys, after suit is begun, have control of the litigation.

The prayer of the motion to be allowed to continue the action, notwithstanding the allegation of settlement, is granted. The scope the issues may take will not be now determined.

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BELT LINE RY. CO. v. CITY OF MONTGOMERY et al.

(District Court, M. D. Alabama, N. D. October 3, 1912.)

No. 301.

1. STREET RAILROADS (§ 18\*)—GRANT OF FRANCHISE—CONSTRUCTION—LENGTH OF TERM.

A grant of a franchise to a street railroad company to use the streets of a city must be in plain terms, and nothing passes except it be clearly stated or necessarily implied. If it is in any way ambiguous as to the length of the term, it is to be construed strictly against the grantee.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 39-41; Dec. Dig. § 18.\*]

2. STREET RAILROADS (§ 18\*)—FRANCHISE—CONSTRUCTION OF GRANT—LENGTH OF TERM.

A city enacted an ordinance granting a franchise to certain individuals to construct and operate a street railroad for a term of 20 years. A few months later an amendatory ordinance was passed granting a similar franchise to a corporation which succeeded to the rights of the individuals and providing that all provisions of the original ordinance not contained therein were repealed. This ordinance contained no provision as to the duration of the franchise. Subsequently a third ordinance was passed amending the second by reciting that the corporation named therein was the successor and assignee of the persons named in the original grant, and that it was the intention thereby to confer upon it all of the rights and privileges granted to them by the first ordinance.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Subsequently other ordinances were enacted from time to time granting additional privileges to the company, extending its franchise to other streets, etc., expressly subject to the terms and conditions of the first two ordinances. All of said ordinances were accepted in writing by the grantees. *Held*, that the limitation of the term of the franchise to 20 years contained in the original grant was not repealed by the second ordinance; it being at least doubtful whether such repeal was intended.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 39-41; Dec. Dig. § 18.\*]

**In Equity.** Suit by the Belt Line Railway Company against the City of Montgomery. On demurrer to bill. Demurrer sustained.

The original bill in this cause was filed on June 22, 1911, in the Circuit Court by the Belt Line Railway Company, a corporation organized under the general laws of Alabama on December 6, 1889, against the city of Montgomery, a municipal corporation, and the individuals composing the board of commissioners of said city, and alleged that complainant, as a street railway company, had power conferred upon it to construct, maintain, and operate a street railway line in and over certain streets of the city of Montgomery and to have succession perpetually, and that in pursuance of the powers conferred upon it by its said charter, and in pursuance of the rights and privileges conferred by the city of Montgomery, complainant constructed its tracks, switches, and turnouts over and along the streets of said city, and enjoyed the privileges conferred by the said city for many years.

It was further alleged that prior to the incorporation of complainant, and on March 29, 1889, the city of Montgomery, by an ordinance approved March 30, 1889, granted to F. M. Billing and others the right of way over certain streets of said city upon certain conditions and limitations named in the grant, and authorized them to construct, maintain, and operate a street railway over and along the streets named in the ordinance. Section 2 of the ordinance making the grant provided that the authority granted to Billing and others should cease and determine at the end of 20 years. It was also provided in the ordinance that, before the rights, privileges, and powers granted by it should vest, Billing and his associates should become incorporated under the general laws of Alabama, relating to street railway companies, and that thereupon such rights and privileges should vest in the corporation to be formed.

The bill further alleged that prior to the incorporation of complainant, and by ordinance approved October 4, 1889, copy of which was made an exhibit to the bill, the city of Montgomery granted to the Montgomery Belt Railway Company, a corporation, its successors and assigns, as the successors and assigns of Billing and associates, the right and privilege to construct and operate a street railroad in the city of Montgomery, for the transportation of freight and passengers, along and across certain streets therein named and under the regulations and conditions set forth. This last ordinance, the bill alleges, purported to be amendatory of the ordinance approved March 30, 1889; but the bill alleges the ordinance approved October 4, 1889, was a complete ordinance and a full revision of the subject-matter contained in the ordinance approved March 30, 1889, and was intended to repeal said ordinance. The former ordinance contained the following provision, in section 11 thereof: "That the Montgomery Belt Railway Company shall consent to this ordinance as an amendment to said ordinance of March 29, 1889, and approved March 30, 1889, and accept the same in lieu thereof." Section 13 of the said ordinance contained the following: "Be it further ordained that everything contained in said ordinance of March 29, 1889, and not herein contained, is hereby expressly repealed." Nothing was said in the ordinance of October 4, 1889, which contained section 13, above set out, as to the duration of the franchise. The Belt Railway Company filed its consent and acceptance of the ordinance in writing. Complainant alleges that the ordinance approved March 30, 1889, *including the 20-year limitation therein, was repealed by the ordinance of October 4, 1889*

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



Paragraphs 5 and 6 of the bill, respectively, made exhibits to the bill an ordinance approved July 11, 1890, authorizing the complainant, as the successor of the Montgomery Belt Railway, to construct and operate a switch into certain property; an ordinance approved March 10, 1893, granting to complainant the right to construct and operate its line of road along and across certain streets therein named, for the transportation of freight and passengers, being substantially the same streets over which the city of Montgomery consented that it might construct and operate its line of road as shown in the charter, and the ordinance fixed no period of time during which complainant was to exercise the privileges therein granted and providing that it should not take effect until the Belt Line Railway Company should file its consent in writing, which was done. The ordinance also declared complainant "the sole and lawful successor of the rights theretofore (granted) by the said ordinance of September 30, 1889, which are herein and in the sections of said ordinance other than section 1 contained."

Paragraphs 7 and 8 of the bill make exhibits thereto ordinances of the city of Montgomery approved December 9, 1903, granting complainant the right to make certain changes in its tracks, and the ordinance approved January 18, 1897, empowering and authorizing complainant to put down and operate additional main track. It was alleged in the bill that these ordinances did not contain any limitation upon the right of complainant to exercise the privileges and rights therein contained.

An ordinance adopted by the city council of Montgomery on March 6, 1893, and approved March 10, 1893, is as follows: "Whereas, heretofore, on the 30th day of September, 1889, this council enacted an ordinance relative to the Montgomery Belt Railway Company and its rights to operate a railway in the city of Montgomery by an amendment to a former ordinance granting such right to F. M. Billing, W. F. Joseph, W. F. Vandiver, their associates, successors and assigns; and whereas by the first section of said ordinance, it was intended to grant the said railway company the same right to maintain a line of railroad in the streets and along the line therein described, which had heretofore been granted to the said parties; and whereas, doubts have been expressed concerning the sufficiency of the form of said section; and whereas, the said Montgomery Belt Railway Company has forfeited all right to have any railroad on Bell street and on Tallapoosa street between Goldthwaite and the intersection of Tallapoosa and River streets: Now, therefore, be it ordained by the city council of Montgomery as follows, viz.: That section 1 of said ordinance, adopted September 30, 1889, and approved October 4, 1889, be amended so as to read as follows: Section 1. Be it ordained by the city council of Montgomery that an ordinance of the city council of Montgomery, granting the right of way over the streets of the city to F. M. Billing, W. F. Joseph, W. F. Vandiver, their associates, successors and assigns, for the construction and operation of a street railway, adopted March 29, 1889, and approved March 30, 1889, be, and the same is hereby, amended so as to read as follows: That the Belt Line Railway Company, a corporation chartered and incorporated under and by virtue of the laws of the state of Alabama, its successors or assigns (the said railway company having become and being the assigns and successors of said Billing, Joseph and Vandiver of such of the rights, privileges, powers and franchises granted to and conferred upon said Billing, Joseph and Vandiver, by said ordinances of March 29, 1889, and September 30, 1889, as are herein, and the section of said ordinance of September 30, 1889, other than section 1 of said last-named ordinance granted), are hereby granted the right to construct, operate and maintain a single line or track of street railway in the city of Montgomery for transportation of freight and passengers, either or both, upon the following streets or parts of streets with the right to cross any of said streets or parts of streets, viz.: Beginning at the west side of North Perry street on Columbus street, thence west on Columbus street to and across North Court street, to Tallapoosa street, thence along Tallapoosa street to and along River street, thence along River street with the right to cross Goldthwaite, Whitman, Hanrick, Holt, Dickinson and Bell streets, crossing the last-named street at or near the corporation line, with the right to make a continuous line. The said Belt Line Railway Com-

pany, its successors or assigns, is hereby declared the sole and lawful successor of the rights and franchises heretofore by the said ordinance of September 30, 1889, which are herein and in the sections of said ordinance other than section 1 contained; and said Belt Line Railway Company, its successors or assigns are hereby granted the right to exercise such of the rights, franchises, powers and privileges granted to said Billing, Joseph and Vandiver by said ordinances of March 29, and September 30, 1889, which are herein and in the sections of said ordinance of September 30, 1889, other than section 1 of said ordinance contained, and are authorized to maintain said right according to the terms and provisions of this ordinance and the sections other than section 1 of the said ordinance of September 30, 1889; provided that this ordinance shall not take effect until the consent in writing of the Belt Line Railway Company heretofore has been filed with the city clerk." The complainant accepted the provisions of this ordinance in writing as required.

The ninth paragraph of the bill as amended alleged "that on the 13th day of June, 1911, the board of commissioners of the city of Montgomery, representing the city of Montgomery as a municipality having a population of more than 25,000 and less than 50,000 people, which board is composed of W. A. Gunter, Jr., president, C. P. McIntyre, W. R. Brassell, J. T. Letcher, and E. B. Joseph, acting for said city under supposed authority conferred upon said city and the said board of commissioners by the act of the Legislature of Alabama, approved April 6, 1911 (General Acts Alabama 1911, p. 289 et seq.), and other general laws passed by the Legislature of Alabama conferring power upon municipalities, adopted a resolution. \* \* \*"

"Whereas, an ordinance was approved March 30, 1889, granting the right of way over the streets of the city to F. M. Billing, W. F. Joseph, W. F. Vandiver, their associates, successors and assigns, for the construction and operation of a street railway. And whereas, by section 2 of said ordinance it was provided that the authority granted by said ordinance should cease and determine at the end of twenty years. And whereas, an ordinance was approved Oct. 4, 1889, to amend 'an ordinance of the city of Montgomery' entitled 'An ordinance granting the right of way over the streets of Montgomery to F. M. Billing, W. F. Joseph, W. F. Vandiver, their associates, successors and assigns for the construction and operation of a street railway,' adopted March 29, 1889, and approved March 30, 1889. And whereas, by said amended ordinance the Belt Line Railway Company acquired all the rights, powers, privileges and franchises granted to F. M. Billing, W. F. Joseph, W. F. Vandiver. And whereas, an ordinance was approved July 11, 1890, to authorize the Belt Line Railway Company to construct and operate a switch or turnout from the main line into the property of J. C. Hurter & Co. and the property known as the Alabama Warehouse. And whereas, said Belt Line Railway Company, as successors of the Montgomery Belt Railway Company, acquired by said ordinance the power therein given subject to all the restrictions and limitations of the ordinances approved October 4, 1889, and March 30, 1889. And whereas, an ordinance was approved on March 10, 1893, to amend section 1 of an ordinance entitled 'An ordinance to amend an ordinance of the city of Montgomery' entitled 'An ordinance granting the right of way over the streets of the city to F. M. Billing, W. F. Joseph, W. F. Vandiver, their associates, successors and assigns, for the construction and operation of a street railway,' adopted February 30, 1889, and approved by the mayor October 4, 1889. And whereas, it was expressly declared that the said Belt Line Railway Company, its successors and assigns, were the sole and lawful successor of the rights and franchises granted by the said ordinances of March 29 and September 30, 1889, as are herein, and the sections of said ordinance of September 30, 1889, other than section 1 of said last-named ordinance, and said Belt Line Railway Company, its successors and assigns, were granted the right to exercise the rights, franchises, powers and privileges granted to said Billings, Joseph and Vandiver under said ordinances of March 29 and February 30, 1889. And whereas, an ordinance was approved January 18, 1889, to be entitled 'An ordinance to confer additional powers and privileges upon the Belt Line Railway Company.' And whereas, by section of said ordinance it was expressly declared that such powers, so granted, were subject to the terms, conditions, restrictions, limitations and

requirements set forth and contained in an ordinance adopted on, to wit, the 29th day of March, 1889, granting a right of way over the streets of the city to Billing, Joseph, Vandiver, their associates, successors and assigns. And whereas, an ordinance was approved December 9, 1903, 'to permit the Belt Line Railway Company to remove and change the point at which its bulk track intersects with its main track on Tallapoosa street.' And whereas, said power was granted subject to all the conditions, requirements, limitations and regulations contained in the ordinances under which the said Belt Line Railway Company was then operating and subject to any and all ordinances of the city council of Montgomery, then in existence, or which might thereafter be adopted, regulating the operation of railways over the streets of the city of Montgomery. And whereas, an ordinance was approved December 24, 1903, granting to the Belt Line Railway Company permission to change the location of a 'cross-over' track, the same connecting with main line tracks Nos. 1 and 2 in Tallapoosa street in the city of Montgomery, Ala. And whereas, such power was granted subject to all the conditions, requirements, limitations and regulations contained in the ordinances of the city of Montgomery, then in existence, or which might thereafter be adopted regulating the operation of railways over the streets of Montgomery: Now therefore, it is hereby declared by the board of commissioners of the city of Montgomery, acting for said city of Montgomery, that the franchise granted to the said Belt Line Railway Company expired on March 30, 1909, and that said Belt Line Railway Company have, since that date, been using the streets of the city of Montgomery without any authority therefor. Therefore be it resolved by the board of commissioners of the city of Montgomery, that the said Belt Line Railway Company be, and are hereby, ordered to cease the further operation of said Belt Railway Company and to remove from the streets of the city of Montgomery all its tracks and property of every description, within ten days from the passage of this resolution. Be it further resolved, that the president of the board of commissioners of the city of Montgomery be, and he is hereby, authorized and empowered to see to the enforcement of this resolution and to use the engineering and police departments of said city, for such purpose whenever, in his opinion, it is necessary to do so."

The tenth paragraph of the bill as amended is as follows: "Orator further shows unto your honor that the adoption of the resolution of June 13, 1911, just above referred to, was an attempt on the part of the city of Montgomery and of the board of commissioners of the said city to impair the obligation of the contract which for many years had existed between the city of Montgomery and your orators; and that said resolution is violative of section 10, art. 1, of the Constitution of the United States, which provides that 'no state shall pass a law impairing the obligation of contracts,' and also violates the fourteenth amendment of the Constitution of the United States, in that said resolution purports and attempts to deprive complainant of its property and its property rights without due process of law. Complainant further avers that the said resolution is void and ineffective in that it denies to complainant the equal protection of the laws as guaranteed to it by the fourteenth amendment of the Constitution of the United States. Orator further shows that it expended large sums of money under the rights and privileges granted to it by the city of Montgomery, in the construction of its tracks, along, upon and across the streets of said city, and under the contract between your orator and said city; that the rights and privileges granted by the city of Montgomery were and are valuable; and that the exercise of those rights and privileges are essential to the performance by your orator of those functions, privileges, and rights conferred upon it by its charter; and that if the threats contained in the resolution of June 13, 1911, are permitted to be executed, that the damage to orator will be irreparable. Orator avers that it is not true, as declared in said resolution, that the privileges and franchises granted to it by the city of Montgomery have expired, but, on the contrary, orator avers the fact to be that under the ordinances and acceptances of same, herein set forth and made exhibits to the bill, your orator's right to exercise the privileges and franchises conferred upon it by the city of Montgomery is perpetual. Orator further avers that unless restrained the threats contained in said resolution will be



enforced immediately upon the expiration of the time named in said ordinance and in the manner therein provided for, and the tracks and property of your orator will be forcibly removed from the streets of the said city of Montgomery, resulting thereby in the impairment or destruction of the contractual rights and obligations heretofore created by the ordinances of the said city and the acceptance of the same by your orator and by the Montgomery Belt Railway Company, its predecessor; also resulting in the taking of your orator's property without due process of law or in the denial to it of the equal protection of the laws guaranteed to it by the fourteenth amendment of the Constitution of the United States; and that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$5,000."

The bill prayed a temporary restraining order enjoining and restraining the respondents, their agents or servants, from putting into effect the resolution of June 13, 1911 (which was granted upon the execution of bond by complainant), and that upon final hearing a decree be made declaring complainant's rights and privileges over the streets of Montgomery to be perpetual, and perpetually enjoining and restraining the said respondents from putting into effect the resolution complained of, or otherwise interfering with the property of complainant and for general relief.

Respondents filed motions to dissolve the temporary restraining order and to dismiss the bill upon the following grounds: "First, for that there is no equity in said bill. Second, for that by the allegations of said bill it is shown that the franchise granted to the complainant by the city of Montgomery expired on, to wit, the 30th day of March, 1909." Later the bill was demurred to on the same grounds. The demurrers having been sustained, and complainant declining to amend or plead over, the bill was dismissed.

John R. Tyson, of Montgomery, Ala. (Steiner, Crum & Weil, of Montgomery, and W. E. Kay, of Jacksonville, Fla., on the brief), for complainant.

John V. Smith, City Atty., of Montgomery, Ala. (Wm. A. Gunter, of Montgomery, Ala., on the brief), for respondents.

JONES, District Judge (after stating the facts as above). The real issue is whether or not the limitation of the franchise to 20 years, in the original ordinance adopted March 29, 1889, was repealed by subsequent ordinances. Respondents admit, if that ordinance has been repealed, complainant is entitled to the relief prayed in the bill.

[1] In *Blair v. City of Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801, it is held that one asserting private rights in public property under grants of franchises must show that they have been conferred in plain terms; for nothing passes by a grant except it be clearly stated or necessarily implied. Legislative grants of franchises which are in any way ambiguous, as to whether granted for a longer or shorter period, are to be construed strictly against the grantee.

In *Cleveland Electric Railway v. Cleveland*, 204 U. S. 129, 27 Sup. Ct. 207, 51 L. Ed. 399, it is said:

"The rules of construction which have been adopted by the courts in cases of public grants" (of the use of the streets) "by the authorities of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and definite in their nature, and should contain no ambiguity in their terms. The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant 'in order that the privileges may be intentionally granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the Legislatures with a



view to obtain from such bodies the most liberal grant of privileges which they are willing to give.'"

In *Pennsylvania Railroad Co. v. Canal Commissioners*, 21 Pa. 9, it is said:

"The rule of construction in cases of this description is this: That any ambiguity in the terms of the grant must operate against the corporation, and in favor of the public. \* \* \* If, on a fair reading of the instrument, reasonable doubt arises as to the interpretation to be given to it, those doubts are to be solved in favor of the state; and, where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state."

In *Slidell v. Grandjean*, 111 U. S. 412, 4 Sup. Ct. 475, 28 L. Ed. 321, this is declared a wise doctrine:

"It serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealings with legislative bodies."

The same doctrine is upheld in numerous other authorities. See *Louisville Trust Co. v. City of Cincinnati*, 76 Fed. 296, 22 C. C. A. 334.

[2] After a careful consideration of the ordinances passed subsequently to the original grant, which was for a limited period only, and the wording of the ordinances, which it is insisted repeal the limitation in the original grant, bearing in mind that such a result if intended could have been better accomplished by a few simple, direct words, obviating the necessity for the elaborate circumlocution employed, and the reasons given in the preambles of the several ordinances why further legislation regarding the original grant was necessary, I am doubtful, to say the very least of it, whether those who voted for the subsequent ordinances were put on notice, by the language employed, of any lurking intent in the subsequent legislation to repeal the limitation contained in the original grant, or intended, or desired by voting for the subsequent ordinances, to effect a grant of the franchise beyond the term fixed in the original ordinance, or that the subsequent ordinances had that effect. Under all the authorities, under such circumstances, the doubt must be resolved in favor of the city, and I must hold that the resolution directing the complainant to remove its tracks and cease the use of the streets is a proper exercise of authority by the commission and that complainant has no right to complain of its enforcement.

There must be a decree discharging the temporary restraining order, denying a preliminary injunction, and dismissing the bill. If the complainant desires to appeal, it may have a supersedeas upon giving bond in a sum to be agreed upon by counsel or fixed by the court. Counsel may prepare and present a decree in conformity with this opinion.

**PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.**

(District Court, S. D. New York. December 18, 1912.)

Eq. Nos. 2—9, 2—33, 2—149, 3—37.

**STREET RAILROADS (§ 58\*)—INSOLVENCY AND RECEIVERS—DISTRIBUTION OF ASSETS—LESSOR AND LESSEE COMPANIES.**

Decretal orders settled for the apportionment and distribution of the fund realized from the settlement of two suits by the receivers of the New York City Railway Company as between them and the receivers of the Metropolitan Street Railway Company.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.\*]

In Equity. Suits by the Pennsylvania Steel Company and another against the New York City Railway Company and another, by the Farmers' Loan & Trust Company against the Metropolitan Street Railway Company and others, by the Guaranty Trust Company of New York against the Metropolitan Street Railway Company and others, and one other cause. On applications for settlement of decretal orders.

For prior opinions, see 196 Fed. 661, and 198 Fed. 778.

Theo. W. Morris and Matthew C. Fleming, both of New York City, for City receiver.

A. H. Masten and Wm. M. Chadbourne, both of New York City, for Metropolitan receiver.

James Byrne, of New York City, for Pennsylvania Steel Co.

Brainard Tolles, of New York City, for Guaranty Trust Co.

Bronson Winthrop, of New York City, for Farmers' Loan & Trust Co.

Richard R. Rogers, of New York City, for New York Railways Co.

Benj. S. Catchings, of New York City, for tort creditors.

LACOMBE, Circuit Judge. The first application is in the proceeding, which has been designated, "Apportionment Proceeding." That proceeding is concerned with the apportionment between the Metropolitan and the City Company of the proceeds of the two litigations prosecuted by the receiver of the City Company. The application is for the entry of decree upon the mandate of the Circuit Court of Appeals. See 198 Fed. 778. That mandate was not specific in form. It directed this court to enter a decree in conformity with the views expressed in the opinion of the appellate court. Upon the argument there appeared to be a great diversity of opinion as to precisely what language would correctly express that opinion. When, however, the opinion is studied in connection with other opinions of the same tribunal delivered at the same time, it is thought that the proper disposition of the pending application is not obscure. The decretal order which was appealed from was in the form of answers to three separate questions. These questions and answers are set forth in full in the opinion of the Court of Appeals.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The first question asked in what proportion the proceeds of the settlement should be apportioned. The answer to that question, as stated by the circuit court, was approved.

The second question asked to what part of such proceeds the Metropolitan Company or its receivers were entitled; or, to state it differently, whether the City Railway receiver, now the custodian of the fund, is entitled to deduct any, and, if so, what, sums from the distributive share of the Metropolitan. The trial court held that there should be four classes of deduction, as follows: (1) A certain specific sum of money amounting to \$234,483.81. (2) A sum representing expenditures made by the City Company upon the Twenty-Third Street loop and the First Avenue line, and all such other expenditures made and obligations incurred by the City Company prior to the appointment of receivers on September 24, 1907, for purposes described in article 15 of the lease of February 14, 1902, an accounting to be had to ascertain the amount of such expenditures. (3) A sum representing expenditures and obligations of a similar character (viz., for purposes described in said article 15) made by receivers of the City Company after their appointment down to the time when the lease should "be deemed to have been no longer in effect." (4) In the event of the Court of Appeals holding that the lease became inoperative on October 1, 1907, a sum representing the amount of all money and the value of all property belonging to the City Company which came into possession of the receivers of the Metropolitan, or for which the estate of the Metropolitan Company may be held accountable to the estate of the City Company.

In the memorandum which was filed April 8, 1912, when this decretal order was made ([D. C.] 196 Fed. 661), it was said:

"By reason of the circumstance that the numerous questions arising under these receiverships came up for determination in separate proceedings, inconsistencies sometimes appear . . . in the deliverances of the court. For example, in this proceeding no attention is paid to the question when the lease terminated. The opinion proceeds on the assumption that capital disbursements made by receivers after October 1, 1907, were made by them as City Company receivers with City Company money. That assumption is apparently inconsistent with the opinion heretofore expressed that after that date the receivers were not operating the road under the lease. Until the court of Appeals finally decides the one question, there can be no final decision of the other. If this court's decision as to the lease be sustained, then there will be no disbursements by receivers subsequent to October 1st to be deducted from the Metropolitan's distributive share. In the place of such deduction, however, the New York City receiver would have a good claim against Metropolitan's distributive share for any money or property of its own which was used by Metropolitan receivers subsequent to October 1st."

The Court of Appeals in its opinion approved this answer to question 2, "except that subdivisions 3 and 4 are to be reserved for disposition in future proceedings." It will be observed that the matters treated of in these subdivisions could not be made definite and certain until it was finally determined on what date the lease of February 14, 1902, and the obligations created thereby ceased to be a factor in determining the incidence of expenditures for operation, maintenance, repair, and betterment of the property. At the time the decretal

order was entered that date was uncertain. The master held it was September 24, 1907. The writer, sitting at circuit, held it was October 1, 1907. Various interests contended strenuously that it was August 1, 1908. At the time the opinion of the Court of Appeals was filed that question had not been finally determined. Presumably the members of that court had already agreed as to what they would decide in the proceeding, called inartificially the "termination of the lease proceeding," possibly they had concurred in the opinion to be handed down in that proceeding, but the dispute as to date would not be finally determined until the mandate in that proceeding was signed, and the decision not modified on rehearing or certiorari.

Since then, however, that question has been finally determined. It is now settled that the date was September 24, 1907, and the opinion which sets forth the reasons for that conclusion is so clear and specific as to the rights and obligations of the parties that it would seem nothing further is needed to dispose of the two subdivisions which were reserved for future proceedings. The Court of Appeals says:

"The expenditures during the dual receivership (September 24, 1907, to August 1, 1908) were for the preservation and improvement of the Metropolitan property, and every equitable consideration requires that they should be borne by the Metropolitan, and not by the City, interests."

If there be enough now settled to dispose of these two subdivisions, it would certainly seem that this should now be done, so that some progress can be made towards distribution, rather than to initiate new proceedings to present again the same questions which were presented in the decretal order appealed from.

The receivership during the period in question is called "dual" because the same individuals were receivers of both roads; but, so far as rights and obligations and action taken by receivers are concerned, the situation is the same as if there had been one set of receivers for one road and another set for the other one, all working together to see to it that the interests of the public should not suffer, while those of each road should be faithfully looked after. This was the theory of the situation adopted by the Circuit Court early in the proceeding, that the system should be run somehow, and the burden of doing so be settled afterwards, as a "mere matter of bookkeeping." There is nothing in the opinion of the Court of Appeals to indicate that this theory was a mistaken one. The logical application of this theory clarifies the situation. There were expenditures by receivers after September 24, 1907, for operation, for rentals and similar obligations, for maintenance, repairs, and improvements. Property of the City road was used for these expenditures. The simplest illustration is found in the cash on hand, about \$600,000 which belonged to the City Company and which was thus expended. Such expenditures were, as the Court of Appeals has held, for the preservation and improvement of the Metropolitan property, and to be borne by it, not by the City interests. What would have been the course of proceeding if there had been separate receivers? The Metropolitan receivers, needing \$600,000 in cash instantly available, would have applied to New York receivers to advance it, just as they might have applied to any lender



of money to advance it on receiver's certificates. The City receivers, knowing these expenditures should be borne by the Metropolitan and that corpus of the property was sufficient to make the loan a safe one, advanced the \$600,000, feeling assured that, when the accounting came, the advance would be restored. In reality, therefore, the expenditure of the \$600,000 was an expenditure of Metropolitan receivers with money of their own, which they had obtained from their associates the City receivers. It is not perceived that the circumstance that the same persons were receivers of both roads operates in any way to the prejudice of such accounting. In this view of the situation subdivision 3 of the original decretal order should be expunged. The City receiver is not entitled to deduct anything from the Metropolitan distributive share for expenditures or obligations made or incurred by the City receivers for purposes of article 15 subsequent to September 24, 1907, because the City receivers never made any such expenditures.

As to subdivision 4, it is now settled that the lease ceased to be a factor in determining the incidence of expenditures on or about the property on the very day receivers were appointed, September 24, 1907; that from that time on all such expenditures were to be borne by Metropolitan, not by City, interests. This being determined, there seems to be no reason why the point reserved as to this subdivision should not now be determined. It is not disputed that money and property of the City Company were after that date turned over by its receivers to Metropolitan receivers, and used by the latter for Metropolitan purposes. The amount of such money and property can, of course, be determined only by an accounting; but it seems so clear that such money and property was not a gift, but a loan to receivers, that no force is found in the suggestion that the amount of such loan should not be included among the items of deduction from Metropolitan's distributive share before such share is turned over by its custodian, the present receiver of the City Company. This loan is made up of various classes of property. There was cash in the safe, in banks, and trust companies; there were bills receivable the proceeds of which were taken by Metropolitan receivers; there were possibly some tools not in use as a part of the equipment; there were materials and supplies of many different sorts; finally, there were credits of a peculiar sort. When receivers' certificates were issued and sold, they were made a lien, not only on the property of the Metropolitan, but also of the City Company. This was done by direction of the Court of Appeals, probably to make the security attractive to the purchaser. That court reserved the question as to who should ultimately respond for them. In this connection reference may be made to opinion of this court filed November 12, 1912. Had it been known at the time that all expenditures after September 24, 1907, were to be borne by Metropolitan, not by City, interests, this presumably would not have been done. But it has been done and cannot be undone. The lien which the purchaser of those certificates has cannot be destroyed or impaired. It is understood that these certificates have been renewed, and are not yet paid. If they be not redeemed, the holders will en-

force payment as they most conveniently can. If liquid assets of the City Company are available, the holders may, for aught any one can now tell, enforce the lien against them. If the City property is thus made to pay these certificates, or any part of them, the proceeds of such certificates being used for expenditures which should have been borne by Metropolitan and not by City interests "every equitable consideration," to use the language of the Court of Appeals, requires that the City Company should be reimbursed for its property, thus appropriated to meet obligations of the Metropolitan receivers. No good reason appears why such reimbursement should not be made out of the distributive share of the Metropolitan now in the hands of the City receiver.

It has been suggested that the Court of Appeals has held that the Metropolitan's share of the fund should be treated as assets for the benefit of general creditors. It is thought that this proposition in no way interferes with the present application, or with the City receiver's right to payment of the money and property loaned to the Metropolitan receivers. If, when the latter receivers are accounting with the different Metropolitan interests, it should be held that such repayment ought to have been made by them out of some other fund (such as the \$12,000,000 cash proceeds of sale), they will no doubt then be required to take out of that fund sufficient to replenish this one. No opinion is expressed on such question because it does not arise on this application.

These views may be expressed by amending the decree on mandate now proposed by counsel for the City Company as follows:

1. By striking out everything from the words "(3) the receiver of the City Company" on page 6 to and including the words, "to reimbursement or to have deducted," being the concluding words of the first paragraph on page 7.

2. By substituting for the part thus struck out the following:

"(3) The receiver of the New York City Railway Company is also entitled to reimbursement for all money and property belonging to the City Company, which came into the possession of the receivers of the Metropolitan Company on or subsequent to September 24, 1907, and for all money and property of the City Company which may have been or may hereafter be paid out to redeem any of the receiver's certificates sold under the order of June 2, 1908, or issued in renewal of such certificates."

In the opinion of the Court of Appeals in this proceeding, the entire answer to question 3 in the original decretal order was approved, with the proviso that the deductions mentioned in said answer should be those contained in subdivisions 1 and 2 of question 2. The proposed order on mandate provides that the share of the notes apportioned to the equity suit are hereby allowed as a claim against the Metropolitan estate. This subject apparently is not discussed in the opinion of the Court of Appeals. A less positive form of words should be used.

The proposed decree on mandate should therefore be amended as follows:

3. By striking out the small paragraph in quotation marks on page 7 and substituting the following:

"The deductions mentioned in this answer are those enumerated in subdivisions 1 and 2 of question 2. Nothing herein contained shall be held to prejudice an application of the receiver of the City Company to have the share of the notes apportioned to the equity suit allowed as a claim against the estate of the Metropolitan Company."

Nothing was said in the original decretal order about distribution of accretions of interest on the fund of \$5,500,000. To avoid all uncertainty, there should be inserted in the proposed order the following:

4. On page 7 immediately before the words, "II. That such decree as so modified," insert the following:

"In case the accretions of interest upon the fund of \$5,500,000 shall exceed the amount of all disbursements, counsel fees and other expenses referred to in subdivision (b) of the answer to Question 1, such surplus accretions shall be distributed in the same proportion as the principal sum upon which they shall have accrued."

Counsel for the City receiver may prepare a new order amended as above indicated, and give notice of the settlement thereof, so that, if anything has been overlooked in this memorandum, it may be considered.

#### Petition to Sell Certain Property.

When the writ of error was sued out to review the judgment in the action at law which was subsequently included in the settlement, whose proceeds are the subject of this proceeding, certain items of property were deposited as security to stay execution. It has been held that these should be applied pro tanto to the satisfaction and payment of the judgment in the action at law before apportionment is made. In order to do this, it is necessary that they be sold by the present receiver of the City Company, who is now the custodian of the whole fund. The Metropolitan receiver now asks that such sale be ordered, enumerating all the items in his petition.

In opposition to this application counsel for the City receiver calls attention to the following facts:

(1) The note of the Third Avenue Railway Company, dated February 21, 1907, for \$107,100, has been surrendered to that company pursuant to the terms of a settlement approved by this court December 28, 1911.

(2) The note of the New York City Railway Company, dated April 1, 1907, for \$5,000,000, to the order of the Metropolitan Securities Company, was satisfied and discharged as part of the settlement of July 8, 1910.

(3) The 130,000 shares of the capital stock of New York City Railway Company is to be held and accounted for by the receiver of City Company under the stipulation made in this proceeding with reference thereto.

These items, therefore, will not be included in the sale. An order for the sale of the other items, with sufficient provisions for notice may be submitted.

### Accountings in This Proceeding.

Upon motion of Metropolitan receiver the special master will be instructed to take testimony and report as to the amount of disbursements, counsel fees, and other expenses in connection with the prosecution and settlement of the claims involved in the action at law and in the suit in equity, in conformity with the provisions of the decree to be entered on the mandate in this proceeding—subdivision (b) of the answer to Question 1. The special master is further instructed to take testimony and report as to all expenditures of the sort described in subdivision 2 of the answer to Question 2, as stated in the decree to be entered on the mandate in this proceeding.

### Accounting for City Property Used Subsequent to Appointment of Receivers.

The City receiver has applied for an order instructing the special master to take testimony and report as to the amount of cash and personal property of the City Company which was taken by receivers on September 24, 1907, and used for Metropolitan purposes. This is the cash and property heretofore referred to in this opinion. Such an order may be prepared and submitted. It should be broad enough to include any counterclaims and offsets which Metropolitan receiver may present.

These several orders will be settled on notice

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### THE VIKING.

#### THE ROBERT DONALDSON.

(District Court, E. D. Virginia. November 27, 1912.)

#### 1. COLLISION (§ 95\*)—ANCHORED STEAMSHIP AND TOW—FAULT OF TUG AND TOW.

A collision in Hampton Roads in the daytime between an anchored steamship and a barge in tow *held* to have been due to the fault of the tug and tow—the former being in fault for not passing the steamship on the other side, as was customary, her action involving risk of collision because of the length of the towing hawser and set of the tide; and the latter for not being properly manned and in consequence failing to clear the steamship, as she might have done by proper navigation.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.\*]

#### 2. COLLISION (§ 71\*)—SHIP AT ANCHOR.

In a collision between a barge, in tow of a tug, and a ship at anchor, barge *held* in fault, as well as tug, because of failure to have efficient lookout, in addition to master at wheel, on the barge.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.\*]

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

In Admiralty. Suit for collision by John Brown, master of the steamship Bangor, against the steam tug Viking and the barge Robert Donaldson. On final hearing. Decree against both the tug and barge.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



Hughes, Little & Seawell, of Norfolk, Va., for libelant.

W. H. White, Jr., of Norfolk, Va., for the Viking.

John W. Oast, Jr., of Norfolk, Va., and W. M. Harris, of Philadelphia, Pa., for the Robert Donaldson.

WADDILL, District Judge. This case grows out of a collision that occurred in Hampton Roads, on the 20th day of February, 1912, between the British steamship Bangor, and the barge Robert Donaldson, in tow of the steam tug Viking. The libel is filed by the Bangor's master against the tug and barge, and the master of the barge has also filed an intervening petition and libel against the tug.

The Bangor, light, an ocean-going steamer of 2,201 net tons burden, 330.6 feet in length, 43.2 feet in breadth, and 21.6 feet draft, was and had been anchored at the quarantine station on the western side of the main channel, about three-quarters of a mile to the southward and westward of the hospital ship Jamestown, stationed near Old Point Comfort, Va. On the day in question the Viking, a combined freight and tug boat, of about 145 tons gross, 110.1 feet in length, 21.5 feet in breadth, and 7.3 feet draft, was towing the Robert Donaldson, a barge of 185 feet in length, 23.10 feet in breadth, and 13.6 feet draft, 389 gross tons, and 378 net tonnage, about one-half capacity loaded, bound to Philadelphia by the bay and inland route, intending to stop in the Poquossin river, with a view of completing its cargo. The day was clear, and weather fair, with little or no wind; a strong ebb tide running.

The tug, in going out of Hampton Roads, attempted to pass around the bow of the Bangor, the ship at the time heading up the channel and to the southward and westward, and cleared the same variously estimated at from 60 to 300 feet, and the barge collided with the Bangor; the starboard bow of the barge coming into collision with the port bow of the ship, causing serious injury to both vessels. The barge, at the time, was being towed on a hawser claimed by the libelant to be 500 feet long, and admitted by respondents to be 360 feet, and the tug was making about  $4\frac{1}{2}$  miles an hour.

The assignments of fault by the libelant against the tug and barge are many in number, and on the part of the latter vessels, the assignments are in large measure of fault one against the other; and in turn they assign against the Bangor that she was anchored in an improper place, was without a proper lookout, and at the time of the collision should have played out more chain, with a view of preventing the accident. The court will not attempt to enter into a general discussion of the various assignments of fault, but merely pass upon those material to be determined, and bearing directly upon the collision, considering them against the ship, the tug, and the barge, in the order mentioned.

First. The faults alleged against the Bangor are entirely without merit. She was anchored in a recognized anchorage ground in Hampton Roads, with ample room on both sides of her for the tug and tow to have passed, and with a great space to the eastward and southward

side of her, which was the regular fairway over which shipping generally passed at the time, and during the 17 days she had been at anchor; and there were no special conditions making it impractical for the tug and tow to have taken the course adopted by other vessels at this time, nor for their not passing in safety on the contrary course, on the opposite side of the vessel, if it saw proper to adopt the same. It is true the tug insists that it took the course it did because of the existence of other shipping in the fairway. This, however, is not supported by the testimony; and in no event does it account for the failure to properly navigate on the western side of the Bangor, where there was ample room as before stated.

The criticism respecting the lack of a lookout by the Bangor is equally without merit, certainly so far as this collision is concerned, as there is no pretense but that the ship was seen, and its position known, several miles away, and there was nothing that a lookout could have done to avoid the collision. The suggestion that the ship was in fault for failing to play out more chain before the collision, is also without merit; and in any event, if in default in this respect, it would have been error in extremis, for which she would not be liable.

[1] Secondly. The claim of the Viking that the collision was brought about by the barge's taking a sudden sheer to starboard as the tug passed the bow of the Bangor, thereby bringing about the accident, is not supported by the testimony, and in any event it would not serve to relieve the tug, since it was charged with the obligation, not only to avoid the collision, but the risk of collision, either by itself or the tow. The faults on the part of the tug are clear and palpable, arising as well from attempting to pass unnecessarily to the westward of the Bangor, instead of the southward and eastward, as other shipping did, as from its failure to so direct its movements as to prevent either itself or its tow from fouling the anchor chain of the ship, or coming in too close proximity thereto. Under the circumstances, with ample room on either side, and no conditions arising from the weather or otherwise, it clearly should not have attempted to graze by her, and it should have taken into account any possible deviations in course that its tow might suddenly make, including the possibility of its failure to follow closely in the wake of the tug, and especially was it charged with knowledge of the fact that the tide at the time was running strongly ebb, which would tend to drive a large barge, of the character of the Donaldson, into the anchored ship.

[2] Thirdly. Considering the responsibility of the barge for the collision, we are confronted with a more difficult question, as she was in tow of a tug that in large measure controlled her movements. The ship's contentions are that the barge was, among other things, at fault in not being properly manned, in permitting the tug to bring her into dangerous proximity with a vessel at anchor, in failing to follow the course of the tug, in not letting go her towline in time to avoid the collision, and in being towed by a tug incapable of properly controlling the barge's movements.

While all of the above enumerated faults against the barge may not be said to be fully established by the testimony, the conclusion of

the court is that it is quite manifest that the barge was not sufficiently manned for the voyage in question, and that her failure in this respect contributed directly to the cause of the disaster. The master of the barge, in his efforts to control the wheel and at the same time perform the duty of lookout and deckhand, taking into account the barge's length, utterly failed to perform either service in the manner that good seamanship required, and that was necessary to be rendered, looking to the avoidance of the collision. The imminent danger of the collision was apparent to those on the barge a sufficiently long time in advance of the happening of the event to have made the services of both a lookout in the bow of the barge and a wheelsman at the helm essential. Had the barge promptly cast its hawser off, upon the tug's course being apparent, and put its wheel hard aport, the collision would almost certainly have been avoided, and in any event it would have so lightened the blow thereof as to make the same of small consequence. The barge's master did perhaps what he believed to be best in the emergency in which he was placed; but he was largely powerless to do anything by himself, with the strong ebb tide then prevailing. He put his wheel hard astarboard, placing it in a becket, and rushed to the forward part of his barge, and threw the hawser off, but too late to accomplish anything—in fact, he admits that the hawser was thrown off just as the crash came. Moreover, the presence of a proper lookout would in every probability have earlier warned the master at the wheel of the dangers likely to ensue from the tug's course.

The barge's master says that he supposed the tug would pass on the port side of the ship, until within something less than 300 feet away, when he observed his change of course. This statement, however, is not supported by the testimony, as the barge was on a hawser of 360 feet, and probably longer, and the tug's purpose to cross the bow of the anchored ship, and the danger of such an experiment to the tow, must have been evident several minutes before the collision. To make successful such a maneuver on the part of the tug required the constant attention of those on the barge to avoid the latter's colliding with the ship, and this duty could not have been performed by only one person upon a barge of this size.

The barge, at the time of the collision, was under charter by the owner of the Viking, and there is considerable evidence to support the charge on the part of the ship that the Viking was incapable of handling properly the tow; but that question need not be determined positively, in arriving at a conclusion in this case, as it is evident that the barge was in fault in the two respects mentioned—that is to say, in not being properly manned, and as a consequence in failing to fully perform its duties at the time of the collision.

From what has been said, it follows that the Bangor was without fault, and that the collision was caused by the joint negligence of the tug and the barge, for which they are each liable, and a decree will be entered so ascertaining, and at the same time dismissing the intervening petition and libel filed on behalf of the barge.

## THE KIRNWOOD.

(District Court, E. D. Virginia. November 27, 1912.)

**COLLISION (§ 95\*)—TOW AND OVERTAKING STEAMER—FAULT OF STEAMER.**

A collision in the daytime, in fair weather, to the south of the middle of the channel in Hampton Roads, between an outgoing steamship and the last of two barges in a tow which she was overtaking, held due solely to the fault of the steamship for attempting to pass to the starboard of the tow, so close as to involve risk of collision, without having received assent to her signal, and when a schooner ahead, which had gone to the starboard, had tacked and was heading across the course of the tug a short distance ahead, making it proper and necessary for the latter to change her course somewhat to starboard to pass under the schooner's stern.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.\*]

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

In Admiralty. Suit for collision by George F. Howland, master of the barge *Florida*, against the steamship *Kirnwood*, with the tug *Coastwise* impleaded. Decree for libellant against the *Kirnwood*.

Hughes & Vandeventer, of Norfolk, Va., and Edward E. Blodgett, of Boston, Mass., for libellant.

Hughes, Little & Seawell, of Norfolk, Va., for respondent.

WADDILL, District Judge. The collision between the steamship *Kirnwood* and the barge *Florida*, which is the subject of this litigation, occurred on the evening of the 29th of August, 1912, about 3:30 o'clock, in Hampton Roads, off Old Point Comfort, Va., about half a mile below the Ripraps, slightly to the southward of mid-channel.

The barge *Florida*, loaded with coal, was the rear of two barges in tow of the tug *Coastwise*, proceeding to sea, and the *Kirnwood* was a tramp steamship, loaded with lumber, also bound out of the Capes. The *Coastwise* was an ocean-going tug of 268 tons burden, 103 feet long, 25.5 feet beam, and 15 feet draft; and each of the barges were large ocean-going vessels, the forward barge, the *I. H. Chapman* being 237.5 feet long, 42.7 feet beam, and 19.2 feet draft, with a cargo of about 3,200 tons of coal, and the *Florida*, 220.4 feet long, 34.8 feet beam, and 25.4 feet draft, with a cargo of 2,100 tons of coal, and each being towed on hawsers, as claimed by the tows, of some 50 fathoms in length, and by the steamship to be considerably longer. The *Kirnwood* was a large steamer, 340 feet long, and 1,953 tons burden. At the time of the collision, the steam barge *Jackson* was coming in from Chesapeake Bay, on the port side of the tug, and in the immediate vicinity thereof. The tug *Clark*, with a tow, was coming up the channel some half mile away, bearing slightly on the port bow of the *Coastwise*; and the three-masted schooner *Edward B. Smith* was tacking across the Roads, having gone over on the port tack to the southward of the channel, and shortly before the collision

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



had put about on the starboard tack to the northward, and across the course of the Coastwise. There were also on the tail of the Horse-shoe, some distance to the eastward of the scene of the accident, several schooners at anchor. The Coastwise was proceeding to sea on a course N. E. by E., and at the Ripraps hauled a little to the eastward; and at the same time the Kirnwood was proceeding to sea on a course N. E. by E.  $\frac{3}{4}$  E. The tide was ebb, the wind blowing slightly from the eastward, weather clear, and no conditions apparent, other than as stated above regarding the shipping in the channel, to have in any way confused or disturbed those engaged in navigation. The tug and tow were moving about 5 knots an hour, and the Kirnwood about 8 knots an hour. Under these conditions, the collision occurred, the Kirnwood striking the Florida virtually at right angles, slightly aft of amidship on her starboard side, causing her to sink in a few minutes.

The libel was filed by the master of the Florida against the steamer Kirnwood, and the latter answered, bringing in the Coastwise under the fifty-ninth admiralty rule. The allegations of fault by the parties, one against the other, are many and varied; but in substance, and in so far as is necessary and material to be stated under the facts and circumstances of the case, they may be summarized as follows:

On the part of the libelant and the Coastwise, that while the Coastwise was on her regular course, proceeding down and slightly to the southward of mid-channel, with two barges following directly behind on hawsers of about 45 fathoms, and navigating with reference to the tug and tow coming in, and the schooner Edward B. Smith tacking across their course, and having slightly ported, with a view of veering to starboard, and passing under the stern of the schooner, without having received any signals from the Kirnwood, or giving any reply to any signals from her, that the steamship approached from the rear, and to the starboard of the Florida, running apparently on parallel courses with them, and, when about lapping the stern of the rear barge, suddenly starboarded and ran into the Florida, and sank her; that no reverse, danger, or other signals were given by the Kirnwood at the time of the latter's change of course.

On the part of the Kirnwood, that when in about five ship lengths of the rear barge, and running on parallel courses therewith, some two or three ship lengths to starboard, and when it was entirely safe and prudent for her so to do, she blew a signal of one blast of her whistle, indicating that she would pass the tug and tow to starboard; that she received no reply, and continued on her course, and when in two ship lengths from the barge gave a second signal of one whistle to indicate the same purpose, to which also she received no reply; that she continued upon her course, which was still considered safe, until the ship's bow overlapped the stern of the Florida, when suddenly the tug changed her course to starboard, crossing the Kirnwood's course, causing the collision; that thereupon the steamship immediately blew a signal of three blasts of her whistle, put her engines full speed astern, and so continued until the collision, having almost entirely killed her headway at the time of impact, and having let go

her starboard anchor just before the vessels struck, in order to help check her way; but the Florida, which had likewise changed her course continued ahead and to starboard, across the course of the steamer, and came into collision with her, the steamer's bow striking the starboard side of the barge just aft of amidship, sinking the barge, and doing serious damage to the Kirnwood; that, but for the sudden and unnecessary change of course to starboard on the part of the Coastwise and tow, the vessels would have passed in safety; and that, immediately upon seeing the tug and tow in the act of making this change, everything was done on board the steamship which could be done to avoid the collision.

On the case thus stated, the question is by whose fault were these two vessels brought into collision, whether the tug for starboarding and crossing the course of the outgoing ship, or the ship for coming into collision with the barge under the circumstances named. At a glance, it will be perceived that, in the absence of negligence on the part of some one, there was no cause for the collision. The channel was about a mile wide, virtually unobstructed, save by the shipping above mentioned; it was broad daylight, the weather apparently perfect, neither wind nor tide to disturb the same; and, indeed, there was nothing to prevent vessels, prudently navigating, from avoiding accidents.

A great number of witnesses were examined—the officers and most of the crew of the tug and two barges and of the Kirnwood; the master and mate of the Jackson, the incoming steam barge, and a passenger thereon, and of the tug Clark, also coming in; the master and mate of the schooner Edward B. Smith; the master of a ferry steamer in the vicinity of the vessels, and officers of a battleship upstream, in full view of the accident, and persons on the wharf at Old Point Comfort, most of whom saw and observed the movements of the two vessels at and about the time of the collision, and who gave their respective accounts of what occurred, some conflicting, but mostly coinciding as to the material points to be determined in the case.

The conclusion of the court, upon a full consideration of the entire testimony, is that it is established, by an overwhelming preponderance of the same, that the collision was brought about as the result of the failure of the steamer Kirnwood, the overtaking vessel, to take timely and precautionary steps to avoid either the collision, or the risk of collision, with the tug and tow ahead of her, and especially in attempting to pass the overtaken tug and tow to starboard, without procuring their assent to such passing, after the Kirnwood had initiated the maneuver by giving proper signals so to do.

The impropriety of attempting to pass this tug and tow in such close proximity was accentuated in this case by the fact that, crossing both the bow of the tug and the steamer, a three-masted schooner was tacking on the starboard tack, in such manner as to cross to the northward over their course, which necessitated, to make safe and possible the maneuver of the Kirnwood, that she should rush across the bow of the schooner, and ahead of the tug boat, which, if successful,

would have resulted almost inevitably in the schooner's colliding with either the tug or part of its tow. It should be borne in mind, in this regard, that the Kirnwood's position is that the schooner Smith was not taken into account by her in passing the tugboat, and that the same was to the southward, and in fact astern of the tug and tow, instead of ahead of it.

This defense of the steamship respecting the presence of the schooner is not supported by the testimony; on the contrary, the evidence overwhelmingly establishes that the schooner passed on the port tack across to the southward, put about, and while on the starboard tack crossed the bow of the tug, some short distance ahead of the same, estimated by most of the witnesses at about 200 feet, and that it was well to the port of the tug and tow at the time of the collision. This portion of the testimony is sustained by the witnesses on both sides, and, indeed, as the court recalls, Capt. Peak, the pilot navigating the Kirnwood at the time of the collision, alone testified that the schooner passed to the northward after the collision.

As viewed by the court, the pilot's navigation of the Kirnwood can only be accounted for by the fact that he failed to take into account the probable movements of the schooner, which was tacking in the vicinity of his course, and which should have been anticipated by him: that he noticed her while going to the southward on the port tack, and failed to timely observe that she had changed her tack, putting her in an opposite direction to which she was first going; and that his idea that she crossed behind the tug and tow arose from seeing her on that side of the channel after the collision, when, of course, the latter vessels, as well as the Kirnwood, had proceeded on their courses further down the channel. The presence of a tacking schooner ahead of and to the starboard of the tug and tow, in these waters and under these conditions, should have admonished the navigator of the Kirnwood that he should not have attempted to proceed to the starboard of the latter vessels, as it placed him necessarily between the same and the schooner; and the steamship's navigator was charged with knowledge, and admits that he knew, that this schooner, proceeding on her port tack, would change her course as soon as the same ran out, and hence involved danger in bringing her across the bow of the tug, or into collision with the outgoing vessels.

The risk involved in this movement was clearly one condemned by the law, and contrary to the rules of good seamanship. The pilot's view apparently was, as he in effect said, that safety consisted in ability to pass clear; and he on two occasions spoke of his ship being "sandwiched in" between the tug and tow and the schooner Smith. It was incumbent upon him, the navigator of an unincumbered vessel, not to have placed himself, in such relation to this sailing vessel and incumbered tugboat, and for injury arising as the result thereof his ship is liable in damages to those sustaining the same. *Donald v. Guy* (D. C.) 135 Fed. 429, 432.

The pilot of the Kirnwood insists that the navigation of his ship was proper and prudent, and that the collision was only brought about by the improper maneuvers on the part of the Coastwise, in not keep-

ing its course and speed after the Kirnwood's presence was or should have been known, and that the direct cause of the disaster was the tug's changing her course abruptly to starboard across the steamship's course, at a time when it was too late for the steamship to so change or alter her course as to avoid the same, and that he did everything possible, without avail, after such change of course on the part of the tug. This position cannot be conceded here by any means, for the reason that it was the avoidance of the risk of collision, as well as actual collision, with which the unincumbered and overtaking ship was burdened. Rules of Inland Navigation, articles 23, 24; *The New York*, 175 U. S. 187, 207, 20 Sup. Ct. 67, 44 L. Ed. 126; *The Richmond* (D. C.) 114 Fed. 208, 213; *The Georgetown* (D. C.) 135 Fed. 854, 858. Prudent seamanship, with the conditions existing, as shown by the great preponderance of the evidence in this case, would have warned the Kirnwood not to have attempted to pass to starboard at all, with the tacking schooner and tug and tow ahead, and the latter owing the obligation to the former to keep out of the way. The attempt of the ship, under the circumstances, to cut between two vessels, that she was required to keep out of the way of, was almost inexcusable.

It is entirely true that ordinarily a vessel having the right of way owes the obligation to the other vessel to keep her course and speed; but this has no application to the Coastwise on this occasion. She had neither heard the Kirnwood's signals to pass to starboard nor assented to the same. She was at a distance that made it improbable under existing conditions (some 3,000 feet away), running in the face of the wind, that she would have heard the same, and had no right to assume or anticipate that the steamship would attempt to pass by in an open roadstead, in good weather, in the daytime, in such manner as to endanger, or involve the risk of collision with, her tow. The Coastwise owed the obligation to keep out of the way of the schooner, and to avoid crossing ahead of her, unless the circumstances so admitted. If she ported and went astern at the time she did, whether half a point as admitted by her, or  $2\frac{1}{2}$  or 3 points as claimed by the schooner, it was what she should have done, if necessary to keep out of the way of the schooner then navigating across her course, and with a view of passing under her stern, and not ahead of her, if the circumstances of the case admitted of her doing so (Inland Rules of Navigation, articles 20 and 22); and certainly she should not be condemned at the instance of the Kirnwood, the unincumbered vessel, which apparently was seeking to pass, not under the stern of the schooner, but ahead both of the tug and tow and of the schooner.

The Kirnwood's claim that she promptly reversed, and gave proper signals, and did all within her power to avoid the collision, after the Coastwise changed its course, is doubtless true; but it was too late to serve any good purpose, in the position in which she had placed herself and the several vessels then were, having regard to the burdens borne by them, respectively, one to the other. The Kirnwood, the overtaking ship, should not have crowded the tug and tow. Article 24, *supra*. She had ample room to pass to port, there being



no obstruction of the channel to prevent her so doing, and likewise room to pass to starboard, but on the latter side only with the prudence necessary to avoid entanglements arising from the outgoing tug and tow and the tacking schooner, and this appropriate degree of care she utterly failed to exercise. Moreover, she in no event should have continued on her course and speed, and attempted to pass this incumbered vessel, overtaken by her, without receiving the assent required by article 18, rule 8, of the Inland Navigation Rules, which in terms forbade her from doing so.

The Kirnwood having violated the plain and salutary rules prescribed for governing overtaking vessels (Inland Rules of Navigation, rule 8, art. 24, 30 Stat. 96), which in this case sufficiently accounts for the collision, all doubts should be solved against her; and she cannot escape liability by relying upon or suggesting the possible fault of others (*The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84; *The Victory & The Plymothian*, 168 U. S. 410, 423, 18 Sup. Ct. 149, 42 L. Ed. 519; *Foster v. Merchants' & Miners' Transp. Co.* [D. C.] 134 Fed. 964, 969).

It follows, from what has been said, that the Kirnwood is solely responsible for causing the collision in question, and a decree may be entered so ascertaining.

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In re AMERICAN LIME CO.

(District Court, E. D. Tennessee. December 6, 1912.)

No. 937.

**1. MECHANICS' LIENS (§ 32\*)—"FURNISHING MATERIALS."**

Semble, one who has sold machinery to the owner of a building for erection on the property, has "furnished materials" for the erection of such machinery.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 37; Dec. Dig. § 32.\*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3012, 3013.]

**2. STATUTES (§ 225¾\*)—CONSTRUCTION—MECHANIC'S LIEN—"UNDERTAKER."**

Acts Tenn. 1845-46, c. 118, conferred the right to a mechanic's lien on mechanics, undertakers, founders, and machinists, and, the Supreme Court of Tennessee having held that the term "undertaker" did not include a mere furnisher of material in connection with the erection of the building, the word was retained in Code 1858, § 1981, providing that there shall be a lien on the tract of land on which a house is constructed, built, or repaired, or fixtures or machinery furnished or erected, or improvements made by special contract by the owner or his agent in favor of the mechanic, undertaker, founder, or machinist, who does any part of such work or furnishes any part of the materials, etc. *Held*, that such section adopted the prior construction of the term "undertaker," and hence, one who merely sold machinery to the bankrupt which was erected by the bankrupt on its land, is not an undertaker entitled to a lien under section 1981.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 306; Dec. Dig. § 225¾.\*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7163, 7164.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
201 F.—28

### 3. MECHANICS' LIENS (§ 32\*)—FURNISHER OF MATERIAL—STATUTES.

A creditor of a bankrupt, who merely furnished machinery under a contract of sale which was erected by the bankrupt on its land, but constituted no part of any house or building, and was therefore not entitled to a lien as a mechanic, undertaker, founder, or machinist under Code Tenn. 1858, § 1981, was also not entitled to a lien under Acts 1859-60, c. 114 (Shannon's Code, § 3531), providing that the mechanics' lien act shall apply to all persons doing any portion of the work or furnishing any portion of the material for the building contemplated by section 1981.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 37; Dec. Dig. § 32.\*]

*In Bankruptcy.* In the matter of bankruptcy proceedings of the American Lime Company. A claim of lien by Davis, Kelly & Co. for certain machinery alleged to have been sold to the bankrupt having been overruled by the referee, they petition for review. Order affirmed.

The petitioners claimed a lien on the real estate of the bankrupt for the purchase price of a cableway engine and equipment which they sold and delivered to the bankrupt, and which were erected by the bankrupt on a tract of land owned by it, but which were not erected in any house or building and constituted no part of any house or building. This claim of lien having been disallowed by the referee, the claimants filed a petition for review.

W. B. Miller and D. L. Grayson, of Chattanooga, Tenn., for petitioners.

Pritchard, Allison & Lynch, of Chattanooga, Tenn., for trustee in bankruptcy.

#### Memorandum Opinion. Published by Request.

SANFORD, District Judge. While the witness Kelly states that Davis, Kelly & Co. were "undertakers," I think it is immaterial whether they were merely jobbers selling machinery, as stated by the witness Walker, or also undertook generally contracts for the erection of machinery, since it is clear that in this particular instance they merely sold the machinery to the bankrupt under a special contract, and did not themselves either undertake to erect it or in fact erect it. See *East Tenn. Iron Co. v. Bynum*, 3 Sneed (Tenn.) 268, 270, 65 Am. Dec. 56.

On this state of facts I have reached the following conclusions:

[1] 1. Section 1981 of the Tennessee Code of 1858 provides as follows:

"There shall be a lien upon any lot of ground or tract of land upon which a house has been constructed, built or repaired, or fixtures or machinery furnished or erected, or improvements made, by special contract with the owner or his agent, in favor of the mechanic or undertaker, founder or machinist, who does the work or any part of the work, or furnishes the materials, or any part of the materials, or puts thereon any fixtures, machinery or material, either of wood or metal."

While the petitioners did not "put" the machinery in question on the tract of land, that is, erect it, they furnished the owner the ma-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

chinery which was erected on the tract of land. And as this section provides that there shall be a lien upon any tract of land upon which fixtures or machinery have been furnished or erected, in favor of the mechanic or undertaker furnishing any part of the materials, it would not be a strained construction of this section, I think, to hold that the person who sells machinery to the owner for erection on the property has furnished the "materials" for the erection of such machinery, and is therefore entitled to a lien, provided he comes within the class of persons who are declared by the statute to be entitled to the lien.

[2] It is well settled, however, that while this statute is to be liberally construed in reference to the property to which the lien attaches, only those persons enumerated and embraced in the statute are to be held entitled to the lien, and that no persons are to be included under its provisions unless they make it clearly appear that they are so entitled, without a strained construction of the statute. *Nanz v. Park Co.*, 103 Tenn. 299, 302, 52 S. W. 999, 47 L. R. A. 273, 76 Am. St. Rep. 650. However, by the express terms of this section of the Code, the lien exists in favor only of mechanics, undertakers, founders, and machinists. It is not contended that the petitioners are either mechanics, founders, or machinists; but it is insisted that they are undertakers within the meaning of the Code provision. I should be strongly disposed to hold that one who contracts to furnish materials for the erection of a house, fixtures, or machinery is such an "undertaker," were it not for the decisions of the Supreme Court of Tennessee construing the meaning of the word "undertaker" as used in the Tennessee act of January 28, 1846 (Acts 1845-46, p. 185, c. 118), from which this Code provision is derived, with some enlargements of its terms. This act of 1846, among other things, gave a lien to any mechanic or undertaker who, by special contract with the owner of land, constructed or repaired any house, fixtures, or improvements, or furnished any materials therefor, or did any work upon such house.

In *Greenwood v. Tenn. Mfg. Co.*, 2 Swan (Tenn.) 130, 135 (1852), it was held that a merchant who contracted with the owner to furnish material to be used in the erection of a building was not a "mechanic" or "undertaker" within the meaning of the act, and was not entitled to a lien. And in *Stevens v. Wells*, 4 Sneed (Tenn.) 387, 389 (1857), it was held that dealers in lumber who had furnished the owner of land with lumber for the purpose of building a house, which was used for that purpose, but who were in no way connected with the building of the house, were neither mechanics nor undertakers entitled to a lien under the act of 1846. The court said:

"Complainants are within neither of these provisions: They are neither mechanics who have worked upon the house, nor are they undertakers for its construction. \* \* \* They have simply sold the owner a bill of lumber, for which the statute gives them no lien, and they stand as other creditors of the owner. See *Greenwood et al. v. Tennessee Mfg. Co.*, 2 Swan, 130."

And while there are dicta in *East Tenn. Iron Co. v. Bynum*, 3 Sneed (Tenn.) 268, 270, 65 Am. Dec. 56, and *Electric Light Co. v.*

Gas Co., 99 Tenn. 371, 375, 42 S. W. 19, to the effect that the furnisher of materials, fixtures, or machinery is entitled to a lien under the statute, I cannot regard the inadvertent expressions contained in these cases, on a point not involved in the decisions, as controlling the two express decisions of the Supreme Court of Tennessee above cited, giving a fixed and definite meaning to the word "undertaker," as used in the act of 1846. And since the Legislature in re-enacting the provisions of the act of 1846 in section 1981 of the Code of 1858 adopted the same word "undertaker," it must, in the absence of a plainly expressed intention to the contrary, be held that the Legislature adopted the construction which the Supreme Court of Tennessee had given to that word under its previous decisions, and made such construction a part of the statutory provision. *United States v. Le Bris*, 121 U. S. 278, 280, 7 Sup. Ct. 894, 30 L. Ed. 946; *Sessions v. Romadka*, 145 U. S. 29, 42, 12 Sup. Ct. 799, 36 L. Ed. 609. And hence, although as an original question I should probably have reached a different conclusion, I am constrained to hold, in view of the decisions of the Supreme Court of Tennessee above cited, that the petitioners are not undertakers entitled to a lien within the meaning of section 1981 of the Code.

[3] 2. Neither are the petitioners entitled to a lien by reason of the provision of the Tennessee act of March 22, 1860 (Acts 1859-60, p. 105, c. 114), amending section 1981 of the Code so that its benefits "shall apply to all persons doing any portion of the work, or furnishing any portion of the material for the building contemplated in said section." Shannon's Code, § 3531. This question is conclusively determined by the case of *Allman v. Corban*, 4 Baxt. (Tenn.) 74, 77, in which it was held that no lien existed under this act in favor of a person who was not a mechanic, undertaker, founder, or machinist, who merely furnished machinery to a mill building without aiding in the construction of the building or the putting up of the machinery; the words "building contemplated," as used in this amendment, being held by the court to relate to the house which had been constructed, built, or repaired, and not to machinery or fixtures placed in the house or building. *A fortiori* it cannot be held to apply to the case of machinery of the character involved in this suit, which is no part of any house or building, but was merely erected upon the tract of land.

3. For the foregoing reasons I find no error in the order of the referee disallowing the lien claimed by the petitioners. An order will, accordingly, be entered affirming the order of the referee and dismissing the petition to review at the cost of the petitioners.



## In re NUCKOLS.

(District Court, E. D. Tennessee, N. D. March 16, 1912.)

No. 1,142.

**1. BANKRUPTCY (§ 184\*)—VALIDITY OF LIEN—UNRECORDED CHATTEL MORTGAGE.**

Under Shannon's Code Tenn. §§ 3664, 3706, providing that chattel mortgages to be valid against creditors of the mortgagor must be registered, and that such registration shall be in the county where the mortgagor resides, if a resident of the state, and Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), which vests trustees with the rights of a judgment creditor, a chattel mortgage given by a bankrupt who was a resident of the state is invalid as against his trustee, unless recorded in the county of his residence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.\*]

**2. CHATTEL MORTGAGES (§ 82\*)—RECORDING—LAW GOVERNING.**

Where at the time of the execution of a chattel mortgage the property was situated in a state other than that in which the mortgagor was domiciled and the mortgage executed, it is, in a bankruptcy proceeding, governed as to registration, and its validity and priority determined, by the law of the state where the property was situated, rather than that of the state where it was executed, and in which the bankruptcy proceeding is being conducted.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 151; Dec. Dig. § 82.\*]

In the matter of Jay Nuckols, bankrupt. On review of order of referee allowing the claim of the Mechanics' Bank & Trust Company as a secured debt. Order confirmed.

This cause came before the court on petition of the trustee in bankruptcy for review of an order of the referee allowing the claim of the Mechanics' Bank & Trust Co. as a secured claim and disallowing the trustee's objection thereto. The material facts, as shown by the referee's certificate, were these: On July 9, 1910, about seven months prior to the institution of the bankruptcy proceedings, the bankrupt, being then a citizen and resident of Knox County, Tennessee, with his domicile in said county and state, executed and delivered to the Bank & Trust Co., a Tennessee corporation, with its principal office and place of business in said county and state, a chattel mortgage on a contractor's outfit, consisting of steam shovels, cars, and other personal property, then located in Christian and Todd Counties in the State of Kentucky, to secure a loan by the Bank to the bankrupt of \$20,000.00. The bankrupt was then engaged in railroad construction work in said counties in Kentucky, and this outfit had been placed in said counties in Kentucky to be used in such railroad construction work. This chattel mortgage was never recorded in Knox County, Tennessee, but was promptly and duly recorded in said counties in Kentucky. This railroad construction work had not been completed at the time the proceedings in bankruptcy were instituted in this court, and the property covered by the mortgage was at that time and still remained in said counties in Kentucky. By stipulation of the parties it was agreed that the trustee might take possession of the mortgaged property in Kentucky "subject to such claims thereon as the Mechanics' Bank & Trust Co. might have." The Bank & Trust Co. filed its proof of claim in this cause, in which it sought to have said mortgage established as a valid incumbrance upon the property in Kentucky covered thereby. The trustee in bankruptcy filed objections to this claim, praying that it be disallowed as a secured claim, upon the ground,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

among others, that it had never been recorded in Knox County, Tennessee, where the bankrupt and the Bank & Trust Co. both had their residences at the time of its execution. The referee overruled this objection and allowed the claim of the Bank & Trust Co. as a secured claim; and the trustee thereupon filed his petition for a review of the order of the referee.

Charles M. Seymour and Cornick, Frantz & McConnell, all of Knoxville, Tenn., for trustee in bankruptcy.

T. A. Wright, of Knoxville, Tenn., for Mechanics' Bank & Trust Co.

SANFORD, District Judge. [1] 1. As section 2033 of the Tennessee Code (Shannon 3706) provides that all mortgages of personal property shall be registered in the county where "the person executing the same resides, and in case of his non-residence, where the property is," and as the bankrupt resided in Knox County, Tennessee on July 9, 1910, when the chattel mortgage in question was executed, it is clear that such chattel mortgage, not having been registered in Tennessee, must be deemed, so far as the Tennessee statute is concerned, an unregistered instrument.

2. Section 8 of the Act as approved June 25, 1910 (36 Stat. 840, c. 412 [U. S. Comp. St. Supp. 1911, p. 1500]), before the execution of this chattel mortgage, amends section 47a (2) of the bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]) so as to provide that—

"trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all the property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

Section 2003 of the Tennessee Code (Shan. 3664) provides that all mortgages of personalty shall be in writing and approved and registered, "to be valid against the creditors of the bargainor." As the trustee by the express terms of said amendment of the Bankruptcy Act is to be deemed a judgment creditor holding an execution returned unsatisfied, it is clear that under the two sections of the Tennessee Code above cited, if the validity and effect of this chattel mortgage is to be controlled by the Tennessee statutes, it must be held invalid as against the trustee, independently of the question whether before said amendment to the Bankruptcy Act, it would, although unregistered, have been good against the trustee as a representative of general creditors.

[2] 3. The question as to whether the mortgagee has acquired a valid lien upon the property in question by registration of the mortgage in the State of Kentucky where the property was situated at the time the mortgage was executed, and where it still remains, which is prior to the quasi judgment creditors' lien subsequently acquired by the trustee by virtue of the bankruptcy proceedings, must therefore clearly depend upon the question as to whether the effect of the chattel mortgage as a prior lien against subsequent judgment creditors is to be controlled by the law of the State of Tennessee, where the parties resided and the mortgage was executed, or by the laws of the State

of Kentucky where the property was situated and still remains. After careful consideration of the opposing views which are clearly and forcibly expressed in the briefs of counsel for the respective parties, I conclude that the true rule, supported by the great weight of authority, is this: That while in general the validity of a chattel mortgage is to be determined according to the *lex loci contractus*, yet where the mortgaged property at the time of the execution of the mortgage is situated in a State other than that in which the mortgagor is domiciled and the mortgage executed, the question of the preservation of the lien acquired by the mortgage under the laws in reference to registration and the priority of such lien over the rights and interests subsequently acquired by third persons, is to be determined by the law of the place where the property is situated at the time the mortgage is executed. 1 Wharton's Conflict of Laws (3d Ed.) § 317 (b), p. 708; Jones on Chattel Mortgages, § 305; Green v. Van Buskirk, 7 Wall. 139, 151, 19 L. Ed. 109; In re Soldiers' Dispatch Co., 3 Ben. 204, 22 Fed. Cas. No. 781; In re Brannock (D. C.) 131 Fed. 819; Hardaway v. Semmes, 38 Ala. 657; Ames Iron Works v. Warren, 76 Ind. 512, 40 Am. Rep. 258; McFadden v. Blocker, 2 Ind. T. 260, 48 S. W. 1043, 58 L. R. A. 878; Aultman Co. v. Kennedy, 114 Iowa, 444, 87 N. W. 435, 89 Am. St. Rep. 373; Arkansas Bank v. Cassidy, 71 Mo. App. 186; Clark v. Tarbell, 58 N. H. 88; Keller v. Paine, 107 N. Y. 83, 13 N. E. 635; Smead v. Chandler, 71 Ark. 505, 76 S. W. 1066, 65 L. R. A. 353; Ballard v. Min. Co., 39 W. Va. 394, 19 S. E. 510; Golden v. Cockrill, 1 Kan. 259, 81 Am. Dec. 510; Pleasanton v. Johnson, 91 Md. 673, 47 Atl. 1025; Guillander v. Howell, 35 N. Y. 657; Denny v. Faulkner, 22 Kan. 89; Rice v. Courtis, 32 Vt. 460, 78 Am. Dec. 597; Bank v. Bank (Tex. Civ. App.) 139 S. W. 665.

It is earnestly insisted, however, in behalf of the trustee, that the rule giving effect in such cases to the *lex rei sitæ* rather than to the *lex loci contractus* is based upon the fact that the litigation is in general had in such cases in the courts of the State where the property is situated, and is due to the effect given to the *lex rei sitæ* as the *lex fori*. And it is urged that upon the express authority of Runyon v. Groshon, 12 N. J. Eq. 86, where there is a conflict of laws, the laws prevailing in the State where the litigation is had, rather than those where the property is situated, should have preference. A careful examination of the cases, however, does not show, in my opinion, that the *lex rei sitæ* is given effect under the great weight of authority merely because it is the *lex fori*, but that, on the contrary, it is given effect as the *lex rei sitæ* itself, upon the theory that priority of liens acquired on personal property having an actual situs should be determined according to the law of the place where the property is situated. While it is true that in two of these cases, namely, Keller v. Paine and Denny v. Faulkner, the opinions of the court seem to be based, at least in part, upon the fact that the *lex rei sitæ* was also the *lex fori*, and in two of these cases, namely, Aultman Co. v. Kennedy and Smead v. Chandler, the doctrine of the *lex fori* appears to have been the controlling consideration in the opinion of the court, in most of the cases above cited, on the other hand, no reference whatever was

made to the *lex fori* and the decisions appear to be based solely upon the ground that the *lex rei sitæ* should control. Furthermore, in the *Soldiers' Dispatch Co.* case the law of New Jersey was held to control as to property there situated as the *lex rei sitæ*, rather than the law of the State of New York in which the litigation was being conducted in the Federal Court as the *lex fori*; in *Arkansas Bank v. Cassidy* it was specifically said that the law of the forum is only to apply in case the law of the situs cannot be determined; and in *Guilander v. Howell*, 35 N. Y. 657, in litigation in New York, a sale in New York of chattels situated in New Jersey was held void under the laws of New Jersey, the *lex rei sitæ*, although valid under the law of New York, the *lex fori*.

I am constrained to conclude, after the consideration of all these cases, that the great weight of authority supports the proposition that in a case of this character the *lex rei sitæ* should prevail, and that it is against sound public policy to add to the complication existing in cases of conflict between the *lex loci contractus* and the *lex rei sitæ*, as an added element of uncertainty of right, the question of the *lex fori*. It is to the public interest that in cases of this character the rights of the parties should be determined by fixed rule according to the law of the place where the property is situated rather than vary according to the law of the place where the litigation happens to be conducted. Furthermore the application of the *lex rei sitæ* rather than the *lex fori* is peculiarly appropriate in the case of a bankruptcy court, which, in a sense, through the authority of its trustee, is not merely enforcing the local law in the court in which the bankruptcy proceeding is instituted, but may obtain possession and custody of the bankrupt's property wherever situated, and which, in such cases should, I think, in reference to personal property having an actual situs in different parts of the United States, in so far as the matter of priorities of lien are concerned, administer the law of the separate jurisdictions in which the property is thus situated, rather than apply in all instances the law of the State in which the bankruptcy court is being held. In such case I think the bankruptcy court should, as a national court, be controlled by other considerations from those which might properly prevail in the court of a single State enforcing the law of that State.

This is particularly true, I think, in a case like the present where it was agreed by stipulation of the parties that the trustee might take possession of the mortgaged property "subject to such claims thereon as the Mechanics' Bank & Trust Co. might have," thus evidencing an intention that the Bank & Trust Co. should not surrender any prior lien which it had, and certainly showing no intention to waive any of the priority which it would have had if the trustee had instituted proceedings in Kentucky to acquire possession of the property, in which case the registration laws of Kentucky would clearly have prevailed.

The order of the referee sustaining the validity of this chattel mortgage against general creditors and dismissing the trustee's petition to have the claims of the Bank & Trust Co. disallowed as a secured claim, will accordingly be in all things confirmed, and the trustee's petition to



review the order of the referee will be dismissed, the costs incident to such petition to review to be paid out of the general funds being administered in this proceeding.

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LONG et al. v. SOUTHERN EXPRESS CO.

(District Court, S. D. Florida. December 18, 1912.)

**1. COURTS (§ 314\*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP—NUISANCE—INJUNCTION.**

A bill by citizens and residents of Florida legally engaged in selling liquor in that state against an express company, a corporation organized under the laws of Georgia, to restrain it from accepting for transportation liquors illegally sold in that state to purchasers therein in competition with complainant, was within the jurisdiction of the federal court based entirely on diversity of citizenship of the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 860; Dec. Dig. § 314.\*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 296.]

**2. COURTS (§ 266\*)—ILLEGAL ACT IN FOREIGN STATE—DAMAGE TO PROPERTY WITHIN JURISDICTION.**

Where transportation of liquor illegally sold in Georgia by defendant express company to consignees in that state came into competition with complainant's legal sales of liquor in Georgia, transported from complainant's place of business in Florida, a federal court sitting in Florida had jurisdiction to restrain the further transportation of liquor so illegally sold in Georgia.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806-808; Dec. Dig. § 266.\*]

**3. INTOXICATING LIQUORS (§ 262\*)—WRONGFUL SALES—TRANSPORTATION—INJUNCTION.**

An injunction restraining an express company from accepting and transporting liquor illegally sold would not be withheld because the agents of the company could not distinguish illegal from legal shipments, it appearing that such agents could determine with reasonable accuracy whether the shipments did or did not consist of liquor illegally sold.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 402; Dec. Dig. § 262.\*]

**4. INJUNCTION (§ 103\*)—SUBJECTS OF INJUNCTIVE RELIEF—CRIMINAL ACTION—PRIVATE PROPERTY RIGHT.**

Where liquor illegally sold was transported by defendant in Georgia, and came into direct competition with legal sales made by complainant in interstate commerce from complainant's place of business in Florida, complainant's application for an injunction restraining further transportation of such liquor so illegally sold will not be denied on the ground that the writ would not issue merely to restrain a criminal action.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 176, 177; Dec. Dig. § 103.\*]

**5. INJUNCTION (§ 34\*)—RIGHT TO RELIEF—"PRIVATE RIGHT."**

The term "private right," as used with reference to the right of a person to injunctive relief, is used as a mere distinguishing term from "public right," and not as meaning any particular monopolistic right.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 74-81; Dec. Dig. § 34.\*]

For other definitions, see Words and Phrases, vol. 6, p. 5578.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by D. E. Long and others against the Southern Express Company. Decree for complainants.

Akerman, Akerman & McManus, and Ellis & Roland, all of Macon, Ga., and Marks, Marks & Holt, of Jacksonville, Fla., for complainants.

W. E. Kay, of Jacksonville, Fla., and Robt. C. Alston, of Atlanta, Ga., for defendant.

CHENEY, District Judge. The bill alleges that the complainants are residents of the state of Florida and this district, that they are engaged in the business of legally selling liquor in the city of Jacksonville, Fla.; that the respondent is a corporation organized under the laws of the state of Georgia; that it is a common carrier with its business extending from the state of Georgia into the state of Florida and this district. The bill further alleges that divers persons in Savannah, Ga., and in other cities in Georgia, are engaged in making illegal sales of liquor, such sales being misdemeanors and prohibited by the statutes of the state of Georgia. The bill further alleges that the liquors sold illegally are shipped to the purchasers in the state of Georgia by the respondent in its capacity as a common carrier. The bill alleges knowledge on the part of the respondent that the liquors so sold and shipped are sold in violation of law. The bill alleges that the rates for such carriage from the place of the illicit dealers to the purchasers to whom the goods are delivered are less from a shipping point in Georgia to a near delivery point in Georgia than from Jacksonville, Fla., to such delivery point; that, in fact, such shipments made entirely within the state of Georgia can be made so much cheaper to the same destination point from Jacksonville, Fla., that the Jacksonville dealer cannot compete with the illicit dealer in Georgia; and that thereby serious damage is done to the legitimate business of the complainants. Upon the allegations of this bill, the complainants pray that the respondent be restrained and enjoined from receiving shipments of liquor from the illegal dealers of Georgia and from transporting same. The respondent filed an answer that so far as the injunction prayed was concerned left the bill intact.

In the consideration of this case the first question to be met is that of the court's jurisdiction. The respondent denies that this court has jurisdiction, and cites in support of his contention *A. C. L. R. R. Co. v. Macon Grocery Company*, 166 Fed. 206, 92 C. C. A. 114; *Macon Grocery Co. v. A. C. L. R. R. Co.*, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300.

[1] In the opinion of the court jurisdiction in this case is based on the diversity of citizenship of the parties alone. No federal question is involved. The relief prayed might be granted by a court of equity in the state of Georgia, either the state or federal court there, and the bill could not be sustained in this court if the diversity of citizenship was not alleged.

[2] The next important question is whether or not this court can enjoin the respondent from committing the acts complained of in the state of Georgia. Upon this question the authorities seem at first blush

to be involved and conflicting; but a careful analysis of cases decided by the federal courts fully sustain the proposition that, where the property injured is within the jurisdiction of the court, a nuisance can be enjoined in another state or district, if the court has jurisdiction of the offending party. This doctrine is clearly announced in the *Salton Sea Cases*, 172 Fed. 812, 97 C. C. A. 214, and 215 U. S. 604, 30 Sup. Ct. 405, 54 L. Ed. 345. In these cases the Circuit Court of Appeals of the Ninth Circuit founding its power to enjoin, first, upon diversity of citizenship, second, an existing nuisance, third, that the property injured was within the jurisdiction of the court, and, fourth, that the court had jurisdiction of the offending party, proceeded to enjoin a nuisance committed in Mexico. Morrow, Circuit Judge, says:

"It is further objected that the court had no jurisdiction to decree an injunction in effect abating a nuisance caused by the construction of intakes in the republic of Mexico, and it is claimed that there is a rule in support of this objection to the effect that a court of equity can never compel a defendant to do anything which is not capable of being physically performed within the territorial jurisdiction of the court."

And further, on page 813 of 172 Fed., on page 235 of 97 C. C. A., the court continues:

"The injury charged in the present case was an injury to property within the jurisdiction of the court, and the party charged with the commission of the injury was also within the jurisdiction of the court. \* \* \* The cause of the injury was not serving a useful purpose for any one, and the relief asked for was that the party causing the injury might be enjoined from continuing to injure complainant's property within the jurisdiction of the court. *Why may not a court restrain a party over whom it has jurisdiction from injuring property within its jurisdiction?* How does it affect the question of jurisdiction or venue to say that the party on whom the court must act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court? May this not often happen, and would it not happen oftener, if it were determined that such an excuse was sufficient to defeat the jurisdiction of the court?"

These cases were affirmed by the Supreme Court, 215 U. S. 604, 30 Sup. Ct. 405, 54 L. Ed. 345.

In this case the nuisance complained of is located in Georgia, but the property injured, namely, the legal business of the complainants, is located in this district, and this court has jurisdiction of the party complained of as committing the nuisance. It is urged by respondent's counsel that, as it was not an illegal act to ship liquor in the state of Georgia, an injunction as prayed in the bill would be enjoining a legal act. That argument is incomplete. An act legal in itself may be so connected with other acts in a chain of acts that it becomes a link in a crime. It would not be a crime for B. to accept a watch from A., but if the watch was a stolen one, and B. had guilty knowledge of the fact, then his acceptance of the watch might be criminal. If A. is making illegal sales of liquor, and employs B. to deliver the purchases of liquor so sold, and B. has knowledge that he is delivering liquor illegally sold, then B. becomes an agent in the commission of a crime, is *particeps criminis*, and, an illegal sale of liquor being a misdemeanor, he is a principal, and can be convicted as such. In this

case, let A. represent the party making the illegal sales, and B. the Southern Express Company, and the application is complete.

The question was urged by counsel for the respondent, "Why was this bill not brought in Georgia? Either in the state or United States courts?" The court deems that question immaterial. The sole question here is: Do the allegations of the bill and the admissions of the answer show that this court has the right to grant the relief prayed?

[3] Counsel for the respondent argued very strenuously that the agents of the company could not distinguish illegal shipments from shipments that might be made legally. The court is of the opinion that the law of reasonableness applies. It is true that if a party offered a single shipment of liquor, a single package, for shipment, an agent might well claim that there was no ground upon which he could base an opinion as to whether it was or was not a shipment of liquor illegally sold; but if the party presented 50 packages consigned to as many different parties, and daily made such offerings for shipment, it might well convince him as a reasonable person that the party offering such shipments was selling liquor. Numerous statutes have been upheld authorizing seizure where in search of premises an unreasonable amount of liquor is found, and that such unreasonable quantity was prima facie evidence that the liquors were intended for sale. In these statutes no particular quantity is named as being an unreasonable amount. That is a question left to the discretion of the officer making the search, or to the jury upon the trial of the case. The court is of the opinion that any person of sufficient intelligence to act as a receiving clerk for the defendant company can reasonably judge as to illegal sales of liquor, and that he can fully protect himself and the defendant company from knowingly violating an injunction in this case, and also avoid refusing the limited number of shipments of liquor that may be rightfully offered.

[4] The contention of the respondent that the injunction will not issue merely to restrain a criminal action is admitted. A private right must be established. But in this case the allegations of the bill establishes the private right necessary to warrant an injunction. The complainants are forced to compete with a lower express rate which is obtained by the unlawful sellers of liquor in Georgia, to the clear and positive damage of the complainants.

[5] The term "private right" is used in all the cases cited merely as a distinguishing term from "public right," and not as contended by counsel for respondent as meaning any particular monopolistic right. The complainants have the right to sell liquor in Georgia, the same right that a grocery house has to sell sugar in that state, and the grocer in Florida or New York who is selling legally has the private right that may be the basis of a bill for injunction when such right meets with illegal interference which inflicts a money damage. This principle is announced clearly in *Re Debs*, 158 U. S. 564, 15 Sup. Ct. 909, 39 L. Ed. 1092. In that case the proposition is exhaustively treated and discussed, and the court concludes:

"Again, it is objected that it is outside the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unques-



tioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interference, actual or threatened, with property rights of a pecuniary nature, but, when such interferences appear, the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law."

The court is of the opinion that it has jurisdiction, and that the facts alleged in the bill and admitted or undisputed by the answer of the respondent entitles the complainants to the relief sought. It will be so ordered.

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In re UNITED WIRELESS TELEGRAPH CO.

(District Court, D. Maine. December 9, 1912.)

No. 268.

**1. BANKRUPTCY (§ 340\*)—PROOF OF CLAIM—EVIDENCE.**

A sworn proof of claim is prima facie evidence of the statements made therein, even in case the claim is objected to; being regarded more as a deposition than a pleading.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.\*]

**2. BANKRUPTCY (§ 340\*)—PROOF OF CLAIM—SUFFICIENCY.**

In a proof of claim, the statement of the claim and of its consideration must be full and explicit; and a proof in which as to a part of the claim no consideration whatever is stated, and, as to a part, it is stated that claimant was in the employ of the bankrupt for a specified time, and that when he left the employment a certain sum was due him as salary, without stating the nature of his employment, is insufficient as to both items.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.\*]

**3. BANKRUPTCY (§ 330\*)—PROOF OF CLAIM—SUFFICIENCY.**

An allegation on information and belief, on a vital point in a proof of claim in bankruptcy, is not sufficient as proof of such allegation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 517, 519, 521; Dec. Dig. § 330.\*]

In the matter of the United Wireless Telegraph Company, bankrupt. On review of order of referee rejecting claim of Martin M. MacRae. Affirmed.

Howard H. Williams, of New York City, and Symonds, Snow, Cook & Hutchinson, of Portland, Me., for claimant.

Woodman & Whitehouse, of Portland, Me., for trustee.

HALE, District Judge. The certificate of the referee presents for consideration the correctness of his order rejecting the claim of Martin M. MacRae. The proof of claim is as follows:

At the city of New York, state of New York, on the 11th day of January, 1912, came Martin M. MacRae, of No. 527 West 110th street, of New York, county of New York, state of New York, and made oath and says:

That the United Wireless Telegraph Company, against whom a petition for

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of two thousand two hundred twelve and  $\frac{16}{100}$  (\$2,212.16) dollars.

That the consideration of said debt is as follows: Deponent was in the employ of the American De Forest Wireless Telegraph Company as and from on or about the 1st day of November, 1903, until on or about the 1st day of November, 1906. At the time that deponent left the employ of the said American De Forest Wireless Telegraph Company, that concern owed him for salary, in cash, the amount of, \$1,177.94, which, with interest computed at the rate of 6 per cent. per annum to July 24, 1911, amounts to the sum of \$1,512.47. And the said American De Forest Wireless Telegraph Company also owed deponent, at the time he left its employ as aforesaid, the sum of \$544.93, which sum, however, was, according to agreement, to have been paid by the issuance and delivery to deponent of preferred stock of the American De Forest Wireless Telegraph Company, computed on the basis of the average or prevailing selling price for said stock. That said stock was never issued and delivered to deponent. Wherefore deponent claims he is entitled to be paid the said sum, which, with interest computed thereon at the rate of 6 per cent. per annum to July 24, 1911, amounts to the sum of \$699.69, therefore making deponent's total claim herein, with interest due and payable on the 24th day of July, 1911, amount to the total sum of two thousand two hundred twelve and  $\frac{16}{100}$  (\$2,212.16) dollars.

On information and belief, that after deponent withdrew from said American De Forest Wireless Telegraph Company, the United Wireless Telegraph Company, now bankrupt, took over said American De Forest Wireless Telegraph Company, assumed the latter's debts and liabilities, and applied its assets. That said United Wireless Telegraph Company called in the stock of said American De Forest Wireless Telegraph Company, and by due procedure issued stock of the United Wireless Telegraph Company in exchange to holders of the stock of the American De Forest Wireless Telegraph Company.

That deponent thereafter made demand upon the United Wireless Telegraph Company, and was assured by officers thereof that the same should and would be honored.

That no part of said debt has been paid.

That there are no set-offs or counterclaims to the same.

That deponent has not, nor has any person by his order, or, to his knowledge and belief, for his use, received any manner of security for said debt whatever.

That no note has been received therefor, nor any judgment rendered thereon.

The above claim was duly verified by oath.

[1] 1. Does the above instrument contain sufficient allegations to constitute, prima facie, a proof of claim under the Bankrupt Law?

A sworn proof of claim is prima facie evidence of its allegations, even in case the claim is objected to. Bankruptcy proceedings are somewhat summary in their character, and the proof of claim is regarded as a deposition rather than as pleading. It has the force of evidence. *Whitney v. Dresser*, 200 U. S. 532, 535, 26 Sup. Ct. 316, 50 L. Ed. 584; *In re Sumner* (D. C.) 101 Fed. 224; *In re Shaw* (D. C.) 109 Fed. 780; *In re Cannon* (D. C.) 133 Fed. 837; *In re Carter* (D. C.) 138 Fed. 846; *In re Saunders*, 2 Lowell, 444, 446, Fed. Cas. No. 12,371; *In re Baumhauer* (D. C.) 179 Fed. 966, 967. In the *Castle Braid Co. Case* (D. C.) 145 Fed. 224, 228, in discussing the force of allegations in proofs of claim, Judge Ray, of the Southern district of New York, said:

"The allegations of the proofs of claim are to be taken as true. If they set forth all the necessary facts to establish a claim, and are not self-contradictory, prima facie, they establish the claim, even in the presence of objec-

tions; and the objector is then called upon to produce evidence and show facts tending to defeat the claim, of probative force equal to that of the allegations of the proofs of claim. The burden of proof is always on the claimant; but, as probative force is given to the allegations of the proofs of claim, and no probative force is given to the objections, this must be met, overcome, or at least equalized, by the objecting party."

The trustees contend that, while a proof of claim is *prima facie* evidence of its allegations, such allegations in the claim now in question are not sufficient to constitute a valid proof of claim, in that they fail to adequately state the claim and the consideration therefor, as required by section 57a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]).

[2] Under the Bankrupt Law, creditors have an interest in each claim presented, and a right to know its nature. They can know this only through the proof of claim. The statement of the claim and of its consideration must be full and explicit, in order to enable creditors to investigate its adequacy. A claim cannot be said to be "proved," and entitled to allowance, unless the proof of it is properly verified, and gives sufficient facts to advise the creditor of its justice and legality, and the consideration for it. In *re* Coventry Evans Furniture Co. (D. C.) 166 Fed. 516. A claim for "legal services performed during the year 1908" is held insufficient, because it is of a too general character, and affords no light to the parties in interest, in relation to the exact character of the services. In *re* Scott (D. C.) 93 Fed. 418. The Bankruptcy Law requires in a proof of claim more than a general allegation of the consideration. Such proof should inform the trustee with particularity in relation to the precise character of the services rendered and the consideration therefor. In *re* Stevens (D. C.) 107 Fed. 243.

In the first item of the proof of claim before me the deponent makes oath that he was in the employ of the American De Forest Telegraph Company "from on or about November 1, 1903, to on or about November 1, 1906," and that the amount of \$1,177.94 was due him for salary when he left the company's employ. It appears, then, by the verified claim, that the deponent was an officer under a salary; but it does not appear what the character of his employment was. The deposition does not show what the officer did to earn his money; no distinct consideration is given. The proof of claim before me is not so specific as in the Scott Case, for there the proof alleged "legal services," or services of a lawyer; but in the case at bar even such description of the character of the employment is not given. In *The Goble Boat Co.* (D. C.) 190 Fed. 92, the proof contained a statement of the claim, and of its consideration, more specific than that in the case at bar. The proof in that case stated a claim for compensation for "labor as manager of the plant"; but the court held it defective. It seems to me clear that this item of the proof before me does not state the character of the services, and the consideration for them, in so full and specific a manner as to enable creditors to pursue a proper and legitimate inquiry as to the fairness and legality of the claim.

The second item of the proof of claim sets forth that the American De Forest Wireless Telegraph Company also owed deponent, at the

time he left its service, the sum of \$544.93, which sum, according to agreement, was to have been paid by the issuance and delivery to the deponent of preferred stock of the American De Forest Wireless Telegraph Company, computed on the basis of the average prevailing price for said stock. This item of \$544.93 is clearly outside of and beyond the item for salary. We have the mere statement that the bankrupt owed the claimant a certain sum of money; but for this sum no consideration whatever is named. No time is fixed at which the debt was incurred, or at which it was to be paid. If we look upon this item as merely a claim for damages for failure to deliver stock, it appears that no amount of damages is alleged, and no value is assigned for the stock. No statement appears that the stock was of value or whether or not the claimant was damaged in any way by failure to deliver the stock. No consideration is alleged for this item.

I am constrained to hold that the deponent in this case has set forth a mere *statement* of claim, but not a "proof" of claim, within the meaning of the Bankruptcy Law.

[3] 2. The items of the alleged indebtedness are alleged to have been created by agreement between the deponent and the American De Forest Wireless Telegraph Company. The allegation which charges the United Wireless Telegraph Company, the bankrupt in this case, with liability for this debt of the American De Forest Wireless Telegraph Company, is made solely on information and belief. The deponent does not swear that the Wireless Company assumed the debts and liabilities of the American De Forest Wireless Telegraph Company. The deponent swears, merely, that he is informed and believes that the bankrupt assumed the debts and liabilities of the American De Forest Wireless Telegraph Company. *Whitney v. Dresser* decides that the verified proof of claim is *prima facie* evidence of the allegations in the proof. In the case before me the deponent alleges, not the substantive fact of the assumption by the bankrupt of the debts of the American De Forest Wireless Telegraph Company, but his information and belief touching such assumption. The oath of deponent, then, merely verifies his information and belief. In the *Greenfield Case* (D. C.) 193 Fed. 100, the District Court in the Eastern District of Pennsylvania had this question before it, but did not decide it. The court said:

"The case under consideration suggests another question, namely, whether *Whitney v. Dresser* applies to a situation where the proof of claim is sworn to by a person who makes the affidavit, not upon the primary knowledge which a creditor himself may be fairly supposed to possess, but upon secondary evidence, such as the information to which the trustee of a bankrupt creditor is ordinarily confined. In other words, while an *ex parte* affidavit by one having personal knowledge of the facts is to carry a presumption of validity, shall a similar presumption be extended to an affidavit made by one who is only repeating information obtained from others?"

I have disposed of the matter before me on another point, and there is perhaps no occasion for me to decide the question relating to the allegation upon information and belief. But, as the practice of the court is involved in it, I think it well to say that in my opinion the



vital facts to support a proof of claim should be made to appear by positive averments, founded upon the deponent's knowledge, and not upon his belief. The same question has often arisen in equity proceedings. In the equity courts, allegations merely upon information and belief, unsupported by proof, are not sufficient to sustain an injunction. *In re Bloss*, Fed. Cas. No. 1562; *Leavenworth v. Pepper* (C. C.) 32 Fed. 718; *Brooks v. O'Hara* (C. C.) 8 Fed. 529; *Bigbee v. Satterfield*, 105 Ga. 841, 32 S. E. 139. I can see no reason why the rule adopted in equity practice should not apply to a similar matter in a bankruptcy proceeding. A proof of claim derives its force largely from the fact that it is taken, not as pleading, but as evidence. It is not merely for the purpose of stating the case, but for "proof." I think an allegation upon information and belief upon a vital point in a proof of claim in bankruptcy is not sufficient to sustain such proof.

The deponent further says that:

"He thereafter made demand upon the United States Wireless Telegraph Company, and was assured by the officers thereof that the same [namely, the debt stated] should and would be honored."

This allegation is not, in my opinion, an affirmative statement of the transfer of the debts and liabilities of the American De Forest Company to the Wireless Company. A statement of assurance by the officers that the same should and would be honored is not a formal allegation of the transfer of the debt to the Wireless Company, and of its assumption of such debt. It is still true that the vital fact of the transfer of the claim from the American De Forest Company to the United Wireless Company, and the assumption of same by the United Wireless Company, is stated only on information and belief.

The certificate of the referee, rejecting the claim of Martin M. MacRae, is affirmed.

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## THE LAKE SHORE.

(District Court, N. D. Ohio, E. D. October 15, 1912.)

No. 2,517.

### 1. COLLISION (§ 91\*)—LIABILITIES OF VESSELS—CAUSING INJURY TO ANOTHER VESSEL.

The *Butler*, the down-bound of two steamships meeting in the Vidal Shoal Cut Channel, then 2,800 feet long and 250 feet wide, struck the south bank of the channel, and was injured. \* As the down-bound vessel under the rules she had the right of way over the *Lake Shore*, which was up-bound. *Held*, on conflicting evidence, that the *Butler* gave a check signal to the *Lake Shore* before either entered the cut, and that the injury to the *Butler* was caused by the fact that the *Lake Shore* did not heed such signal, but proceeded into the cut, and crowded the *Butler* against the bank.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 187-192; Dec. Dig. § 91.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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**2. COLLISION (§ 18\*)—LIABILITIES OF VESSELS—CAUSING INJURY TO ANOTHER VESSEL.**

A vessel which, by her negligent navigation, causes another to injure herself by striking against a bank or other obstacle, is as much responsible for the damage as though it was caused by direct collision between the two.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 16; Dec. Dig. § 18.\*]

In Admiralty. Suit by the Tonopah Steamship Company, owner of the steamer Joseph G. Butler, Jr., against the steamship Lake Shore; Gilchrist Transportation Company, claimant. Decree for libelant.

Goulder, Day, White, Garry & Duncan, of Cleveland, Ohio (O. D. Duncan and Robert G. McCreary, both of Cleveland, Ohio, of counsel), for libelant.

A. J. Gilchrist, of Cleveland, Ohio, for respondent.

DAY, District Judge. [1] This libel alleges a cause of damage to the libelant's steamer, Joseph G. Butler, Jr., by the steamer Lake Shore about 10 o'clock p. m. of the night of June 28, 1907, in the Vidal Shoal Cut Channel. The Vidal Shoal Channel is a channel cut through rocks, and in 1907, at the time of the accident, was approximately 2,300 feet long and about 250 feet wide. Its general direction is marked by the Canadian Canal Ranges, which mark the center of the cut. The northern side of the cut, at the upper or westerly end, is marked by a red float light, and three spar buoys are below, or to the eastward of, the float. There are no lights on the southerly side, but there are four stakes, the extreme westerly stake being about 50 feet more to the westward than the float light, and the last stake on the southerly side is somewhat to the westward of the last stake, as it marks the extreme lower or eastern end of the cut on the southerly side. Below the Vidal Shoal Channel there is open water of a minimum depth of 23 feet, which extends for a considerable distance. This open expanse of water is perhaps half a mile in length, permitting of sufficient space for vessels to turn around, and to wait and anchor before entering the Vidal Shoal Channel. It also appears that there is a current of perhaps two miles an hour running through this Vidal Shoal Channel.

It is claimed on behalf of the Butler: That she was down-bound with a cargo of 9,800 tons of iron ore, and a uniform draught of about 20 feet. At a point designated as Big Point, some distance above the Vidal Channel, the Butler was checked to half speed, and later checked to slow speed, and proceeded at a rate of between four and six miles an hour. That, when she arrived at the point where the turn onto the Canadian Canal Ranges was to be made, she commenced making the turn in the usual manner on her starboard helm. That at this time the lights of the vessel, which afterwards proved to be the Lake Shore, were seen coming out of the Canadian Canal Piers. That the Butler immediately blew a signal of three whistles to the Lake Shore as a request for the Lake Shore to check, so that the vessels would not meet in the Vidal Shoal Cut. Shortly after

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

this, the Butler blew a signal of three long and two short blasts for the Canadian Lock, this being the customary signal to notify the Canadian Lock officials of an approaching boat. The Lake Shore answered the three blast signals by blowing one. The Butler blew three again, followed by one whistle, and the Lake Shore answered with three whistles. That by the time this signaling had been completed the Butler had completed the turn, and was headed down on the Canadian Canal Ranges. The Butler continued down about on the ranges, and passed the red float light marking the upper end of the cut on the port hand in the usual manner, and, when the Butler was getting pretty close to the lower end of this cut, it was seen that the Lake Shore was not stopping below, but was coming ahead, and was dropping to the southward of the ranges, some distance below. The Butler's wheel was ported enough to clear the Lake Shore, and her engines rung up for full speed. She swung to starboard under the porting of her helm just as her bows met the Lake Shore bows, her starboard side forward about abreast of No. 1 hatch, struck on the bank to the southward of the southerly line of the channel. This rolled her over to port, and the porting bilge also struck, and damage to both sides was sustained. That at the time of the striking of the Butler the pilot houses of the two boats were abreast and their sides at that time were from two to eight feet apart, and at this time both boats were well to the southward of the range.

It was the contention on behalf of the Lake Shore: That she was up-bound and left the Canadian Canal at about 9:40 p. m. After leaving the canal, she proceeded at a speed of five or six miles an hour. That somewhere between the turn from the course leading from the canal and the Vidal Shoal Cut the Lake Shore passed the steamer Advance port to port; and, after passing the Advance, made out the red light and range lights of the Butler somewhere in the neighborhood of Big Point. The Lake Shore at this time was approaching the lower end of the Vidal Shoal Cut. A little later those on board the Lake Shore saw the Butler open up her green lights, the Lake Shore at that time entered the Vidal Shoal Cut, and immediately blew a three-blast signal. The Butler then blew one, which the Lake Shore answered with one, followed by a second three-blast signal, to which no reply was received.

It is contended that the Lake Shore was at this time on the range course; that she continued on the range course, and, when about 1,000 to 1,200 feet from the Butler, they ported their wheel, and crawled to the American side of the channel as the Butler was coming on an angle headed for about the Lake Shore's texas, and showing both side lights. After porting the Lake Shore headed on the float light until they got close up to the northward side of the channel, when they straightened up. The Lake Shore met the Butler just as the bows of the two boats were abreast of the float light; the texas of both boats being about abreast of each other at the same time as they were abreast of the float light. The Lake Shore passed the float very close, so close that they were apprehensive of striking it. The steamer Joseph G. Butler is a freighter of 6,588 gross ton, 525

feet in length, 55 feet beam. The Lake Shore is a freighter 3,871 tons, 356 feet in length, and 50 feet beam.

From an examination of the record it is quite apparent that the only witnesses, which are the officers and the crew of these respective ships, stick very closely to their own boats, and it will be necessary to examine this record in order to arrive at the probabilities of its occurrence.

Under both stories, a one-whistle passing agreement was established. It is also noticed that both sides claim that three-whistle signals were blown and answered, and that these signals were intended as checking signals. The three principal contradictions are then: First, as to the signals given by the respective boats; second, the meeting place of the boats; and, third, as to which boat was crowding the other. A portion of rule 5 of the pilot rules of the Great Lakes reads as follows:

"That in all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara and St. Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take."

The witnesses for the Lake Shore on being examined some five years after the accident with striking distinctness seem to recall the details of the occurrence, although the Lake Shore was not in any way damaged at the time, and with great uniformity place the positions of the two boats and the float light in a direct line. A consideration of the probabilities would not indicate such a position. The Butler was the down-bound boat, coming with the current, and it would seem natural that, it being the Butler's duty to blow first, the Butler would blow first, and did blow first, in order to establish a passing agreement. The whistle blown by the Butler for the Canadian Canal would give notice to the Lake Shore that the Butler intended to pass through the Shoal into the Canadian Locks. It is well established in navigation that a vessel proceeding against the current is much more easily controlled than proceeding with the current. The *Galatea*, 92 U. S. 439, 23 L. Ed. 727. It was then more probable that the Butler would blow to the Lake Shore than for the Lake Shore to blow first to the Butler. The location of this occurrence given by the officers and crew of the Lake Shore is not as probable as that given by the officers and crew of the Butler. The testimony of the captain of the Butler, I think, is frank and distinct concerning the signals and the location of the accident. He gives the meeting of the boats at a place well down the Vidal Cut, and I think that this is where they met. The contention is made that the Butler struck a boulder, but this is in no way established by the testimony in this case. In this narrow channel, only 250 feet in width, it is apparent from the record that the Lake Shore forced the Butler off of the ranges, compelling the Butler to run aground and suffer the injuries complained of.

[2] In this case I am confronted with interested, biased witnesses, and I am compelled to arrive at my decision from the probabilities of the situation as I have before indicated. There was no contact be-



tween the Butler and the Lake Shore, but the Lake Shore by her negligent navigation caused the Butler to damage herself by striking and accordingly the Lake Shore is as responsible for the damage as if she herself had inflicted it by direct contact. *The Maggie J. Smith*, 123 U. S. 349, 355, 8 Sup. Ct. 159, 31 L. Ed. 175; *The Ohio*, 91 Fed. 547, 558, 33 C. C. A. 667; *The Elizabeth Jones*, 112 U. S. 514, 5 Sup. Ct. 468, 28 L. Ed. 812.

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ST. BERNARD v. SHANE et al.

(District Court, N. D. Ohio, E. D. January 2, 1913.)

No. 8,404.

**1. DEATH (§ 31\*)—RIGHT TO SUE—STATUTORY ACTIONS—LIMITATIONS.**

A right of action for wrongful death conferred by statute, being in contravention of the common law and dependent alone on the statute creating it, must be taken with the limitation placed by the statute on the remedy, giving the right to sue solely to a particular person.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. § 31.\*]

**2. DEATH (§ 8\*)—WRONGFUL DEATH—RIGHT TO SUE—STATUTES.**

Where the intestate of a Michigan administratrix was killed in Illinois, the administratrix's right to sue therefor in Ohio depended on the statutes of Illinois, and for the purpose of such suit she might be regarded as an Illinois administratrix.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 12, 36, 52, 121, 133; Dec. Dig. § 8.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 524\*)—LETTERS—SCOPE—EXTENT OF POWERS—SUIT IN FOREIGN JURISDICTION.**

The capacity conferred by letters of administration is limited to the state within which they are granted, and, in the absence of statutes giving effect to the foreign appointment, no suit can be maintained by such administrator in another state in either the state or federal courts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2330-2343; Dec. Dig. § 524.\*]

**4. DEATH (§ 35\*)—WRONGFUL DEATH—FOREIGN ADMINISTRATOR—RIGHT TO SUE.**

Gen. Code Ohio, § 10769, and section 10770 as amended by Laws 1910, p. 198, provides that an administrator duly appointed in another state or country may sue in the courts of Ohio in like manner and under like restriction as a nonresident is permitted to sue, and may sue for wrongful death in all cases where the state of the administrator's domicile allows the enforcement in its courts of a statute of Ohio of a like character. The Illinois statute relating to wrongful death (Laws 1853, p. 97) as amended in 1903 (Laws 1903, p. 218) provides that no such action shall be brought or prosecuted in Illinois to recover damages for a death occurring outside the state. *Held*, a Michigan administratrix of a person alleged to have been wrongfully killed in Illinois could not sue either in the state or federal courts of Ohio for such wrongful death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 50; Dec. Dig. § 35.\*]

What law governs actions for wrongful death, see note to *Burrell v. Fleming*, 47 C. C. A. 606.]

**5. COURTS (§ 371\*)—FEDERAL COURTS—WRONGFUL DEATH—STATE STATUTES—ENFORCEMENT.**

The federal courts in one state will enforce a cause of action for wrongful death arising under the statutes of another state, only when it

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is not prohibited by the statutes or public policy of the state where the action is brought, and where the procedure is adequate to the enforcement of such rights therein.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 907, 972-976; Dec. Dig. § 371.\*]

Jurisdiction of federal courts as affected by state laws, see note to *Barling v. Bank of British North America*, 1 C. C. A. 513.]

**6. COURTS (§ 371\*)—FEDERAL COURTS—CAUSES OF ACTION ARISING IN DIFFERENT STATES.**

The right to enforce in a federal court in one state a cause of action arising under the laws of another state depends entirely on the statutes and policy of such other state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 907, 972-976; Dec. Dig. § 371.\*]

At Law. Action by Lillian St. Bernard, as administratrix of the estate of Bion St. Bernard, deceased, against S. P. Shane and G. A. Garretson, receivers of the Gilchrist Transportation Company. On demurrer to complaint. Sustained.

Ewing, Counts & Terrell, of Cleveland, Ohio, for plaintiff.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for defendant.

DAY, District Judge. This is an action brought by the plaintiff, as administratrix, to recover damages on account of the death of her intestate. The injuries and death occurred in Illinois. The cause of action arises out of the Illinois statutes providing for the recovery by the decedent's personal representative for the death of the decedent. The sections of the statute giving the right of action (Hurd's Revised Statutes of Illinois 1912, chapter 70, sections 1 and 2) provide as follows:

"Section 1. Be it enacted by the people of the state of Illinois, represented in the General Assembly. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 2. Every such action shall be brought by and in the name of the personal representatives of such deceased person and the amount recovered in every such action shall be for the exclusive benefit of the widow and the next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law. In relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person not exceeding the sum of ten thousand dollars: Provided, that every such action shall be commenced within one year after the death of such person. Provided further, that no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state, and that the increase from five thousand to ten thousand dollars in the amount hereby authorized to be recovered shall apply only in cases when death hereafter occurs."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff has brought suit in this court, alleging in her petition that she was appointed administratrix in Michigan, the home of the decedent.

The defendants have filed a demurrer to the petition, assigning two grounds: "First. The plaintiff has not legal capacity to sue. Second. That the facts alleged in the petition are not sufficient to constitute a cause of action."

The question then for consideration is this: Can an administratrix, appointed in Michigan, enforce in a federal court of Ohio a cause of action given by the Illinois statutes for death occurring by wrongful act in Illinois? This demurrer raises no question of jurisdiction.

[1] The first ground of demurrer raises the question as to whether or not the plaintiff has legal capacity to maintain this action in this court. The question then is: Can the plaintiff, as an administratrix, appointed in Michigan, under the facts stated, maintain this action in the federal courts in Ohio? The right of action for death by wrongful act arising under the Illinois statutes is vested in the personal representative of the decedent. The right of action being given, in contravention of the common law, and being dependent alone upon the statute creating it, the right must be taken with the limitation placed upon the remedy.

[2] The rights of the administratrix are therefore derived from the Illinois statutes, and for the purposes of this suit she may be regarded as an Illinois administratrix. *Davidow v. Pennsylvania R. Co.* (C. C.) 85 Fed. 943, 944; *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 197, 14 Sup. Ct. 978, 38 L. Ed. 958.

[3] The capacity conferred by letters of administration is limited to the state within which they are granted, and, in the absence of statutes giving effect to the foreign appointment, no suit can be maintained by such officer in another state, in either the state or federal court. *Story on the Conflict of Laws*, § 513; *Noonan v. Bradley*, 9 Wall. 394, 400, 19 L. Ed. 757; *Johnson v. Powers*, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112; *Byers v. McAuley*, 149 U. S. 608-615, 13 Sup. Ct. 906, 37 L. Ed. 867.

[4] That this rule is applicable to both state or federal courts was recognized by the Court of Appeals for this circuit, in the case of *Courtney v. Pradt et al.*, 160 Fed. 561-563, 87 C. C. A. 463. This being the recognized rule, it becomes important to ascertain what right the Ohio statutes give to an administratrix, appointed in a foreign jurisdiction, to maintain an action in this state. It was held in *Chambers v. B. & O. R. Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143, that:

"The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions."

The policy of Ohio, in such cases, is found in sections 10769 and 10770 of the General Code.

Under section 10769 it is provided that:

"An executor or administrator duly appointed in another state or country, may commence and prosecute an action or proceeding in any court in this state, in his capacity as such, in like manner and under like restrictions as a nonresident is permitted to sue."

Section 10770, as amended by Laws 1910, p. 198, provides that a right of action for death by wrongful act arising under a statute of another state may be enforced in Ohio "in all cases where such foreign state \* \* \* allows the enforcement in its courts of a statute of this state, of a like character."

In the case of *B. & O. R. Co. v. Chambers*, 73 Ohio St. 16, 23, 76 N. E. 91, 93 (11 L. R. A. [N. S.] 1012), the Supreme Court of the state of Ohio said:

"Primarily the Legislature must be held to be the judge of questions of public policy, and, if it has spoken plainly either for or against the enforcement of a statute of its sister state in a given case, the courts must obey its mandate."

It will then be seen that, under the Ohio statutes and Ohio decisions, the Legislature of Ohio and the courts of Ohio have expressly declared that it is against the public policy of the state of Ohio to permit a foreign administratrix to enforce in its courts a cause of action for death by wrongful act arising under the statutes of another state, except where such state permits the enforcement in its courts of similar causes of action arising under the Ohio statutes. We then inquire: Will the statutes of Illinois and will the law of Illinois permit of the enforcement in its courts of the Ohio statutes giving a cause of action for wrongful death? The Illinois statutes (Laws 1853, p. 97) covering this situation as amended in 1903 (Laws 1903, p. 218) provided in part:

"That no such action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state."

And this is the present statute law of the state of Illinois. The Supreme Court of Illinois, in the unreported case of *Thomas Daugherty, Administrator, appellant, against American McKenna Process Company, appellee*, decided on the 26th day of October, 1912, upholds the constitutionality of this statute, so it is the established law of the state of Illinois that no action shall be brought or prosecuted in that state to recover damages for a death occurring outside of that state. It is well established that an administrator appointed in one state to recover damages for the death of his intestate in the courts of another state receives his capacity to sue conferred by letters of administration granted in the appointment, and this capacity to sue is limited to the state within which the letters are granted; and that, in the absence of a statute giving effect to a foreign appointment, no suit can be maintained in the courts of another state by such an administrator.

Such is the law as is announced by the Court of Appeals for this circuit in *Maysville St. R. Co. v. Marvin*, 59 Fed. 91, 8 C. C. A. 21. The following cases are also authority for this doctrine: *Sanbo v. Union Pacific Coal Company* (C. C.) 130 Fed. 52; *Cornell Company, Ltd., v. Ward*, 168 Fed. 51, 93 C. C. A. 473; *Dodge v. Town of North Hudson* (C. C.) 177 Fed. 986; *Smith v. Madden* (C. C.) 78 Fed. 833. It then becomes apparent that the plaintiff herein has not the legal capacity to maintain the action in this court, and the demurrer will be sustained as to the first ground thereof.

In considering the second ground of demurrer as suggested by coun-



sel for the defendant, the right of the administrator as a citizen of one state to enforce in the courts of Ohio, or a federal court in Ohio, an action for wrongful death, arising under the statutes of another state, is the question raised. From the Ohio statutes already quoted it appears that an action for wrongful death would be enforced in this state in all cases where such foreign state allows the enforcement in its courts of the statutes of this state, of a like character.

The provisions of the Ohio law relating to the right to maintain an action for a death or injury occurring in another state were considered by the Supreme Court of Ohio, in the case of *Wabash R. Co. v. Fox*, Adm'r, 64 Ohio St. 133, 142, 59 N. E. 888, 889 (83 Am. St. Rep. 739) where the court said:

"It is apparent from this section that a condition to the right to maintain such action in this state where the injury occurred in another state is that such state allows the enforcement of the statutes of this state of like character; that is, if by the laws of such foreign state our statutes will be enforced in an action based upon alleged death from negligence occurring in Ohio, then a party may maintain an action of like character here where injury was received in such other state; otherwise not."

This statute having been construed by the Supreme Court of Ohio, this court is bound by such decision. *Maiorano v. B. & O. R. R. Co.*, 213 U. S. 268, 29 Sup. Ct. 424, 53 L. Ed. 792.

The Supreme Court of the United States has also decided that a state may restrict or even deny the right to sue in its courts in transitory actions. *Chambers v. B. & O. R. R. Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143. This case was before the Supreme Court on a writ of error directed to the Supreme Court of Ohio.

From the decisions cited, it seems clear that a state may through its Legislature say what transitory action arising in other jurisdictions shall be enforced in its courts and upon what conditions they may be so enforced.

From the foregoing it is clear that a state, through its Legislature, may declare the public policy of that state in its statutes, if the policy adopted operates uniformly upon the citizens of the respective states. The conditions we have presented by the petitioner in this case we are considering operates uniformly, because it denies the right to enforce a cause of action for death arising in Illinois, not only to the citizens of Illinois, but to the citizens of the several states, including the state of Ohio.

The plaintiff herein is not denied access to the courts of Ohio because she is a citizen of a particular state or because she is not a citizen of Ohio, or some other state, but because what she seeks to enforce is not cognizable in the courts of this state for the reason that the Legislature of Ohio has declared it to be against the public policy of Ohio to entertain such actions in its courts.

[5] The federal courts in one state will enforce a cause of action for wrongful death arising under the statutes of another state, only when it is not prohibited by the statutes or the public policy of the state where the action is brought, and where the procedure in such state is adequate to the enforcements of such rights therein. Slater

v. Mexican National Railroad Company, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900; Cuba Railroad Company v. Crosby, 222 U. S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40.

[6] The right to enforce an action, then, in a federal court in one state in a cause of action arising under the laws of another state, depends entirely upon the statutes and the policy of such other state. The policy of the state of Illinois does not permit the maintenance of such an action as is involved in this case arising under the statutes of the state of Ohio, the statutes of Illinois prohibiting such action. The statutes of the state of Ohio deny to a citizen of the state of Illinois the right of action for wrongful death arising under the statutes of Illinois, and this applies equally to the federal courts in Ohio.

The second ground of demurrer will, accordingly, be sustained, and exception granted to the plaintiff.

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UNITED STATES FIDELITY & GUARANTY CO. v. WENGER et al.

(District Court, D. Montana. January 10, 1913.)

No. 1,064.

INDEMNITY (§ 8\*)—CONTRACT—SUBJECT-MATTER—SUBROGATION.

Defendants became indemnitors of plaintiff surety company against liability as surety on the official bond of a county treasurer. Plaintiff also became surety to the county treasurer against defalcation by a deputy. Such deputy having converted county funds, plaintiff paid a judgment rendered therefor in favor of the county against plaintiff and the treasurer, and then sued defendants for indemnity. *Held* that, by virtue of plaintiff's relation to the deputy, the payment of the judgment constituted but a payment of plaintiff's own debt as surety for the deputy, not within defendants' indemnity contract, and that defendants were not bound to indemnify plaintiff and then sue plaintiff as subrogees of the county treasurer.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 10-15; Dec. Dig. § 8.\*]

At Law. Action by the United States Fidelity & Guaranty Company, a corporation, against John Wenger and others. On demurrer to defendants' answer. Denied.

Gunn, Rasch & Hall, of Helena, Mont., for plaintiff.

W. H. Trippet, of Anaconda, Mont., H. G. Rodgers, of Dillon, Mont., and Rodgers & Rodgers, of Anaconda, Mont., for defendant Wenger.

Tolan & Gaines, of Missoula, Mont., for defendant T. J. McKenzie.

BOURQUIN, District Judge. Defendants, apparently by request of one Nadeau, became and are indemnitors of plaintiff, surety on the official bond of Nadeau, county treasurer. One Johnston was deputy treasurer, and plaintiff executed a fidelity or indemnity bond in his behalf to Nadeau. Johnston converted treasury funds, the county recovered judgment therefor against Nadeau and plaintiff, and plaintiff paid it. Plaintiff brings this action for indemnity. Defendants plead

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by way of defense that plaintiff is not entitled to recover by reason of its relation to Johnston. Plaintiff demurs.

Plaintiff contends that in any event defendants must indemnify it, and, as subrogees to it and Nadeau, might bring an action against Johnston and also plaintiff as indemnitor for Johnston.

Defendants contend that, when plaintiff paid as aforesaid, it only paid its own debt as indemnitor for Johnston, not within their contract of indemnity to plaintiff, that they may so defend herein, and are not driven to the circuitry of action suggested by plaintiff. The case would appear to be novel in its facts, however it may be in reference to the law.

Contracts of indemnity in some respects are distinguishable from suretyship, but they are largely of like obligations and consequences. That of defendants approximates suretyship, wherein plaintiff is creditor of Nadeau, defendants are sureties for Nadeau, and Nadeau is debtor and principal therein. Both by contract and by operation of law, defendants possess the rights of sureties. When pursued by the creditor, the surety may interpose any defense that the principal can—stands in the shoes of the principal—if inherent to the debt and not merely personal to the principal. For the surety engages and can be held to pay only what the principal should pay, and when the latter is released or excused from or has a good defense to payment, so, likewise, the former. It is believed that a surety in a bond who undertakes to indemnify his principal for the defaults of others for whom the principal is responsible to the obligee, thereby in legal effect releases the principal from the liability to reimburse the surety for any payments the latter may have made to the obligee on account of defaults of the principal which are primarily such defaults of such others. Otherwise plaintiff is creditor of and debtor to Nadeau, and Nadeau likewise to plaintiff, arising out of the same contract and for the same transaction; plaintiff is creditor of and debtor to itself; plaintiff as surety would recover reimbursement from Nadeau, to the end that Nadeau could recover it from plaintiff as indemnitor; and plaintiff as surety, failing to recover reimbursement from Nadeau, could as subrogee to Nadeau's rights recover it from Johnston and itself as indemnitor. Such cross-demands must extinguish each other.

- No one can be debtor to or creditor of himself, nor maintain a suit against himself.

If plaintiff sued Nadeau for reimbursement, the latter could interpose as a release and defense plaintiff's contract of indemnity for Johnston. On the other hand, if Nadeau sued plaintiff as indemnitor for Johnston, plaintiff could defend that therefor it had necessarily reimbursed the ultimate party entitled thereto, the county, bailor of both Nadeau and Johnston and to which both were liable, which reimbursement inured to the benefit of Nadeau. The debt of Nadeau paid by plaintiff to the county was also the debt of Johnston which plaintiff was bound to pay Nadeau. The payment of the first was also a payment of the last. In both suggested actions the answers as aforesaid could be defenses and not necessarily set-offs or counterclaims. Hence, in this action at law, the defense is available to defendants, for

plaintiff, having released their principal, has released them. Any payment by them would be as volunteers and would subrogate them to no right to reimbursement from Nadeau only, they then standing in plaintiff's shoes, in that Nadeau owes plaintiff nothing.

Demurrer overruled.

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In re SHEAR.

(District Court, W. D. New York. January 4, 1913.)

**1. BANKRUPTCY (§ 408\*)—DISCHARGE—OFFENSES—NECESSITY OF CONVICTION.**

To deprive a bankrupt of his right to a discharge, it is not necessary that he shall have been convicted of one of the offenses enumerated in the act; but it is enough if it be shown by clear and convincing evidence that he has been guilty of such offense.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.\*]

**2. BANKRUPTCY (§ 408\*) — DISCHARGE — FALSE OATH — CONVICTION — PRIMA FACIE EVIDENCE.**

A prior adjudication that the bankrupt had made a false oath, in the course of his examination in relation to the conduct of his business, on the certificate of the referee, and summary punishment for contempt, constitute prima facie proof of a relevant specification against his application for the discharge; but he may still show that the offense was not knowingly and fraudulently committed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Wilson M. Shear. On review of a special master's decision denying the bankrupt's discharge. Affirmed, on condition.

See, also, 188 Fed. 677.

Carleton H. White, of Buffalo, N. Y., for objecting creditor.

Dolson & Dolson, of Buffalo, N. Y., for bankrupt.

HAZEL, District Judge. The bankrupt, on motion of creditors, was heretofore adjudged guilty by this court of making a false oath in testimony given before the referee in bankruptcy in relation to the whereabouts of his property and the conduct of his business. Subsequently, under section 14 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), specifications were interposed in opposition to his discharge on the ground that he had committed an offense punishable by imprisonment, in that he had made the aforesaid false oath. At the hearing in the bankruptcy proceeding, the objecting creditor introduced in evidence the decision of this court, adjudging the bankrupt guilty of making a false oath and of contempt of court, and then rested, without further evidence. The bankrupt then moved for a dismissal of the specification, and submitted that the objecting creditor failed in affirmatively establishing that he was guilty of an offense under section 29 (b) of the Bankruptcy Act.

[1] To deprive a bankrupt of discharge, it is not necessary that

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



he shall have been convicted of one of the offenses enumerated.' It is enough if it be shown by clear and convincing evidence that he has been guilty of such an offense. In *Re Gaylord*, 112 Fed. 668, 50 C. C. A. 415, it was plainly held by the Circuit Court of Appeals for this circuit that a bankrupt, who has intentionally testified falsely respecting a material fact at a first meeting of creditors, is not entitled to a discharge, though in that case the court reached the conclusion that the evidence was insufficient to show that the particular statements of which perjury was predicated were false, and the bankrupt was granted his discharge. In *Re Kretsch* (D. C.) 172 Fed. 523, Judge Hand held that perjury by the bankrupt in proceedings for his discharge did not operate as a bar thereto, where there was other evidence showing him to be entitled to it. In *Re Blalock* (D. C.) 118 Fed. 679, the court held that the willful making of a false oath in another bankruptcy proceeding was not ground for refusal to discharge.

[2] Apparently there is a well-defined distinction between the making of an intentional false oath in an examination of the bankrupt under section 7 (9) of the Bankruptcy Act and in a proceeding for discharge. In this case the false oath, willfully and fraudulently made as heretofore determined, was made in the course of the examination of the bankrupt in relation to the conduct of his business. His right to a discharge depended upon his appearance at the meeting of creditors and submission to an examination in relation to his business and property. If the evidence as to his conduct and the willful falsity of the oath taken by him clearly show that he is lacking in honesty, his discharge should be refused; but I think the opportunity should not be denied him of showing in this proceeding that the offense of making a false oath was not knowingly and fraudulently committed, and that he should not be prevented from making further explanation of his testimony, if he is able to do so, or from showing that he did not make a willful misstatement of facts on his examination. The prior adjudication that the bankrupt had made a false oath, on the certificate of the referee, and his summary punishment for contempt (In *re Shear* [D. C.] 188 Fed. 677), are to be considered as showing *prima facie* that this specification was established.

The discharge is denied, unless the bankrupt within 10 days petitions the court for leave to introduce testimony, in which case the matter will be resubmitted to the special master.

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EVANS v. WESTERN TIMBER & LOGGING CO.

(District Court, W. D. Washington, S. D. December 26, 1912.)

No. 1,235.

ADMIRALTY (§ 19\*)—JURISDICTION—MARITIME TORTS—INJURY TO VESSEL.

A suit in personam against a timber company to recover for the loss of a vessel by coming into collision at night with a pile, alleged to have been an obstruction to navigation, driven by respondent in navigable

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

water in aid of its rafting operations and negligently left unlighted, is within the jurisdiction of a court of admiralty.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 233, 234; Dec. Dig. § 19.\*]

Admiralty jurisdiction of torts, see note to *Campbell v. H. Hackfeld & Co.*, 62 C. C. A. 279.]

In Admiralty. Suit in personam by Bert Evans against the Western Timber & Logging Company. On exceptions to libel for want of jurisdiction in the court. Exceptions overruled.

Teats, Metzler & Teats, of Tacoma, Wash., for libelant.

Ballinger, Battle, Hulbert & Shorts, of Seattle, Wash., for respondent.

CUSHMAN, District Judge: This is a libel in personam, wherein the libelant seeks to recover from the respondent for injuries caused by a collision between libelant's gasoline launch, of 20 tons' burden, with a pile, alleged to have been driven in the navigable waters of Puget Sound by the respondent. The libel recites:

"That on the 23d day of March, 1911, and for some time prior thereto, the libelant, Bert Evans, was the master and owner of the launch Elsie E. That the said launch Elsie E was a gasoline propelled craft of about 20 tons' burden, and a tight, staunch, and strong craft. That the said Bert Evans is at this time, and was at all times herein mentioned, a duly licensed pilot, and that on the 23d day of March, 1911, and for some time prior thereto, the said Bert Evans operated the said craft Elsie E on the waters of Puget Sound, and in particular between the ports of Tacoma and Burley, carrying passengers and freight for hire. That the town of Burley is located at the north or upper end of what is known as the Burley Lagoon. That said lagoon is a navigable body of water at high tide and an arm of Puget Sound. That on the 23d day of March, 1911, and for a long time prior thereto, the said Western Timber & Logging Company, in the operation of its logging business, had placed and driven into the said lagoon piles to be used by the said Western Timber & Logging Company for its rafting and booming ground. That the said piles were driven into the said lagoon, and along and across the channel of the said lagoon. That it was necessary for the various water crafts, in reaching the said town of Burley, to follow the said channel. That the respondent Western Timber & Logging Company obstructed the channel leading to the town of Burley with its said piles, making navigation in the upper end of the said Burley Lagoon dangerous and hazardous, and that the said piles were a hindrance and obstruction to navigation, and that on the 23d day of March, 1911, the said respondent maintained no lights in the nighttime upon the said piles, or any of them. And that said Western Timber & Logging Company on the said 23d day of March, 1911, and prior thereto, maintained said piles driven into the said Burley Lagoon, contrary to the orders of the United States engineers. That in order to reach the town of Burley it was necessary, owing to the shallowness of the water in the said lagoon, to go in at high tide, and that on the said 23d day of March, 1911, the tide was high at about the hour of 1:30 in the morning; that on the said 23d day of March, 1911, as the said Bert Evans was proceeding on his way with the said launch Elsie E to the landing at Burley, and as he was navigating his said craft in a careful and cautious manner and under slow speed, and through no fault of his own, but through the carelessness and negligence of respondent, and its utter disregard to the rights of navigators in obstructing the said channel with their piles, and through the carelessness and negligence of the Western Timber & Logging Company

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in not maintaining in the nighttime lights upon the said obstructions, the launch *Elsie E* struck one of the said piles, overturning the said craft, which immediately took fire, and was totally consumed, and was a total loss."

This matter is before the court on exceptions to the libel; it being contended that the cause of action set forth "is not an admiralty and maritime action, and is not within the jurisdiction of this court." In *Philadelphia, Wilmington & Baltimore Railroad Co. v. Philadelphia & Havre de Grace Towboat Co.*, 23 How. 209, 16 L. Ed. 433—which was a case of injury to a vessel colliding with a pile left in the bed of a navigable river—concerning jurisdiction, the court says:

"Since the case of *Waring v. Clark*, 5 How. 464, 12 L. Ed. 226, the exception of *infra corpus comitatus* is no longer allowed to prevail. In such cases, the party may have his remedy either in the common-law courts or in the admiralty."

In the case of *The Blackheath*, 195 U. S. 361, at 365, 25 Sup. Ct. 46, at 47 (49 L. Ed. 236), it is said:

"The precise scope of the admiralty jurisdiction is not a matter of obvious principle or of very accurate history. As to principle, it is clear that, if the beacon had been in fault and had hurt the ship, a libel could have been maintained against a private owner, although not in rem. *Philadelphia, Wilmington & Baltimore R. R. Co. v. Philadelphia & Havre de Grace Steam Towboat Co.*, 23 How. 209 [16 L. Ed. 433]; *Atlee v. Packet Co.*, 21 Wall. 389 [22 L. Ed. 619]; *Panama Railroad v. Napier Shipping Co.*, 166 U. S. 280 [17 Sup. Ct. 572, 41 L. Ed. 1004]. Compare *The Rock Island Bridge*, 6 Wall. 213 [18 L. Ed. 753]."

In the first case above, *Philadelphia, Wilmington & Baltimore R. R. Co. v. Philadelphia & Havre de Grace Steam Towboat Co.*, 23 How. 209, 16 L. Ed. 433, the pile causing the damage had been driven in connection with the construction of a railroad bridge, a matter entirely nonmaritime. In the case before the court it is alleged that the pile placed in the channel and causing the damage was, with other piles, placed by the respondent in the lagoon to be used "for its rafting and booming ground"—a use connected with navigation. In this respect the case now before the court is more clearly within the jurisdiction of the court than the case of *Philadelphia, Wilmington & Baltimore R. R. Co. v. Philadelphia & Havre de Grace Steam Towboat Co.*, *supra*.

The exceptions are overruled.

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In re FULLICK.

In re CALIFORNIA TEA CO.

(District Court, W. D. Pennsylvania. October, 1912.)

**1. BANKRUPTCY (§ 482\*)—FEES—BANKRUPT'S ATTORNEY—COMPENSATION.**

Where the attorney for an involuntary bankrupt did nothing but prepare the bankrupt's schedules, which were brief, an allowance of \$25 was sufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. BANKRUPTCY (§ 369\*)—ACCOUNTS—REFEREE—DUTY TO EXAMINE.**

It is the duty of the referee in bankruptcy to see that an estate is economically administered, and to examine the accounts of the receiver and trustee, though no person files exceptions thereto.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 570; Dec. Dig. § 369.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of one Fullick. On exceptions to the referee's refusal to allow more than \$25 as an attorney's fee for the bankrupt. Overruled.

Alpern & Seder, of Pittsburgh, Pa., for trustee.  
Wm. H. Leahy, of Pittsburgh, Pa., for bankrupt.

ORR, District Judge. [1] This matter comes before the court upon exceptions to the action of the referee in refusing to allow more than \$25 as a fee to the attorney for the bankrupt. The proceeding was an involuntary one. The attorneys for the petitioning creditors procured the appointment of the receiver. The attorney who presented the claim did nothing but prepare the schedules for the bankrupt. The schedules are brief and did not require much labor. The attorney for the bankrupt never appeared before the referee. The allowance made by the referee is, in the opinion of the court, sufficient.

[2] The whole policy of the law with respect to bankrupt estates is that they shall be economically administered, and it is the duty of referees, as well as of receivers and trustees, none of whom are entitled to receive greater compensation than is fixed by the bankruptcy law, to see that estates are administered with the strictest economy. But the law imposes specially upon referees the settlement and distribution of estates. They must pass upon the accounts of receivers and trustees, and be satisfied as to their correctness. It is not proper for a referee to assume that an account is correct, or that payments made by an accountant are proper, simply because no person interested files an exception thereto. What is everybody's business is nobody's business. The court has thus expressed itself in this case because, in support of the exceptions now before the court, there have been produced a number of accounts in which appear various allowances to attorneys and others, which may have been allowed without special investigation by the referees, because no exceptions were filed to the accounts in which the allowances were claimed. The probabilities are that these accounts were all properly examined; but the consideration of the present case affords an opportunity to emphasize the duty imposed by law upon the referees to require economy in the administration of bankrupt estates.

The referee is sustained, and the exception dismissed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



## EASTFIELD S. S. CO., Limited, v. McKEON et al.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1912. Rehearing  
Denied January 28, 1913.)

No. 2,313.

CORPORATIONS (§ 586\*)—PARTIES—UNEXECUTED AGREEMENT FOR TRANSFER OF  
CAUSE OF ACTION.

Libelant, an English steamship company, joined with four other companies in an agreement for consolidation, providing that the vessels and other property of the several companies, including the benefit of all contracts existing on a date named, should be transferred by proper conveyances to be thereafter executed to a new company. Conveyances of the vessels of the constituent companies were subsequently made, but with respect to choses in action and similar assets the parties agreed that the same should be realized on and the proceeds paid over to the new company. One of such choses in action within the terms of the agreement was a claim by libelant against respondent for breach of a charter. *Held*, that the agreement itself, not having been executed as to such claim by a transfer or assignment, did not divest libelant of its title or interest so as to deprive it of the right to maintain a suit thereon in its own name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2348–2353; Dec. Dig. § 586.\*]

Appeal from the District Court of the United States for the Southern District of Alabama; Harry T. Toulmin, Judge.

Suit in admiralty by the Eastfield Steamship Company, Limited, against J. T. McKeon and others. Decree for respondents (186 Fed. 357), and libelant appeals. Reversed.

This is an appeal from a decree in admiralty entered in the court below dismissing a libel, and the transcript shows as follows: A libel was filed by the Eastfield Steamship Company as owner of the steamship Eastfield against certain charterers to recover damages resulting from the latter's refusal to continue to use the vessel under the charter.

The cause was put at issue, duly tried, and Judge Toulmin filed the following opinion in his conclusion upon the facts and merits of the case:

This is an action brought by libelant to recover hire alleged to be due from the defendants on a charter of the steamship Eastfield, made between the Port Arthur Transatlantic Steamship Company and the libelant. The charter party was signed by the agents of the libelant and by H. G. G. Donald, manager of the Port Arthur Transatlantic Steamship Company, on June 19, 1901. While the charter party was in the possession of said Donald, on July 2, 1901, the defendants indorsed in writing on said charter party a guaranty to the owners of the steamship Eastfield of the fulfillment of the charter party, and the same was delivered to the agents of said owners, who were at that time the Eastfield Steamship Company, and who are the libelants in this case.

"By the provisions of the charter party the charterers agreed to hire said steamship Eastfield for the term of 24 calendar months from the time of her delivery, at the hire of £900 per month. In accordance with the contract, said steamship was delivered to the charterers on September 10, 1901, at Mobile, Ala. On the date of the said guaranty by the defendants, said Donald, as manager, transferred to each of them one-third interest in the profits to be made by the ship under the charter, and subsequently on the same day transferred the entire interest to them. The evidence was that the defendants 'financed' the enterprise, and paid such installments of the hire of said steamship as were paid. The evidence showed that said Don-

\*For other cases see same topic- & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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ald and one or more of the defendants jointly inspected the vessel, accepted her, and jointly gave instructions to her while she was operating under the charter.

"Defendant McKeon testified that said guaranty was made for the benefit of said Donald and of the owners of said steamship. The last voyage under said charter was from Mobile to Newcastle, with a cargo of lumber to be there discharged, and to await orders from the charterers. The vessel arrived at Newcastle on April 9, 1902. Her cargo was completely discharged on April 12, 1902. Up to this time no orders, instructions, or information of any kind had been received by the master of the vessel from the charterers as to her further use or service, and no intimation had been received by her owners of the charterers' intention to throw up the vessel. On April 9, 1902, libelants received a letter from the charterers, and on April 20, 1902, a cablegram from Louis Donald, a ship broker at Mobile, who had some connection with the chartering of the vessel, notifying the libelants that the charterers declined to use her further. The libelants replied that the vessel was still at charterers' disposal, and insisted on the charter being fulfilled. Subsequent communications between the parties failed to effect an adjustment of the matter. The charterers still declining to further employ the vessel, the libelants sought employment elsewhere for her, and some time in the next month succeeded in placing her.

"The main ground indeed, I believe the only ground, alleged by the charterers for throwing up the vessel and declining to further use her was their dissatisfaction with her speed and coal consumption. There was some conflicting evidence as to the general speed of the vessel, and also as to her speed during the voyages made under the charter, as well as to the quality and efficiency of the coal used. The charterers under their contract furnished the coal. However, on the facts established by the evidence, I think it is unnecessary and but a waste of time to undertake to reconcile such evidence, or to consider it at all. There was no guaranty or representation as to the speed of the vessel or her coal consumption in the charter party, and the express evidence was that there was no such guaranty given by the owners of the vessel or by their agents. There was no evidence of any fraudulent or false representations as to such speed and coal consumption made by the owners or by their authority to induce the making of the contract. There was evidence that at the time the charterers declined to further use the vessel there was little demand for such vessels, and that freights had declined.

"My opinion is that the refusal of the charterers to comply with the provisions of the charter party and to pay the hire of the vessel according to the terms of the contract was without legal justification or excuse; and that on the facts shown by the evidence in the case the defendants are liable for the same.

"But it is contended on the part of the defendants that at the time this suit was brought the libelants had parted with all interest in the steamship Eastfield and in all their assets, including the subject-matter of this suit.

"It is true that the libelants had parted with all interest in said steamship, as claimed. The transfer of said interest was under a sale which took effect on the 30th day of June, 1902. By an agreement made by one W. W. Jones, liquidator for and on behalf of the libelants with the Field Line (Cardiff), Limited, on the 9th day of December, 1902, it was agreed that the former would sell and the latter would purchase said steamship Eastfield, and the benefit of all contracts, agreements, and engagements existing or pending on the 30th day of June, 1902, entered into or held by said steamship company. The contract involved in this suit and the cause of action arising out of same is not expressly named in said agreement or specially identified in it. But it appears from the testimony of said W. W. Jones that the parties to said agreement of the 9th of December, 1902, understood it to include the benefits of the cause of action in this case, as well as all other assets of said Eastfield Steamship Company, and that it was further understood and agreed that any proceeds of such assets that said Jones as liquidator might recover and realize should be transferred to said Field Line, Limited.

"The purchase provided for in the agreement of December 9, 1902, was completed on April 7, 1903. Said agreement provided that said sale should, on the completion of the purchase, be deemed to take effect as from the 30th day of June, 1902. From that date (June 30, 1902) the Field Line, Limited, became the owner of the steamship Eastfield, and entitled to the benefits of all contracts entered into by her and existing on that day.

"Said Jones testified that the cause of action in this suit was agreed on December 9, 1902, to be sold, and was absolutely intended to be sold on April 7, 1903, but that it came under the method of realization by him hereinbefore mentioned, and that it was never transferred.

"If the benefits under this claim were sold to the Field Line, Limited, on April 7, 1903, then under the agreement of December 9, 1902, such sale took effect on the 30th of June, 1902, and said Field Line, Limited, became the beneficial owner thereof from that date, and no agreement between the parties as to the method of realization on the same by said liquidator would, in my opinion, vest in the Eastfield Steamship Company the right to recover by suit any interest or claim belonging to said Field Line, Limited, and, certainly none accruing after the 30th day of June, 1902. *Mackay v. Randolph, Macon Coal Co.*, 178 Fed. 881 [102 C. C. A. 115].

"The evidence is that the hire of the steamship Eastfield was paid by the defendants up to April 10, 1902. From that date to June 30, 1902, the vessel belonged to the libelants, and my opinion is that they are entitled to maintain this suit to recover the charter hire of said steamship from April 10, 1902, to the 30th of June, 1902, inclusive, less any profits made by the libelants by her employment during that period with interest on the same from June 30, 1902.

"It is ordered that it be referred to Richard Jones, clerk of this court, as special commissioner, to ascertain and report to the court the amount found due on the basis stated in the opinion of the court, and from the evidence now before the court and any relative to the matter that may be submitted by the parties.

"Filed August 4, 1910."

This opinion was followed by a formal decree in favor of the libelant and referring the case to a special commissioner to report upon the damages.

This was followed by an application on the part of respondents for a rehearing on the ground that "the transfer by the libelant, the Eastfield Steamship Company to the Field Line (Cardiff), Limited, covered and carried, not only the steamship and benefits of all contracts existing on the 30th day of June, 1902, but all assets and effects and thereby carried all interest which the Eastfield Steamship Company had in the contract of charter of this vessel which is the subject-matter of the suit," and therefore the Eastfield Steamship Company was without interest to maintain and prosecute the suit.

This application for rehearing was granted and an order rendered thereon setting aside the order of reference, and thereupon the libelant asked leave of the court to amend its libel so that it might read that "the Eastfield Steamship Company sues on its own behalf and for use of the Field Line (Cardiff), Limited."

This application for leave to amend was denied by the court in an elaborate opinion to the effect that libels in admiralty should be, and could only be, brought and maintained by the real party in interest, and, following this opinion, the court enters a formal decree dismissing the libel, whereupon the Eastfield Steamship Company brought this appeal.

Charles R. Hickox and Convers & Kirlin, all of New York City, and D. P. Bestor, Jr., of Mobile, Ala., for appellant.

Palmer Pillans, of Mobile, Ala., for appellees.

Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). On the general merits of this case we concur with the District Court in the conclusion that on the pleadings and proofs the respondents are liable to the Eastfield Steamship Company, Limited, or its assignees for full damages resulting from breach of the charter party.

On the more or less technical question as to whether subsequent to the breach of the charter party and prior to the institution of this libel the Eastfield Steamship Company, Limited, had so sold and transferred its rights in the claim for resulting damages to the Field Line (Cardiff) Limited, that it had no longer any interest in the same, and therefore that the libel filed and prosecuted in its name must be dismissed, we do not concur in the opinion and decree of the District Court. The proof in the case shows that the cause of action for breach of the charter against the respondents was originally in the Eastfield Steamship Company, Limited, in whose name the libel was filed and the suit prosecuted. Subsequent, however, to the breach and prior to the filing of the libel, there was a contract entered into between the Eastfield Steamship Company and four other steamship companies for the formation in England of the corporation of the Field Line (Cardiff) Limited, and the amalgamation of five single ship companies which had all been theretofore managed by Mr. William W. Jones, who was appointed liquidator of each of the companies for the purpose of transferring each of the steamers to the new corporation, and Mr. Jones was in due course appointed chairman and managing director of that company, so that he then was managing director, not only of the old companies, but of the new one. The agreement under which the transfer was to be made was dated December 9, 1902, and was between the five different single ship companies as vendors and the Field Line (Cardiff) Limited, as vendee.

The substance of the agreement, material to the present consideration, was for the transfer to the vendee of: (1) Sixty-four sixty-fourths shares of the five ships of the vendor companies; (2) the benefit of all contracts, agreements, and engagements existing or pending on the 30th day of June last (1902) entered into or held by the vendor companies, respectively, for the purpose of the working of, or otherwise in connection with the said steamships, respectively, including all contracts of marine insurance; and (3) all other, if any, the undertaking property, assets, and effects of every kind, including credit balances of the vendor companies as on that date.

As it was recognized that various matters would have to be done to complete the transfer and to vest in the vendee all that the vendors intended to convey, it was provided in clause 20 as follows:

"The vendor companies, respectively, and their liquidator shall as soon as conveniently may be (but without prejudice to clause 17 hereof) execute and do at the expense of the purchasing company all such assurances and things as shall be reasonably required by the purchasing company for vesting in it the property hereby agreed to be transferred and for giving to it the full benefit of their agreement."

• Clause 17 need not be considered as it dealt with a lien by the vendor companies on their property until the purchase money should be



paid. The only testimony in the case as to what took place after the agreement was made is that of Mr. Jones as follows:

"Between the 9th December, 1902, and 7th April, 1903, the said conditions preliminary to sale and amalgamation were completed. The sale contingently agreed upon as aforesaid was determined and agreed as between the vendor companies and the purchasing company to be carried out, and in the following manner: As to the steamship Eastfield and the other steamships before mentioned by transfers which were duly executed on the 7th April, 1903. As to the other assets so agreed to be sold, by my realization and recovery as liquidator of the vendor companies and the transfer of the proceeds to the purchasing company, I being chairman and managing director of the purchasing company and liquidator of the vendor companies, this method of carrying out the sale of such last-mentioned assets was considered effective and sufficient, and a good performance of clause 20 of the agreement above cited for the due assurance of assets purchased. This method was therefore followed and the liquidation of the several vendor companies was kept open and active for the purpose of so carrying out the sale. The cause of action sued upon, namely, breach of the charter dated July 19, 1901, arose in April, 1902, and a claim for damages had arisen at the date of the said agreement of December 9, 1902. This right of action was therefore one of the said assets agreed contingently to be sold by that agreement, and afterwards in April, 1903, absolutely intended to be sold, and which came under the method of realization so determined upon as aforesaid between the vendor companies and the purchasing company, and consequently was never transferred or otherwise divested from the 'Eastfield' Steamship Company, Limited, but upon repudiation of liability by respondents the 'Eastfield' Steamship Company, Limited, exercised the right of action which they had advisedly and by agreement aforesaid retained, I having sole authority by the companies' acts (for England) to use the name of the 'Eastfield' Steamship Company, Limited, in any proceedings for the enforcement of such right of action."

From the testimony of Mr. Jones, and from the language of clause 20 of the agreement, it appears that all parties considered that certain of the interests which were intended to be conveyed to the vendee did not vest in the vendee by the payment of the purchase price, but were to be specifically thereafter transferred; and the method by which the assets other than physical property were to be transferred to the vendee was agreed between the liquidator of the vendor companies and the vendee to be by the realization and recovery of such assets by the liquidator and the transfer of the proceeds to the purchasing company. And it seems that the liquidation of the various vendor companies was kept open for the very purpose of permitting the liquidator to realize on intangible assets and choses in action.

The claim of the Eastfield Steamship Company against the respondents for damages for the breach of the charter party was such a chose in action that the title thereto would not pass by any general contract so as to be available to the vendee without a specific transfer or assignment in writing; so that, while under the contract or agreement of December 9, 1902, it was to be thereafter transferred as provided in clause 20 of the contract, the evidence shows that in April, 1903, when other assignments of assets were made, no specific transfer of this claim was made, but that by and with consent of all parties in interest it was arranged that the liquidator was to realize and recover on the same and thereafter transfer the proceeds to the purchasing company. As noticed above, the only evidence on the subject

is that of Jones, the liquidator of all the consolidating companies, and is to the effect that this right of action was one of the said assets agreed contingently to be sold, and afterwards, in April, 1903, absolutely intended to be sold, but which under the method of realization determined upon between the vendor companies and the purchasing company was never transferred or otherwise divested from the Eastfield Steamship Company.

As to the exact title retained in the Eastfield Steamship Company under the agreements made and the writings actually passed, the construction given by the parties thereto, as shown by their acts and conduct in carrying out the same, is generally very significant, if not controlling, and it is clear that the parties had a perfect right by subsequent agreement to vary the executive terms of their original contracts to suit themselves; and all this goes to support the evidence of Jones and his construction of the agreement and arrangement of the parties as to the transfer of the specific asset in question. From all of which we conclude that as the cause of action was originally and without doubt vested in the Eastfield Steamship Company, and as the only evidence of any divestiture is that of Jones, which goes no farther than to show an unexecuted agreement to transfer to the Field Line (Cardiff), Limited, the libel in this case was well brought and the same properly prosecuted in the name of the Eastfield Steamship Company, Limited, and that the objection that said company is not such a real party in interest that the libel may not be prosecuted in its name should be overruled, particularly as the case shows beyond doubt that the Field Line (Cardiff), Limited, the alleged transferee of the claim in suit is privy to the proceedings, and as such will be fully bound by any decree that may be rendered on the merits.

We do not think it necessary to review and attempt to harmonize the many authorities cited by the learned proctors in their elaborate briefs, nor those cited and relied upon by the District Judge with whose main proposition, that suits in admiralty should be prosecuted in the name of a real party in interest, we agree, for we decide this case upon the peculiar undisputed facts shown by the evidence.

We may further notice that to maintain the exception interposed would be to give too much effect to a mere technicality not prejudicially affecting the exceptors so far as the merits of the case are concerned, and, if allowed, only operating a hindrance and delay in the judicial proceedings necessary to establish the rights of the parties.

For these reasons, the decree dismissing the libel is reversed, and the case is remanded, with instructions to re-enter and re-establish the decree rendered, filed, and entered in the District Court on August 4, 1910, and thereafter to proceed according to admiralty rules and usages in ascertaining and decreeing the damages to which the libellant is entitled.

## ST. VINCENT COLLEGE v. HALLETT.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912. Rehearing  
Denied July 1, 1912.)

Nos. 1,806, 1,807, 1,808.

**1. COLLEGES AND UNIVERSITIES (§ 7\*)—OFFICERS—AUTHORITY OF PRESIDENT—BY-LAWS.**

The by-laws of a college corporation placed its management in the hands of five trustees and declared that no purchase of real estate, deed, mortgage, or note to secure a loan should be made unless authorized by resolution and at a meeting of the members of the college. They also provided that the president should preside at meetings, that he should execute all instruments of every kind in and about the business of the college, and should in general exercise all authority and perform all acts usually exercised and performed by presiding officers of colleges. *Held*, that such by-laws should be construed as merely designating the president as the officer who should perform the ministerial acts necessary to carry out orders of the trustees, and therefore did not authorize the president, by virtue of his office, to bind the corporation by the execution of notes to evidence loans not authorized by the trustees.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 16-19; Dec. Dig. § 7.\*]

**2. CORPORATIONS (§ 432\*)—NONTRADING CORPORATION—OFFICERS—POWER OF PRESIDENT—EXECUTION OF NOTES—PRESUMPTION.**

In general there is no presumption that the president of a nontrading corporation has authority, solely by virtue of his office, to execute notes purporting to evidence loans to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1737, 1743, 1762; Dec. Dig. § 432.\*]

**3. COLLEGES AND UNIVERSITIES (§ 7\*)—OFFICERS—POWER OF PRESIDENT—EXECUTION OF NEGOTIABLE PAPER—ILLINOIS RULE.**

The Illinois rule, that as against an innocent holder the act of the president of a corporation in executing a note in its name binds the corporation, was not applicable so as to bind an Illinois educational corporation, not organized for profit, by notes executed by its president for loans for his own purposes for which the corporation received no benefit or consideration directly or indirectly, and which were neither authorized nor ratified by the corporation's trustees.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 16-19; Dec. Dig. § 7.\*]

**4. CORPORATIONS (§ 429\*)—COMMERCIAL PAPER—EXECUTION—AUTHORITY OF OFFICERS.**

The rule requiring a purchaser of commercial paper executed by a corporation to ascertain whether its issuance was authorized by the corporation's managers or board of directors, either by giving the executing officers original authority or by express or implied ratification is the law in New York and most states, and therefore cannot be supposed to burden commerce.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1720-1723, 1725; Dec. Dig. § 429.\*]

**5. COLLEGES AND UNIVERSITIES (§ 7\*)—COMMERCIAL PAPER—EXECUTION—ACTIONS—PLEA—NON EST FACTUM.**

Where, in an action on notes of a college corporation executed by the president, defendant filed a verified plea of non est factum, it was error for the court to exclude evidence offered under such plea to rebut any

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

presumption of authority of the president to execute the notes; the issue of such want of authority being properly raised by such plea.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 16-19; Dec. Dig. § 7.\*]

Humphrey, District Judge, dissenting.

In Error from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois; George A. Carpenter, Judge.

Actions by Edward L. Suffern and another, doing business as Suffern & Son, by National Copper Bank, and by Allen P. Hallett against St. Vincent College. Judgment for plaintiff in each case, and defendant brings error. Reversed and remanded, with directions.

Jesse McDonald, of St. Louis, Mo., and William E. O'Neill and Charles L. Mahony, both of Chicago, Ill., for plaintiff in error.

Clark M. Cavenee, W. W. Gurley, Arthur Dyrenforth, and Sidney W. Worthy, all of Chicago, Ill., for defendant in error Hallett.

Moritz Rosenthal, Henry H. Kennedy, Joseph W. Moses, Julius Moses, Hamilton Moses, and Walter Bachrach, all of Chicago, Ill., for defendant in error National Copper Bank.

Eli B. Felsenthal, John W. Beckwith, Edward G. Felsenthal, and Walter J. Spengler, all of Chicago, Ill., for defendant in error Suffern & Son.

Before KOHLSAAT and MACK, Circuit Judges, and HUMPHREY, District Judge.

MACK, Circuit Judge. A single question is presented for adjudication in each of these cases: Is a promissory note in the hands of a holder in due course, executed in the name of an Illinois corporation organized under the general act relating to corporations not for pecuniary profit, by its president, the obligation of the corporation, if such execution was neither expressly nor impliedly (either generally or in the specific instances) authorized or ratified, either by the members or the board of directors (unless such general authority arises from the provisions of the statute, charter, or by-laws hereinafter set forth), if it was done for the president's own purposes, and if the corporation received no benefit therefrom or consideration therefor, either directly or indirectly?

The trial judge to whom the cases were submitted, by his rulings on the pleadings and the evidence answered this question in the affirmative, and rendered judgments against St. Vincent College on nine such notes ranging in amount from \$5,000 to \$40,000.

The objects of the corporation as stated in its articles of incorporation are "to obtain sites for and to build college and school buildings for its own use, and such appurtenances thereto as may be necessary for its own use; and to employ professors, teachers and such other employes as may be necessary; to provide and establish courses of study, classical, scientific, commercial, divinity, art and mechanics, and in all lower branches of learning."

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



Chapter 32, Hurd's Rev. Stat. of Illinois, 1905, being the act under which the corporation was formed, provides, in so far as here material, as follows:

"Sec. 31. Corporations, associations and societies not for pecuniary profit, formed under this act shall be bodies corporate and politic; \* \* \* may have power to make and enforce contracts in relation to the legitimate business of their corporation; \* \* \* and they and their successors, by their corporate name shall, in law be capable of taking, purchasing, holding and disposing of real and personal estate for purposes of their organization; may by their trustees, directors or managers, make by-laws not inconsistent with the laws of this state, or of the United States, which by-laws, among other things, shall prescribe the duties of all officers of the corporation. \* \* \*

"Sec. 32. Corporations, associations, and societies, not for pecuniary profit, formed under the provisions of this act, may select trustees, directors or managers from the members thereof, in such manner, at such times and places and for such periods, as may be provided by the certificate of incorporation, or in case such certificate does not contain such provisions, then as may be provided in the by-laws, which trustees, directors or managers shall have the control and management of the affairs and funds of the corporation, society or association. Said trustees, managers or directors may, upon consent of the corporation, society or association, expressed by the vote of the majority of the members thereof, borrow money, to be used solely for purposes of their organization, and may pledge their property therefor. Whenever trustees, managers or directors shall be elected, a certificate under the seal of the corporation, giving the names of those elected and the term of their offices, shall be recorded in the office of the recorder of deeds, where the certification of organization is recorded. Vacancies in the board of trustees, directors or managers shall be filled in the manner provided by their by-laws, and upon filling any vacancy a like certificate shall be recorded. \* \* \*

[1] The only by-laws that in any manner refer to the powers of the president or the trustees are as follows:

"Five trustees shall be elected by the college every three years, commencing at the expiration of the term of the first board. \* \* \* The trustees shall exercise control over the affairs of the college. Any three of them shall form a quorum for the transaction of business, but no purchase of real estate, no deed of transfer or mortgage of the real property of the college, or note to secure a loan, shall be made unless authorized by resolution of and at a meeting of the members of the college, a quorum being present.

\* \* \*

"The president shall call or order the secretary to call all meetings. He shall preside at such meetings. He shall execute all instruments of every kind in and about the business of the college, and he shall in general exercise all authority and perform all acts usually exercised and performed by presiding officers of colleges."

All the notes in these suits, with one exception, are in the following form, differing only in amount, date, name of payee, and place and time of payment:

"\$25,000.00.

Chicago, Illinois, February 8, 1908.

"Four months after date we promise to pay to the order of Fidelity Funding Company, twenty-five thousand dollars at Central Trust Company, Chicago. Value received.

St. Vincent College, by P. V. Byrne, C. M. Pres.

"No. 2605.

"Due June 8, '08."

The one exception referred to is a note in the same form as the others except that it is signed: "St. Vincent College, by P. V. Byrne, C. M. Pres. Hugh J. O'Connor, Acting Treas."

The undisputed facts appearing from the record are that the notes were signed by P. V. Byrne and Hugh J. O'Connor; that at the time of the signing P. V. Byrne was the qualified and acting president, and Hugh J. O'Connor was the qualified and acting treasurer of the defendant below; that the indorsements on the notes were genuine; that the several plaintiffs below were holders in due course; and that none of the notes had been paid.

Many questions have been argued that are beside the real point in the case. Ultra vires is not involved; the corporation had power to issue negotiable paper. Nor is the fundamental question one that is governed by the law of negotiable instruments. It is essentially a question of agency. Is the president of such a corporation, solely by virtue of his office, authorized to bind the corporation as principal?

It is contended by defendants in error that the by-laws expressly authorize the president to execute corporate notes, and that therefore the real question in the case is whether or not the act of the president, although not authorized in the specific instance and although not for corporate purposes, is nevertheless binding on the corporation because the power of the board of directors has been fully and lawfully delegated to him.

If the by-laws had provided that not only the power to execute instruments, but the power to determine when such execution is necessary or desirable in the management of the affairs of the corporation, shall be vested in the president, either the holder in due course of negotiable paper or the other innocent party to any ordinary contract made by the president apparently on behalf of the corporation, could hold the corporation to the same extent as if the board of directors had specifically authorized or ratified the transaction.

Under such a by-law, the sole question would be whether or not the action of the president or the board of directors would be binding without a vote of a majority of the members. *Louisville, New Albany & Chicago Railway Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, would be a strong authority in favor of the note holder in that event. In that case the defendant railway company was a corporation organized under a statute of the state of Indiana, which contained the provision that:

"The board of directors of any railway company organized under and pursuant to the laws of the state of Indiana, whose line of railway extends across the state in either direction, may, upon the petition of the holders of the majority of the stock of such railway company, direct the execution by such railway company of an endorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining state, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so endorsing or guaranteeing such bonds."

A negotiable guaranty of certain bonds was executed under the seal of the corporation *by order of the board of directors, and signed by the president and secretary of the corporation, although a majority of the stockholders did not petition* for the execution of the guaranty, as required by the statute. There was no evidence that the stock

holders ever authorized the contract or the guaranty; on the contrary, at their next annual meeting it was voted to reject and disapprove both the contract and the guaranty as having been made without legal authority. Before the stockholders' meeting was held at which this action of disapproval took place, 135 of the bonds on which the guaranty was made had been negotiated and sold to bona fide purchasers. The corporation was nevertheless held liable because the act of the board of directors binds the corporation as against one who has no knowledge that the board of directors is violating its duty. As Mr. Justice Gray says (174 U. S. 573, 19 Sup. Ct. 825, 43 L. Ed. 1081):

"One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing on its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation."

The reason for this principle is found in the opinion of Judge Taft when the case was decided by the Circuit Court of Appeals. He said (75 Fed. 433, 452, 22 C. C. A. 378, 398):

"The requirement that, in the exercise of the power of guaranty, the initiative should be taken by the stockholders by petition, was a regulation of the internal management of the corporation for the benefit and protection of the stockholders."

If, however, the by-laws contain no such grant of power, if soundly interpreted they merely designate the officer who is to perform the ministerial acts necessary to carry into execution the orders of the board of directors in whom by the statute the management of the business is vested, the Louisville Case is no authority in favor of the contention that the president, even of a business corporation, may *virtute officii* bind the corporation. On the contrary, all of the intimations in the opinion of the Supreme Court are to the contrary. And in the opinion of Judge Taft in the Circuit Court of Appeals (75 Fed. 433, 22 C. C. A. 378) the reason for this distinction between the binding effect of an act authorized by the board of directors, even though without the prescribed consent of the members, and the act of a mere officer unauthorized by and without the consent of the board of directors, is pointed out at page 461 of 75 Fed., page 407 of 22 C. C. A., as follows:

"It has been urged by way of *reductio ad absurdum* that the same reasoning which raises a conclusive presumption of regularity in favor of a stranger advancing money on the faith of action by directors would require that the presumption arising from the affixing of the seal by the secretary and the signature of the corporation by the president, that the board of directors ordered them upon due authority received from the stockholders, should be equally conclusive. It is not necessary for us to decide the question suggested until it arises. It will suffice to point out the manifest distinction between such a case and the one under discussion. The secretary and the president, in affixing the seal and signature, are mere ministerial officers. They have no discretion to exercise in the matter of guaranty. They are the mere subagents of the corporation—the fingers of the board of directors, so to speak—in this matter; and it would seem that in a case in which not only the action of the directors is necessary, but that of the stockholders, the unauthorized use of the

seal by the secretary, or of the name of the company by the president, to give the appearance of validity to a pretended guaranty, would be as far short of binding the company as a forgery."

See, too, Cook on Corporations (6th Ed.) § 725, p. 2355: "These rules (referring to 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081), however, do not apply to usurpations of authority by corporate officials."

In our judgment, the by-laws of St. Vincent College do not invest the president with any general authority to issue notes. They merely designate him as the one officer who is to perform the ministerial duty of signing such instruments as may, under proper authority, be required in and about the business of the corporation. The final clause of the by-laws (hereinabove quoted) vesting in him such authority as is usually exercised by presiding officers of colleges, adds nothing to his power in the absence of any evidence as to the usual authority of such officers.

[2] We come, then, to a consideration of the vital question in the case: Has the president such authority solely *virtute officii*?

The authorities are in irreconcilable conflict in the case of an ordinary trading corporation. Three rules may be found:

First. That there is no presumption in favor of such authority. This conservative view is supported probably by the weight of authority.

Second. That there is a presumption in favor thereof, but the presumption may be rebutted. The weight of the more recent authorities supports this view.

Third. The so-called Illinois doctrine, that as against an innocent party the act of the president binds the corporation. This is not limited to negotiable paper, but extends to any ordinary business transaction.

The authorities on the question will be found collected by the text-writers: 3 Cook, Corporations (6th Ed.) § 716; 2 Thompson on Corporations (2d Ed.) § 1452 et seq.; 3 Clark & Marshall, Private Corporations, § 701.

If we were to decide this question as one of general commercial law, and not of Illinois law, we should follow the great weight of American authority and hold that no irrebuttable presumption of the president's authority arises by virtue alone of his office. One federal case has been cited holding the contrary view. *American Exchange Nat. Bank v. Oregon Pottery Co.* (C. C.) 55 Fed. 265. No reasons are given in support thereof, and we agree with the Supreme Court of Arkansas (*City Electric Street Ry. Co. v. Bank*, 62 Ark. 33, 34 S. W. 89, 31 L. R. A. 535, 54 Am. St. Rep. 282) that the two cases cited by the learned judge do not sustain his own conclusions.

In *National Bank of Commerce v. Atkinson* (C. C.) 55 Fed. 465, the opposite result was reached. The court says:

"The president of a bank has no power inherent in his office to bind the bank by the execution of a note in its name, yet the power to do so may be conferred upon him by the board of directors, either expressly, by resolution to that effect, by subsequent ratification, or by acquiescence in transactions of a similar nature, and of which the directors have knowledge."



While the Oregon Pottery Case has been cited in no other federal case, the Atkinson Case was affirmed in the Circuit Court of Appeals (*Nat. Bank of Commerce v. First Nat. Bank of Kansas City*, 61 Fed. 809, 10 C. C. A. 87), cited in *Wilson v. Pauly*, 72 Fed. 135, 18 C. C. A. 475, and followed in *Park Hotel Co. v. Fourth Nat. Bank of St. Louis*, 86 Fed. 745, 30 C. C. A. 409.

In a recent federal case (*In re Jefferson Casket Co.* [D. C.] 182 Fed. 689) it was held that the president of a corporation, as such, had no authority to represent the corporation. In that case, a voluntary petition in bankruptcy was filed on behalf of a corporation, signed and verified by its president. It failed, however, to show that any corporate action had been taken by the board of directors authorizing the filing of the petition, or empowering the president to execute the petition in the name of the corporation. It was held that the petition was insufficient to confer jurisdiction on the court to adjudge the corporation a bankrupt. Although this case could have been rested on the ground that filing a petition in bankruptcy is not an act done in the ordinary course of business, the court cites, among other authorities state and federal, *People's Bank v. St. Anthony's Roman Catholic Church*, 109 N. Y. 512, 17 N. E. 408, *infra*, and the other New York cases to the same effect.

In *Dexter Savings Bank v. Friend* (C. C.) 90 Fed. 703, the court expressly based its decision on the ground that the president-treasurer had been given a general authority to execute notes in the ordinary course of the business of the corporation. The court, however, significantly said:

"A distinction must be made between cases where there is an absolute want of authority on the part of the agent, and cases where the agent has authority, but abuses it. Where the agent has authority, and where commercial paper is the subject of the transaction, an innocent holder of the paper gets just what he bargained for; but, where the agent is without authority, the holder gets nothing."

*Farmers' National Bank v. Sutton Mfg. Co.*, 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595, was likewise a case where the agent (secretary-treasurer) had "full and general authority" to sign and issue business paper on behalf of the corporation, and the decision was based thereon.

But even in those cases in which authority is presumed from the nature of the business, an executive officer cannot bind a bank by a transaction out of the ordinary course of business. *Western National Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470. In that case it was held that the vice president (the principal executive officer of the bank), as such, could not, without the authority of the board of directors, bind the bank by borrowing some \$200,000 on four months' time, because such a transaction could not be said to be in the ordinary course of business. Similarly, it may well be said that the execution of notes from \$5,000 to \$40,000 is not a transaction in the ordinary course of the business of a college.

[3] Assuming, however, that we are to apply the law of Illinois, inasmuch as the plaintiff in error is an Illinois corporation and executed the notes in this state, it becomes necessary to consider the de-

cisions which it is claimed establish the so-called Illinois rule and to determine whether or not they are applicable to the instant case. Such an examination will disclose that while in many cases the principle is stated broadly, yet in many others, and among these the more recent ones, the presumption of authority is not deemed irrebuttable.

For example, in *Alton Manufacturing Co. v. Garrett*, Biblical Institute, 243 Ill. 298, at page 303, 90 N. E. 704, at page 706, the court says:

"The trustees, having power to borrow money for proper corporate purposes and execute notes therefor, might exercise this authority in a number of ways: (1) They might appoint one of their number as agent of the corporation for that purpose and expressly or impliedly clothe him with authority to borrow money and give notes; (2) where no actual authority has been conferred upon the agent of the corporation to borrow money and give notes, but where the agent has done so, and with full knowledge of all the facts the corporation has approved and ratified the acts of the agent, it will be liable to the same extent as if actual authority had been given to perform the acts; (3) where no authority had been given or existed in the agent to borrow money but where the corporation received the use and benefit of the money it will be liable; (4) by holding an agent out to the public as possessing authority to exercise the powers assumed by the agent and to do the acts performed by him, in which case the corporation would be bound to the extent of the agent's apparent authority."

In *Lloyd v. Matthews*, 223 Ill. 477, 79 N. E. 172, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346, the court says:

"The president is by virtue of his office, recognized as the business head of the company, and any contract pertaining to the corporate affairs, within the general powers of such officer, executed by the president on behalf of the corporation, will, *in the absence of proof to the contrary*, be presumed to have been by authority of the corporation. If the contract in question had been executed by some agent who ordinarily does not have the power to sign such instruments, and the execution had been put in issue by properly verified plea, then it would be necessary to go beyond the mere fact of the execution of the instrument, and prove the authority of the agent to execute the same. But when the contract is properly executed for the corporation by its president, and it is such a contract as the corporation might lawfully make, the proof of the execution by the president is all that is required, *in the absence of any evidence to the contrary* showing that the contract was not made by the authority of the corporation."

Moreover, in every Illinois case in which the so-called Illinois rule is laid down, it will be found that the corporate liability could have been based on the evidence of implied authority arising from the prior course of business, ratification either express or implied, or so-called estoppel; more properly unjust enrichment arising from the retention of benefits derived by the corporation from the transaction.

Assuming, however, that in Illinois a business corporation would be absolutely bound by the wrongfully issued notes executed in its name by its president and held by a bona fide purchaser, has the same principle been extended, or shall it be extended, to a corporation not for pecuniary profit, either because such a corporation, too, may engage in some business transactions, or for any other reason?

This question has never been expressly decided by the Supreme Court of Illinois.

In *St. Patrick's Roman Catholic Church of East St. Louis v. Abst*,

76 Ill. 252, the liability of the church for the salary of a sexton employed by the priest without direct authority from the board of trustees as such, but with the approval of a majority of the individual trustees, was based on ratification by subsequent conduct.

In *St. Patrick's Roman Catholic Church v. Gavalon*, 82 Ill. 170, 25 Am. Rep. 305, the officiating priest of a church, who was a member and the chairman of its board of three trustees, employed a person to work for the church, without authority of the other trustees. A majority of the court held the church not liable, both on the ground that the priest had no authority to bind the church without being authorized by the board of trustees, and also because there was some evidence that the priest personally engaged him. They say:

"The unauthorized act of one of the trustees could not be held to bind the church as a corporation. This has been held as to directors of schools, and as to trustees of other churches, where they have given notes in their individual names for property applied to the use of the church. *Powers v. Briggs*, 79 Ill. 493 [22 Am. Rep. 175]; *Barlingame v. Brewster*, 79 Ill. 515 [22 Am. Rep. 177].

"In this case, it would not matter that some of the labor was performed for the church, if the priest alone employed the appellee, without express or implied authority from the other trustees, or the act was ratified by them."

The three dissenting judges based their dissent on the fact that the church had received the benefits:

"At all events, he assumed to act on its behalf, without objection from any one, and the society or church availed of the benefit of his acts."

Nor has any other court, so far as we have been able to find, held a charitable corporation bound on the contracts or notes of its president or any other officers, in the absence of some showing either of authority, ratification, or estoppel. All the authorities are the other way.

It is no answer to say that in other states, unlike Illinois, even a business corporation is not absolutely bound by such acts of its officers, for a distinction is made between the two classes of corporations, in that in many of the states there is at least a rebuttable presumption that the president of a trading corporation was authorized, while no such presumption arises as to the acts of the president of a charitable or even of a nontrading business corporation.

In *People's Bank v. St. Anthony's Roman Catholic Church*, 109 N. Y. 512, 17 N. E. 408, where, as in the case at bar, a charitable corporation was sued on notes executed on its behalf by its officers, the notes sued on purported on their face to be the obligations of the corporation, recited that they were given for loans made by the payee to the corporation, and were signed by the president, secretary, and treasurer of the corporation (three of five members of its board of trustees) in their official character. They executed the notes without authority from the board of directors as such. In holding that the corporation was not bound, the court says:

"It is not the common usage or understanding that the president, secretary, and treasurer of a religious corporation possess power, by virtue of their offices, to borrow money for or issue notes of the corporation. They

may be the agents usually designated to issue such obligations when their issuance is determined upon by the trustees; but they are special and not general agents of the corporation, and can only act in such a transaction by virtue of a special authority, and their authority must be shown by those claiming to bind the corporation upon obligations issued by them." *Columbia Bank v. Gospel Tabernacle Church*, 127 N. Y. 361, 28 N. E. 29; *Lyndon Mills Co. v. Lyndon Literary & Biblical Inst.*, 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783.

In *Packard v. Universalist Society*, 10 Metc. (Mass.) 427, the court says:

"To establish the authority of a treasurer of a corporation to bind the corporation by executing promissory notes, accepting drafts, etc., the plaintiff has referred us to the cases of *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. [Mass.] 282, and *Bates v. Keith Iron Co.*, 7 Metc. [Mass.] 224. But these were cases of trading and manufacturing corporations, and they furnish no analogy for cases of parishes or religious societies. There is nothing in the nature of the business to be done, or the duties which devolve upon the treasurer of such corporations, that can require or justify the giving of negotiable instruments binding the society, without being authorized by a special vote to that effect."

See, too, *People's National Bank v. New England Home*, 209 Mass. 48, 95 N. E. 77.

The same rule is applied to a nontrading business corporation in *Craft v. South Boston Street R. R. Co.*, 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641:

"Whatever may be true of trading corporations, there is nothing in the nature of the business of a horse railroad corporation, or of the duties of a treasurer of such a corporation, which implies that the treasurer, by virtue of his office, has authority to borrow money for the company and give its notes therefor. It does not appear that the company in any way held out Reed to the public or to the plaintiff as having any such authority; or that treasurers of horse railroad corporations customarily have or exercise any such authority."

See, too, *Jewett v. West Somerville Co-operation Bank*, 173 Mass. 54, 52 N. E. 1085, 73 Am. St. Rep. 259.

While the decision of Judge Blodgett in *Palmer v. Wardens, etc.* (C. C. ) 16 Fed. 742, is based primarily on the failure to prove that the persons signing the instruments were in fact the officers of the Illinois religious corporation, the reasoning in the opinion is in accord with that of the Massachusetts cases.

This distinction as to the implied or presumptive authority of an officer as agent of a trading corporation on the one hand, and of a nontrading business or of a charitable corporation on the other, is based on the character of the business of the principal. It may be necessary for the conduct of the ordinary business of a trading corporation and for the protection of those dealing with its officers, especially holders in due course of its negotiable paper, to raise such a presumption, and even to make it irrebuttable just as is done in the case of an ordinary trading partnership as to each of the members of the firm. But there is no more need of extending this principle to a nontrading corporation, or a fortiori to a charitable corporation, than to a nontrading partnership. And that a note executed by one part-



ner of a nontrading firm without the authority of his copartners is not binding on them, even in the hands of a holder in due course, has long been settled. See authorities collected in 1 Bates, Law of Partnership, §§ 343, 345; Parsons on Partnership (4th Ed.) § 85; 1 Daniel's Negotiable Instruments (5th Ed.) § 358a; 1 Randolph on Commercial Paper (2d Ed.) § 405; 1 Lindley on Partnership (2d Amer. Ed.) star page 130.

Moreover, in the absence of direct authority, it may fairly be assumed that this distinction based both on authority and reason will be accepted in Illinois, inasmuch as Illinois charitable corporations are exempted from the application of the principle of respondeat superior in suits for certain torts committed by their servants, not, as is held in some jurisdictions, because of the doctrine of assumed risk by the injured beneficiary of such a charity, but for the reasons stated in *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103, as follows:

"The reasons for exemption apply as well to private as to public charitable corporations. The appellee university is a private corporation, but is organized for purely charitable purposes. It declares no dividends and has no power to do so. It depends upon the income from its property and the endowments and gifts of benevolent persons for funds to carry out the sole object for which it was created—the dissemination of learning. All of its funds and property thus acquired are held in trust by it, to be applied in furtherance of the purpose of its organization and increasing its benefits to the public. The funds and property thus acquired are held in trust, and cannot be diverted to the purpose of paying damages for injuries caused by the negligent or wrongful acts of its servants and employes to persons who are enjoying the benefit of the charity. An institution of this character, doing charitable work of great benefit to the public without profit and depending upon gifts, donations, legacies, and bequests made by charitable persons for the successful accomplishment of its beneficial purposes, is not to be hampered in the acquisition of the property and funds from those wishing to contribute and assist in the charitable work, by any doubt that might arise in the minds of such intending donors as to whether the funds supplied by them will be applied to the purposes for which they intended to devote them, or diverted to the entirely different purpose of satisfying judgments recovered against the donee because of the negligent acts of those employed to carry the beneficent purpose into execution."

We are pressed with the contention that the doctrine, that a purchaser must at his peril ascertain whether or not the notes of a charitable corporation executed in its name by its president were issued pursuant to authority conferred upon him by the board of directors, is in conflict with the whole policy of the law of commercial paper; that "one of the constant endeavors to Legislatures and courts is to throw their protection around negotiable instruments and to aid and not impede their free transferability from hand to hand in the markets of the world, and with this end in view the law to-day is that even a thief who breaks in and steals from the maker's safe a properly executed note made payable to bearer can transfer and give title thereto, and that the bona fide purchaser of such a note can recover from the maker." The obvious answer to this is that no one can be obligated by a forgery or unauthorized use of his name, or, in the oft-quoted

language of Justice Miller in *The Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169:

"It is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued."

[4] That no burden is placed on commerce by the rule which requires a purchaser even of commercial paper to ascertain whether its issuance was authorized by the managers of the corporation, the board of directors, is evident from the fact that such has long been the law in the state of New York and in most if not all other states. Practically, it will be found in the case of business corporations that some officers have been held out as having this authority, either by the express terms of the by-laws or resolutions or impliedly by the course of dealing. If, however, no such general agency has been created, if the acts are unauthorized, not ratified, and without benefit to the corporation, the loss should fall on the one dealing with the officer or on those claiming through or under him, rather than on the corporation, especially if it be a corporation not for pecuniary profit.

[5] There was no error in sustaining the demurrer to the fifth and sixth pleas, inasmuch as the defense of want of authority on the part of an officer of a corporation to execute notes in its name can be made under the verified plea of non est factum. *Walsh v. Marvel*, 130 Ill. App. 305; *Ch. Elec. L. R. Co. v. Hutchinson*, 25 Ill. App. 476.

The court erred, however, in excluding the evidence offered under this plea to rebut any presumption of authority. The judgment will therefore be reversed and the cause remanded, with direction to proceed further in accordance with this opinion.

HUMPHREY, District Judge (dissenting). The second, third, and fourth pleas averred failure of consideration and notice of that fact to plaintiff.

No proof was offered under the second or fourth pleas, and demurrer was sustained as to third plea, as to which ruling no error is relied on.

In this state of the record, the holders of the notes were bona fide holders, and, to make a defense against such holders, the law requires proof not only that there was no consideration, but also that the purchaser at the time of purchase had knowledge of such want of consideration. This is statutory in Illinois and is in accord with all the authorities. *Hurd's Rev. Stat.* 1909, c. 98, § 77; *Mitchell v. Deeds*, 49 Ill. 416, 95 Am. Dec. 621; *National Bank of Am. v. Bank of Illinois*, 164 Ill. 503, 45 N. E. 968.

Therefore the issues of want of consideration and bona fides are not in the case.

The controverted questions are: First, are the notes in question the legal obligations of St. Vincent College, raised by the first and seventh pleas; and, second, did the trial court err in sustaining demurrers to the fifth and sixth pleas?

Defendant in error contends, and plaintiff in error admits, that by

the terms of its charter the corporation, St. Vincent College, had inherent power to borrow money and execute notes; so that the single question remaining here is this: The notes having been issued by Byrne, the president of the college, in its corporate name and having passed by purchase for value and before maturity and without notice of any infirmity into the hands of bona fide innocent holders, did they become legal obligations against St. Vincent College in favor of such holders?

If we regard the question as one of general commercial law to be decided by rulings in state courts, then we should follow the Illinois rule because the Illinois court has decided the power given by the act under which these notes were made, and the courts of other states are hopelessly divided on the question. When we turn to the federal decisions, we find them in accord with the Illinois rule.

I think the decision of the United States Supreme Court in *Louisville Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, is controlling here. In that case the defendant railway company was a corporation organized under the Indiana law. The Indiana statute contained the following provisions:

"The board of directors of any railway company organized under and pursuant to the laws of the state of Indiana, whose line of railway extends across the state in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an endorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining state, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so endorsing or guaranteeing such bonds."

Without the authority or assent of the majority of the stockholders a negotiable guaranty was executed under the seal of the corporation by order of the directors at their meeting on October 9, 1889, and was signed by the president and secretary of the corporation. The court said, on page 569 of 174 U. S., page 824 of 19 Sup. Ct. (43 L. Ed. 1081), with regard to the facts:

"No petition of a majority of the stockholders for the execution of the guaranty was ever presented, as required by the statute; there was no evidence that the stockholders ever authorized or ratified the contract or the guaranty; and, at the next annual meeting of the stockholders, in March, 1890, it was voted to reject and disapprove both the contract and the guaranty, as having been made without legal authority or the approval of the stockholders."

However, before the stockholders' meeting had been held, at which this action of disapproval took place, 125 of the bonds on which the guaranty was made had been negotiated and sold to bona fide purchasers. The court said, on pages 570 to 576 of 174 U. S., pages 824 and 825 of 19 Sup. Ct. (43 L. Ed. 1081):

"The controverted question is whether the bonds which the Louisville Trust Company and the Louisville Banking Company, respectively, purchased in good faith, and without notice of the want of the assent of the majority of the stockholders, are valid in the hands of these companies.

"The guaranty by the Louisville, New Albany & Chicago Railway Company of the bonds of the Beattyville Company was not ultra vires, in the sense of being outside the corporate powers of the former company; for the statute

of 1883 expressly authorized such a company to execute such a guaranty, and its board of directors to direct its execution by the company. The statute, indeed, made it a prerequisite, to the action of the board of directors, that it should be upon the petition of a majority of the stockholders; but this was only a regulation of the mode and the agencies by which the corporation should exercise the power granted to it.

"The distinction between the doing by a corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court.

"One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation.

"In *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008, this court stated, as an axiomatic principle in the law of corporations, this proposition: 'Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.'

The decision is by a unanimous court, and the opinion is by Mr. Justice Gray. It decides, as I think, all the questions raised by the cases at bar. It discusses and settles the question that, where there is inherent power in a corporation to issue negotiable paper, irregularities in the manner of exercising its corporate powers will not defeat the paper in the hands of an innocent holder for value before maturity and without notice of the defect of power.

The opinion collects the English cases and those of our Supreme Court, and from a full analysis thereof arrives at the conclusion that, if the contract can be valid under any circumstances, an innocent party has the right to presume the existence of those circumstances, and the corporation is estopped to deny them.

The leading English case and one familiar to American courts is *Bank v. Turquand*, 6 El. & Bl. 327. This case has been adopted and followed by our Supreme Court.

The stockholders of the railroad company in the Louisville Case correspond to the trustees of the college in this case. In both cases there was inherent corporate power to do the thing that was done. In both cases the executive officer or officers acted without the statutory authority of the body creating such officer or officers. In this case, as in that, the requirement of initiatory action by the larger body was a regulation of the internal management of the corporation for the benefit and protection of its members, and when the act is on its face within the power of the corporation, as in the issue of the notes in question, and such notes pass into the hands of bona fide purchasers, without notice, the corporation cannot escape liability because of failure to comply with some regulation upon which the power of those acting for the corporation is made by the law to depend. See



opinion by Justice Brewer at circuit in *Blair v. Railroad Co.* (C. C.) 25 Fed. 684.

In *Farmers' National Bank v. Sutton Mfg. Co.*, 52 Fed. at page 195, 3 C. C. A. at page 21, 17 L. R. A. 595, Judge Taft said:

"Every one dealing with a corporation is charged with notice of its corporate powers. If therefore a reference to the charter shows a seeming act of the corporation to be beyond its powers, it is void, and cannot be made the basis of any claim of liability against the corporation. But there are acts that may or may not be within the charter powers; their lawful character being dependent on the existence of a fact which cannot be known from the act itself. If the extrinsic fact upon which depends the lawful character of the act is one peculiarly within the knowledge of the general agent of the corporation by whom the act is done, the act itself is an implied representation that the necessary fact exists, the truth of which the corporation is estopped to deny against any person who in dealing with the corporation has parted with value on the faith of it. The principle has been frequently applied in cases of commercial paper issued in the name of the corporation by its officers having general authority to issue such paper."

Judge Taft's decision at circuit in the *Louisville Case*, 75 Fed. 433, 22 C. C. A. 378, is full of conclusive paragraphs.

"It is reasonable that the presumption of regularity should have more force in cases of instruments designed to pass from hand to hand as 'couriers without luggage' than in the case of nonnegotiable contracts. *Webb v. Commissioners*, L. R. 5 Q. B. 642. The doctrine of *Bank v. Turquand* is that the resolutions at meetings of stockholders are part of 'the indoor management' of the corporation, as Lord Hatherly calls it in *Mahony v. Mining Co.*, L. R. 7 H. L. 869, 894 (see similar expressions by the same judge in *Fountaine v. Railway Co.*, L. R. 5 Eq. 316, 322, and in *Re Athenaeum Life Assur. Soc.*, 4 Kay & J. 549), and that the public cannot be expected to inform themselves of that of which the proper evidence is to be found only in the books and records of the company, to which they have no access," 75 Fed. page 464, 22 C. C. A. 410.

"Thus, it appears that where, by law, any fact in the internal management of the company is required to be recorded in a public office, the presumption of regularity does not apply, and as to it the outsider dealing with the company must advise himself." 75 Fed. page 465, 22 C. C. A. 411.

"In the case of private corporations, we do not understand that there is any necessity for recitals of due compliance on the face of their deeds, bonds, and notes. The fact of issue in proper form is an implied representation of the fulfillment of preliminary conditions. Lord Campbell referred to the issuance of the bond in the *Turquand Case* as a representation by the directors that the necessary meeting had been held. 5 El. & Bl. 248, 260." 75 Fed. page 467, 22 C. C. A. 412.

"In *Miller v. Insurance Co.*, 92 Tenn. 167, 21 S. W. 39 [20 L. R. A. 765], a company was organized to insure against accidents in traveling. By a subsequent act, such companies were given authority, if the amendment was accepted by a vote of the stockholders, to issue policies of insurance against accidents from any cause or from death by disease. Without action by the stockholders, policies were issued by the directors covering the additional risks. It was held by the Supreme Court of Tennessee, Chief Justice Lurton delivering the opinion, that, on the authority of *Bank v. Turquand*, the policy holder had the right to presume, from the act of the directors, that the new amendment had been accepted by the stockholders." 75 Fed. page 467, 22 C. C. A. 413.

What diligence is required by the law of one about to purchase the commercial paper of a corporation? Clearly it is that such proposed purchaser shall compare the written evidence of the act of the corporation—the paper as it appears on its face—with the publicly

recorded evidence of the powers of the corporation and the manner of exercise of such powers; and if the comparison shows nothing inconsistent the purchaser is not required to look farther. *Louisville Trust Co. v. Louisville Railroad Co.*, 75 Fed. 456, 22 C. C. A. 378.

But it is contended that such prospective purchaser must go further; that, as he is informed by the terms of the statute that the corporation could borrow money only when the proper officer was authorized to do so by the vote of the majority of the members, it became his duty to inquire whether this had been done—to search the records of the corporation for this purpose. I cannot agree with this view. Corporation records are private—even quasi public records, as those of a railroad company, have been so held.

In *Blair v. Railroad Co.*, supra, 25 Fed. at page 686, Judge Brewer said:

"Now I do not understand that a man, dealing with a private corporation, or even a quasi public corporation, like a railroad, is bound to take notice of what the records of that corporation show, for, if it be so, no man can deal with a corporation in safety without first having access to and an examination of its books; and the converse of that would be true, that such a corporation is bound to show its records to whomsoever has dealings with it. In a certain sense, the books of a corporation, so far as persons dealing with it are concerned, are their own private records, and are not open to the inspection or knowledge of strangers, and persons are at liberty to deal with a corporation freely without danger of running against equities or claims unless they are disclosed by the public records, just the same as in dealing with an individual."

In the application of this doctrine there is no distinction between a business corporation and a charitable corporation when the latter engages in an act of business.

In *Illinois Conference v. Plagge*, 177 Ill. 431, 53 N. E. 76, 69 Am. St. Rep. 252, the suit was on a note given by a religious body organized under the same Illinois statute as *St. Vincent College*, and the court in answering the same defense here set up said:

"We do not construe the provisions of the statute hereinbefore set out to make it indispensable it should expressly appear from the record of the proceedings of the conference a majority of the members voted to authorize money to be borrowed or for measures or proceedings having the effect to ratify the act of the board of trustees in borrowing the money."

To the same effect is *National Home Building Association v. Bank*, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245.

It is urged by plaintiff in error that there is such distinction, and that the Supreme Court so recognized it because in the *Louisville Trust Company Case* in the first line of the last paragraph but one on page 573 of 174 U. S., page 825 of 19 Sup. Ct. (43 L. Ed. 1081), the court used the words "a railroad or business corporation." I think from the language of the entire opinion that the court intended no such distinction. Educational corporations must and do perform many acts of business, and some of these transactions run into large sums of money. To make the distinction urged would be to destroy the negotiability of such commercial paper and say that the law merchant does not apply to negotiable instruments issued by educational institutions. There is no law declaring such immunity nor creating

such exemption. In support of the rule contended for, many state cases are cited by plaintiff in error, and one federal decision. The latter is *Palmer v. Wardens and Vestrymen of St. Stephen's Church* (C. C.) 16 Fed. 742, decided by Judge Blodgett in 1883, six years prior to the Louisville decision. I have carefully considered that case. Judge Blodgett found that the admission of the officers who signed the note in that case was the only evidence in the record that they were the duly appointed officers to execute commercial paper on behalf of the church, and he held that the liability of the church could not be established in that way. In other words, he held that the note in question was not the obligation of St. Stephen's church.

Another case relied upon as showing the distinction between the powers of religious corporations and those created for business purposes is *People's Bank v. St. Anthony's Roman Catholic Church*, 109 N. Y. 512, 17 N. E. 408. I do not think this case supports the contention of plaintiff in error. The corporation was organized under an act of New York for the special benefit of the Catholic Church, and in the case cited the court held that the members of the board of trustees, having acted separately and not jointly as a body, had failed to bring the corporation within the terms of the act so as to make the note sued on the obligation of the church.

Many of the state cases cited by plaintiff in error were actions on the case, and the charitable institutions which had been made defendants on account of injuries suffered through negligence of their employes under the doctrine of *respondeat superior* were held not liable. In nearly every instance the plaintiff had applied voluntarily for the benefits of the institution, and the negligent employes were in the performance of its charitable functions, and the courts held that the doctrine of assumed risk would apply. The rule is wholly different in cases *ex contractu*, for in such cases, if there be no distinction between a business and a charitable corporation when the latter is performing a business act, then clearly the rule is that when a corporation, business or charitable, by authority of law, and, as in this case, by its by-laws, holds out an officer as the proper person to execute notes in its name, the corporation cannot deny such paper in the hands of an innocent holder for value before maturity and without notice. *Cromwell v. County of Sac*, 96 U. S. 51, 24 L. Ed. 681; *Credit Co. v. Howe Machine Co.*, 54 Conn. 387, 8 Atl. 472, 1 Am. St. Rep. 123; *Matson v. Alley*, 141 Ill. 284, 31 N. E. 419; *Farmers' Natl. Bank v. Sutton Mfg. Co.*, 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595; *Murphy v. Arkansas* (C. C.) 97 Fed. 723; *Ex parte Estabrook*, 2 Low. 547, Fed. Cas. No. 4,534; *Tod v. Kentucky Union Land Co.* (C. C.) 57 Fed. 47.

It is argued on behalf of plaintiff in error that these notes cannot be held to be the obligations of the corporation unless the law makes it an irrebuttable presumption that the president of an Illinois corporation, simply by virtue of his office, has power to bind the corporation by a note. That this is the law in Illinois there seems to be no doubt. *Insurance Co. v. White*, 106 Ill. 75; *McDonald v. Chisholm*, 131 Ill. 273, 23 N. E. 596; *Atwater v. Bank*, 152 Ill. 620, 38

N. E. 1017; *Durkee v. People*, 155 Ill. 363, 40 N. E. 626, 46 Am. St. Rep. 340; *Lloyd & Co. v. Matthews*, 223 Ill. 481, 79 N. E. 172, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346. To the same effect is *Bank v. Pottery Co.* (C. C.) 55 Fed. 265.

The case of *Bank v. Atkinson* (C. C.) in 55 Fed. 465, which it is claimed reverses this rule, is not in point because in the latter case Woods, the president of the plaintiff bank, had knowledge of the irregularity when the note was made. In most of the states the rule is different, as shown by the text-book writers: 3 Cook, Corporations (6th Ed.) § 716; 2 Thompson, Corporations (2d Ed.) § 1452.

However, I do not think the case turns upon this single question. In the case at bar *Byrne*, the president, was designated as the person to sign notes for the corporation. This power was given to no other officer and it was given to him as one of his duties.

It is altogether aside to say that he could only sign after certain preliminary action by the trustees. The corporation, having inherent power to make notes and having designated its president as the person having power to sign them in its name, must become obedient to the rule so carefully expounded by the courts that the bona fide holder has a right to presume that all necessary preliminary steps have been taken and the corporation cannot escape the obligation.

Why should the rule of liability be modified in the case of a charitable or educational corporation where it engages in a business act? It is said in argument that it should have immunity because its officers are dealing with trust funds. The officers of all corporations handle trust funds. To give the immunity contended for would invite every variety of fraud and deception. The commercial world would distrust such institution because it would be practically impossible for the lender to know when the inquiry as to legal compliance had been pursued far enough. Charitable institutions officered by honest men would be embarrassed in carrying out their corporate functions and to such the rule would work an actual hardship. Such corporations have it in their power to select, as their managing officers, persons who are neither weak nor dishonest. The commercial world has no voice in this selection, and it is not only legal but equitable that the same rule should apply to both business and charitable corporations.

The Supreme Court of Illinois well expressed this idea in *Y. M. C. A. v. Bank*, 179 Ill. 599, 54 N. E. 297, 46 L. R. A. 753, 70 Am. St. Rep. 135, where it said:

"If a loss occurs wherein one of two innocent persons must suffer, that one should sustain the loss who has most trusted the party through whom the loss came."



PETTINE v. TERRITORY OF NEW MEXICO.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1912.)

No. 3,617.

(Syllabus by the Court.)

**1. CRIMINAL LAW (§ 1163\*)—REVIEW—PREJUDICE FROM ERROR—PRESUMPTION.**

The legal presumption is that error produces prejudice. It is only when the fact so clearly appears as to be beyond doubt that an erroneous ruling did not prejudice, and could not have prejudiced, the complaining party that the rule that error without prejudice is no ground for reversal is applicable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090–3099; Dec. Dig. § 1163.\*]

**2. CRIMINAL LAW (§§ 911, 942, 1156, 1176\*)—NEW TRIAL—DISCRETION OF COURT—REVIEW—PREJUDICIAL ERROR.**

On the trial of the defendant for murder in the first degree, the witnesses for the government had testified to a state of facts tending to show his guilt, and the defendant and his witnesses to a state of facts tending to show justifiable homicide, and the defendant had testified that he had never intended to kill the deceased until in fear of his life he fired to save it, when counsel for the prosecution asked him if he had not told one Campagnoli that he had intended to kill the deceased and two other men, but could not find them together, and he answered this question in the negative, and immediately rested his case. On rebuttal Campagnoli was called by the government, and testified that the defendant had made such a statement to him. There was a verdict of murder in the second degree. Thereafter the defendant made a motion for a new trial on the affidavit of Campagnoli that the defendant never made any such statement to him as he had testified to, that he was intoxicated when he gave his evidence, and after he became sober he knew that the defendant had never made any such statement, and upon the affidavit of the defendant to the same effect and that he had no notice or information that Campagnoli would testify as he did until he came upon the stand in rebuttal. The court denied this motion for a new trial.

*Held:* (1) It did not appear beyond doubt that this ruling did not prejudice and could not have prejudiced the defendant, but the record strongly indicated that the ruling was prejudicial error.

(2) It was a rule of the Supreme Court of the territory of New Mexico that a denial by the trial court of a motion for a new trial based upon facts not presented at the trial rested in the sound discretion of the trial court, but that an abuse of that discretion entitled the defeated party to a reversal of the order by the Supreme Court of the territory on an appeal or writ of error.

(3) The denial of the motion for a new trial by the trial court and its failure to grant the defendant a subsequent fair trial in which the false testimony of Campagnoli should be excluded from the minds of the triers was a gross abuse of its discretion fatal to the judgment below.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2134, 2316, 2331, 2332, 3067–3071, 3190, 3191; Dec. Dig. §§ 911, 942, 1156, 1176.\*]

**3. HOMICIDE (§ 295\*)—TRIAL—INSTRUCTIONS—DEGREE OF OFFENSE.**

Where the statute under which the defendant was prosecuted defined murder in the second degree so far as material to this case, to be murder which "shall be perpetrated in the heat of passion without design to effect death, but in a cruel and inhuman manner, or by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable or justifiable homicide," and declared that every killing by another which was not murder in the first or second degree and was

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

not excusable or justifiable homicide was murder in the third degree, it was prejudicial error to omit the words "in the heat of passion," and to charge the jury that murder in the second degree was "all murder which shall be perpetrated by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable or justifiable homicide."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 606-609; Dec. Dig. § 295.\*]

**4. CRIMINAL LAW (§ 789\*)—TRIAL—INSTRUCTIONS—REASONABLE DOUBT.**

A charge that "a reasonable doubt is one for which a reason could be given based on the evidence or want of evidence in the case" destroys the rule of reasonable doubt, substitutes for a reasonable doubt a demonstrable doubt logically and conclusively sustained by the evidence or the want of it, and is error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.\*]

**5. CRIMINAL LAW (§ 1028\*)—WRIT OF ERROR—PRESENTING QUESTIONS IN TRIAL COURT—NECESSITY.**

In criminal cases in which the life or the personal liberty of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may review and correct grave errors in the trials, although the questions they present are not raised by proper requests, objections, or exceptions in the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619, 2620; Dec. Dig. § 1028.\*]

**6. CRIMINAL LAW (§ 561\*)—"REASONABLE DOUBT."**

A reasonable doubt is such a doubt as would cause a prudent and rational man to act or to pause or hesitate to act in the determination of any of the affairs of life of the highest importance to himself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

In Error to the Supreme Court of the Territory of New Mexico.

Antimo Pettine was convicted of murder in the second degree, and brings error. Reversed and remanded, with directions to grant a new trial.

T. B. Catron, of Santa Fé, N. M., for plaintiff in error.

Frank W. Clancy, of Albuquerque, N. M., for the Territory.

Before SANBORN and CARLAND, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. This writ challenges the trial of Antimo Pettine, the defendant below, for murder in the first degree, his conviction of murder in the second degree, and his sentence therefor to imprisonment in the penitentiary for 45 years. After the verdict the defendant made a motion for a new trial, which was denied, and an appeal from the judgment was taken to the Supreme Court of the territory of New Mexico, which affirmed the rulings below, and that affirmance is now presented to this court for review.

The defendant was tried for shooting and thereby killing Mr. Be-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

berardinelli "with malice aforethought and from a deliberate and premeditated design, unlawfully and maliciously to effect his death." Berardinelli was a quarrelsome man, who weighed about 200 pounds, and he had been drinking on the day of his death. He had previously threatened to kill the defendant, who was a small man, and he had been notified of the threat and warned to look out.

On the morning of the shooting Pettine was passing a store on his wheel in the street, when Berardinelli called him, and, after he had dismounted, Berardinelli charged him with writing a letter. Pettine denied the charge. Berardinelli then called him foul names, seized him, and rubbed the letter in his face, when bystanders interfered, caught and held Berardinelli, while Pettine mounted his wheel and escaped. Within an hour thereafter Pettine was again passing the store on his wheel in the street. He stopped and dismounted. Berardinelli advanced toward him threateningly. Pettine backed away and Berardinelli followed, and, when the latter was close upon the defendant, Pettine fired and killed him. The foregoing facts are established without contradiction or dispute. But the witnesses for the prosecution testified, that when Pettine came along the street the second time, he laid his wheel aside, called Berardinelli, and said he was ready, and told him to call him those names again if he desired to do so, that Berardinelli then advanced upon him, and Pettine retreated until he fired. On the other hand, Pettine and his witnesses testified that Berardinelli stopped Pettine on the street, and compelled him to dismount, that Pettine then retreated toward the other side of the street, and Berardinelli threateningly followed, and Pettine testified that he had been previously notified that Berardinelli had threatened to kill him; that as he came along the street Berardinelli rushed at him and compelled him to dismount from his wheel; that he did so and retreated toward the other side of the street and Berardinelli followed; that the latter was a powerful man, twice as large as he was; that he called upon the bystanders to catch him and keep him away and one of them testified that he took hold of and tried to hold Berardinelli, but that he tore himself away and went for Pettine. Pettine also testified that he backed away from Berardinelli; that he was afraid of him; that he told him to stop; that he warned him that he would shoot if he did not stop, but that he still advanced, and that when he was within six feet of him, in fear of his life, he fired to save it; and that he never intended to kill Berardinelli until forced to shoot to save himself. This was the state of the evidence when the defendant closed his case. The prosecution had then taken the evidence of four or five witnesses and the defendant the testimony of eight. Pettine was the last witness on his own behalf. Just before the close of his testimony, he was asked if he did not tell Luciano Campagnoli, in the latter's shop at Santa Fé, that he had intended to kill Berardinelli, Cæsar Grande, and Charles Grande, but that he had never been able to get them together, and he answered that question in the negative. On rebuttal counsel for the prosecution called Campagnoli, who testified that about three months after the shooting Pettine, whom he had never seen before, came into his shop

in Santa Fé and told him that he had killed Berardinelli, that he had intended to kill him and Cæsar Grande and Charles Grande, but had never been able to get them together. Campagnoli further testified that no one but himself and Pettine were present when the latter made this statement. Pettine in surrebuttal testified that he never was in Campagnoli's shop, and that he never had any conversation with him. Upon this evidence the case went to the jury. After the verdict Campagnoli made an affidavit that Pettine never came into his shop and made the statement to which he, Campagnoli, had testified; that he was intoxicated when he so testified; that he subsequently became sober and became acquainted with Pettine; and that he then knew that the latter had never been in his shop, and had never made the statements to which he testified. Pettine made an affidavit that he had never made any such statements and that he never intended or wished to kill either of the Grandes or to kill Berardinelli until he believed it necessary at the moment of the shooting to fire upon him to protect his own life or to save himself from great bodily harm; that he had no knowledge or information whatever that Campagnoli would testify as he did until he gave his testimony at the close of the trial; and that, as he testified that no one but himself and Pettine were present when the statements to which he testified were made, he had no way to disprove his testimony but by his own denial. One of the grounds of the defendant's motion for a new trial which was supported by these affidavits was the submission of this case to the jury upon this false testimony of Campagnoli. It is assigned as error that the trial court overruled the motion, and that the Supreme Court of the territory of New Mexico affirmed that ruling.

[1] It is suggested in answer that if this ruling was error it was not prejudicial because the testimony of Campagnoli went only to the defendant's preconceived intention to kill, and the jury by its verdict of murder in the second degree, instead of in the first degree, as charged, found that he had no such intention. But the legal presumption is that error produces prejudice, and it is only when the fact so clearly appears as to be beyond doubt that an error challenged did not prejudice, and could not have prejudiced, the complaining party, that the rule that error without prejudice is no ground for reversal is applicable. *Deery v. Cray*, 5 Wall. 795, 807, 808, 18 L. Ed. 653; *Peck v. Heurich*, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302; *Smith v. Shoemaker*, 17 Wall. 630, 639, 21 L. Ed. 717; *Moores v. Bank*, 104 U. S. 625, 630, 26 L. Ed. 870; *Gilmer v. Higley*, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62; *Railroad Co. v. O'Brien*, 119 U. S. 99, 103, 7 Sup. Ct. 118, 30 L. Ed. 299; *Mexia v. Oliver*, 148 U. S. 664, 673, 13 Sup. Ct. 754, 37 L. Ed. 602; *Railroad Co. v. O'Reilly*, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; *Railroad Co. v. McClurg*, 8 C. C. A. 322, 325, 326, 59 Fed. 860, 863; *Association v. Shryock*, 20 C. C. A. 3, 11, 73 Fed. 774, 781; *Railroad Co. v. Holloway*, 52 C. C. A. 260, 114 Fed. 458; *Armour & Co. v. Russell*, 75 C. C. A. 416, 144 Fed. 614, 615, 6 L. R. A. (N. S.) 602.

[2] The main issue at the close of the trial of this case was



whether the killing of Berardinelli was murder or justifiable homicide. The answer to that question hinged on the truth of Pettine's testimony. If his testimony and that of his witnesses was true, the killing was justifiable homicide, and he was entitled to a verdict of acquittal. If it was false, he was guilty of murder. It was for the sole purpose of impeaching him and destroying the effect of his testimony that Campagnoli's testimony was introduced by the prosecution in the last moments of the trial without warning to the defendant or opportunity for him adequately to meet it. That testimony was in effect that Pettine had deliberately testified falsely as to his preconceived intention, and it subjected all his testimony to the familiar rule that, when the jury believe from the evidence, that a witness has knowingly testified falsely upon a material issue they may disregard his testimony upon all other issues, unless it is satisfactorily corroborated. The fact that the jury failed to find that Pettine was guilty of murder in the first degree as charged is a demonstration that the issue on the truth of his testimony was a doubtful one. He was entitled to an acquittal unless the evidence proved him guilty of some degree of murder beyond a reasonable doubt. Who can say that this false testimony of Campagnoli, directly impeaching Pettine and contradicting his testimony on the great issue at the trial, his preconceived intention, was not the very evidence which removed the reasonable doubt whether his testimony that at the second encounter he was the assailed and not the assailant was true, and prevented his acquittal. The legal presumption is that this false testimony was prejudicial, and it is far from clear beyond doubt that it was not crucial evidence without which Pettine's evidence would have been believed, the killing would have been found to be justifiable homicide, and he would have been acquitted.

It was an established and settled rule of the Supreme Court of the territory of New Mexico that the denial by the trial court of a motion for a new trial based upon facts not presented at the trial rests in the sound discretion of the trial court, but that an abuse of that discretion entitles its victim to a reversal of the order by the Supreme Court of the territory on appeal or writ of error. *United States v. Lewis*, 2 N. M. 459, 462; *Roper v. Territory*, 7 N. M. 255, 263, 266, 33 Pac. 1014; *United States v. Biena*, 8 N. M. 99, 105, 42 Pac. 70; *Territory v. Emilio*, 14 N. M. 147, 159, 89 Pac. 239. In the case at bar that court, in accordance with this rule, considered the question whether or not the denial of the motion in this case was such an abuse, and declined to decide it on the ground that the testimony of Campagnoli could not have affected the verdict because there was ample evidence to sustain it without that testimony. *Territory v. Pettine*, 16 N. M. 40, 113 Pac. 843, 845. But that court was without jurisdiction on the sharp conflict of testimony here to determine the guilt or innocence of the defendant, or the sufficiency of a part of the evidence before the jury to sustain the verdict they rendered. The question for it to determine was not whether a part of that evidence would satisfy the minds of its members of the guilt or

innocence of the accused, for the jury alone had jurisdiction of that question. The only question of which the Supreme Court of New Mexico had jurisdiction was the question whether or not the defendant had had a fair and impartial trial without error according to law. Under the Constitution of the United States, the defendant had the right to a fair and impartial trial of the issue of his guilt or innocence by a jury of his peers without error of law and according to the course of the common law. He had the right to an acquittal of the charge against him unless the legal evidence satisfied the jury, not the appellate court, of his guilt beyond a reasonable doubt. The evidence on this issue was conflicting with little, if any, preponderance against him, when the false testimony of Campagnoli was thrown into the balance, and he was sent to the penitentiary for 45 years. Was that a fair trial in which this false testimony was thrown into the wavering balance at the close of the trial too late for the defendant to demonstrate its falsity? Is it clear beyond doubt that this testimony did not turn the scales against him or remove from the mind of some juror a reasonable doubt of his guilt? Can it be truthfully said that it was not a gross abuse of its discretion for the trial court to refuse to grant a new trial here and to refuse to exclude this false testimony from the minds of the triers of this fateful issue on which 45 years of the life of the defendant hung? The penalty the defendant was adjudged to suffer is heavy, the issue here presented is grave, and the conclusion derived from a careful reading and consideration of all the evidence in this case is that each of those questions should have been answered in the negative, and that the Supreme Court of the territory erred in its affirmance of the denial of the motion for a new trial.

[3] The statutes of the territory of New Mexico divide murder into three degrees, which they carefully define. So far as those definitions are material to the issues in this case, murder "perpetrated from a deliberate and premeditated design, unlawfully and maliciously to effect the death of any human being" was murder in the first degree; murder "perpetrated in the heat of passion without design to effect death, but in a cruel and unusual manner, or by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable or justifiable homicide," was murder in the second degree; and "every killing of a human being by the act, procurement or culpable negligence of another, which under the provisions of this act is not murder in the first or second degrees and which is not excusable or justifiable homicide," was murder in the third degree. Compiled Laws of New Mexico, 1897, §§ 1063, 1064, 1065. The defendant was indicted for murder in the first degree, and it was the privilege and duty of the jury to determine whether he was innocent or was guilty of one of these three degrees of murder. It is assigned as error that the court entirely withdrew from the jury the consideration of the question whether or not he was guilty of murder in the third degree, so that under its charge they were restricted to a finding that he was innocent or was guilty of murder in

either the first or second degree. The charge upon this subject, so far as material to this question, was as follows:

"Murder in the first degree, as so defined, and as related to the circumstances of this case, is 'all murder which shall be perpetrated \* \* \* from a deliberate and premeditated design, unlawfully and maliciously to effect the death of any human being.'

"Murder in the second degree is 'all murder which shall be perpetrated by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable or justifiable homicide, or which shall be perpetrated unnecessarily, either while resisting an attempt by the person killed to commit any offence against person or property, or after such attempt shall have failed. The absence of deliberate premeditated design is what chiefly distinguishes it from murder in the first degree.'

"Murder in the third degree is every killing of a human being which under the provisions of this act is not murder in the first or second degrees, and which is not excusable or justifiable homicide as now defined by law."

The assignment here made is well founded. The charge omits from the statutory definition of murder in the second degree by means of a dangerous weapon the words "in the heat of passion," and thus declares that all murder with a dangerous weapon without design to effect death which is not excusable or justifiable homicide is of the second degree, while the truth was, so far as material to this case, that murder with a dangerous weapon without design to effect death perpetrated in the heat of passion only was of the second degree and all murder perpetrated with a dangerous weapon which was committed without design to effect death and without the heat of passion was murder in the third degree. This was a palpable and crucial error, for the evidence was conclusive that the killing was perpetrated with a dangerous weapon and the charge that all murder with a dangerous weapon which was not of the first degree was of the second degree when the fact was that murder with a dangerous weapon without design to effect death which was not perpetrated in the heat of passion was of the third degree completely deprived the defendant of his right to a determination by the jury of the question whether the crime which they found he committed was murder in the second or in the third degree.

[4] It is specified as error that the court charged the jury that "a reasonable doubt is one for which a reason could be given based on the evidence or want of evidence in the case." This instruction has been the subject of continuous and frequent challenge, and there is a conflict of authority over the question of its accuracy. It has been sustained in *Griggs v. United States*, 158 Fed. 572, 577, 578, 85 C. C. A. 596. It may be found in instructions given to the jury by trial courts where it does not seem to have been questioned, in *United States v. Stevens*, Fed. Cas. No. 16,392, *United States v. Johnson* (C. C.) 26 Fed. 682, 685, *United States v. Jackson* (C. C.) 29 Fed. 503, and *United States v. Cassidy* (D. C.) 67 Fed. 698, 782, and it has been approved in *Wallace v. State*, 41 Fla. 580, 584, 26 South. 713, *People v. Guidici*, 100 N. Y. 509, 510, 3 N. E. 493, *Butler v. State*, 102 Wis. 368, 369, 78 N. W. 590, *State v. Grant*, 20 S. D. 168, 105 N. W. 97, 11 Ann. Cas. 1017, and other decisions from the states

above named. On the other hand, this instruction has been held to be fatal error in *Owens v. United States*, 130 Fed. 279, 283, 64 C. C. A. 525, 529, *Siberry v. State*, 133 Ind. 677, 33 N. E. 681, 684, *Avery v. State*, 124 Ala. 20, 21, 22, 27 South. 505, 506, *Morgan v. State*, 48 Ohio St. 371, 27 N. E. 710, 712, *Cross v. State*, 132 Ind. 65, 31 N. E. 473, 474, *Cowan v. State*, 22 Neb. 519, 35 N. W. 405, *Carr v. State*, 23 Neb. 749, 37 N. W. 630, *State v. Cohen*, 108 Iowa, 208, 78 N. W. 857, 75 Am. St. Rep. 213, and *State v. Lee*, 113 Iowa, 348, 85 N. W. 619.

[6] A reasonable doubt is such a doubt as would cause a prudent and rational man to act or to pause or hesitate to act in the determination of any of the affairs of life of the highest importance to himself. This and similar definitions of reasonable doubt which have received the repeated and unquestioned approval of the highest courts in the land are easily accessible in the reports. *Hopt v. Utah*, 120 U. S. 430, 439, 7 Sup. Ct. 614, 30 L. Ed. 708; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 320, 52 Am. Dec. 711; *State v. Pierce*, 65 Iowa, 85, 21 N. W. 195; *People v. Dewey*, 2 Idaho (Hasb.) 83, 6 Pac. 103; *Leonard v. Territory*, 2 Wash. T. 381, 7 Pac. 872. In the trial of an important case it is unwise to depart from established and approved definitions to doubtful declarations and novel theories.

In a criminal case the presumption of innocence accompanies the defendant throughout the trial. The burden is on the government to overcome this presumption, to produce evidence that will satisfy the minds of the jury beyond a reasonable doubt of the guilt of the accused. The burden is upon the prosecution to furnish to the jury by the evidence it produces, sound reasons for the conviction of the defendant, reasons that shall produce and maintain in their minds an abiding conviction of his guilt to a moral certainty. Now to say that a doubt of the guilt of an accused person which a juror may indulge is not a reasonable doubt unless he can give a reason for it based on the evidence or want of it is to reverse this established rule, and to put upon the accused the burden of furnishing the jury with a reason for his acquittal; for, if the juror must give a reason for his doubt, he must give a sound reason, or this new rule is idle and ineffective. If no juror who has a doubt of the guilt of the accused may lawfully vote for his acquittal unless he can give a sound reason for his doubt based on the evidence or the want of it, the question immediately arises whether this reason must be sound in his own opinion only, or in the opinion of his fellow jurors, or of the judge, and, once adopt this rule and instructions on this subject must inevitably multiply and add dialectics and confusion to the rule and its application. The ability to give sound reasons for their doubts or their beliefs is not given to many men, and every prudent and thoughtful man at once recognizes the fact that in the graver and more important affairs of his own life doubts for which he can formulate no convincing reason often induce him to act or to refuse to act. To require every person accused of crime to present such a state of evidence at his trial that every juror can give a sound reason based on the testimony for his doubt of his guilt before he may vote for his acquittal



places too heavy a burden on the accused. It destroys the rule of reasonable doubt, and substitutes for a reasonable doubt a demonstrable doubt logically and conclusively sustained by the evidence or the want of it. The court below was in error when it placed this heavy burden upon the defendant, and charged the jury that a reasonable doubt was one for which a reason could be given founded on the evidence or the want of it.

[5] The Supreme Court of New Mexico disregarded the two errors which have been last discussed because they were not properly presented to the trial court by suitable requests, objections, and exceptions. But in criminal cases where the life, or as in this case the liberty, of the defendant for the probable remainder of his natural life is at stake the courts of the United States in the exercise of a sound discretion may notice grave errors in the trial of a defendant although the questions they present were not properly raised in the trial court by request, objection, or exception. *Wiborg v. United States*, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; *Clyatt v. United States*, 197 U. S. 207, 221, 25 Sup. Ct. 429, 49 L. Ed. 726; *Crawford v. United States*, 212 U. S. 183, 194, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; *Weems v. United States*, 217 U. S. 349, 362, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705; *Williams v. United States*, 158 Fed. 30, 36, 88 C. C. A. 296, 302; *Humes v. United States*, 182 Fed. 485, 486, 105 C. C. A. 158, 159. The liberty of the defendant below for more than four decades, if he should so long live, probably depends upon the decision of this case. He may not be deprived of this liberty lawfully without a fair trial free from error according to the course of the common law.

For the reasons that have been stated, the record in this case has convinced that he has not received such a trial, the judgment below is therefore reversed, and the case is remanded, with directions to set aside the verdict and grant a new trial.

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AYER v. TERRITORY OF NEW MEXICO.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1912.)

No. 3,654.

(*Syllabus by the Court.*)

**1. CRIMINAL LAW (§ 1163\*)—HOMICIDE (§ 340\*)—APPEAL—PRACTICE—ERROR IMPLIES PREJUDICE—HARMLESS ERROR.**

The legal presumption is that error produces prejudice. It is only when the fact so clearly appears as to be beyond doubt that an erroneous ruling did not prejudice, and could not have prejudiced, the complaining party that the rule that error without prejudice is no ground for reversal is applicable. Facts considered, and *held* to fail to show that the error could not have prejudiced the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163\*; Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 201 F.—32

**2. CRIMINAL LAW (§ 789\*)—REASONABLE DOUBT.**

A charge that "a reasonable doubt is one for which a reason could be given based on the evidence or want of evidence in the case" destroys the rule of reasonable doubt, substitutes for a reasonable doubt a demonstrable doubt, logically and conclusively sustained by the evidence or the want of it, and places too heavy a burden upon the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.\*]

In Error to the Supreme Court of the Territory of New Mexico. Carlos Cecil Ayer was convicted of murder in the third degree, and brings error. Reversed.

For opinion in the territorial Supreme Court, see 15 N. M. 581, 113 Pac. 604.

E. W. Dobson and Neill B. Field, both of Albuquerque, N. M., for plaintiff in error.

Frank W. Clancy, of Albuquerque, N. M., for the Territory.

Before SANBORN and CARLAND, Circuit Judges, and WILLIAM M. MUNGER, District Judge.

SANBORN, Circuit Judge. The writ of error in this case questions the judgment of the Supreme Court of New Mexico which affirmed a conviction of the defendant below of the crime of murder in the third degree.

[1] It is assigned as error that the trial court charged the jury that "a reasonable doubt is one for which a reason could be given based on the evidence or want of evidence in the case." Because this instruction destroys the rule of reasonable doubt, substitutes for a reasonable doubt a demonstrable doubt, logically and conclusively sustained by the evidence or the want of it, and places too heavy a burden on the defendant, it is error. A discussion of the question here presented may be found in the opinion of this court in *Pettine v. Territory of New Mexico*, 201 Fed. 489, 119 C. C. A. —, which is handed down herewith. In the case at bar the Supreme Court of New Mexico conceded the existence of the error in the charge of the trial court, but declined to reverse the judgment of conviction on the ground that the error was not prejudicial because in its opinion the testimony of the defendant himself excluded the possibility of a reasonable doubt of his guilt. *Territory v. Ayer*, 15 N. M. 581, 113 Pac. 604, 607. Two of the justices of that court, however, dissented from this conclusion on the ground that the question whether or not a part or all of the evidence overcame the presumption of the defendant's innocence in this case and established his guilt beyond a reasonable doubt was a question for the jury, and not for that court.

The legal presumption is that error produces prejudice, and it is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice, and could not have prejudiced, the complaining party, that the rule that error without prejudice is no ground for reversal is applicable.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] The evidence in this case, the fact that upon this evidence the jury acquitted the defendant of the crime of murder in the first degree, for which he was indicted and tried, and found him guilty of murder in the third degree only, and the further fact that two of the five justices of the Supreme Court who heard his case were not convinced that this error in his trial was not prejudicial to him, presents a state of facts which forbids the conclusion that it appears here beyond doubt that, if the jury had been correctly instructed, every juror would have been convinced of the defendant's guilt beyond a reasonable doubt. Under the Constitution of the United States, the defendant had the right to a trial of the question of his guilt or innocence by a jury of his peers without error according to the course of the common law and to an acquittal unless the legal evidence satisfied the jury of his guilt beyond a reasonable doubt. On the review of such a trial the question for an appellate court is not whether the evidence, or a part of it, would satisfy the minds of its members of the guilt of the accused beyond a reasonable doubt, for our system of jurisprudence has not given to the appellate courts jurisdiction of this issue. The determination of this question has been confided exclusively to a jury of the peers of the defendant, and where, as in this case, the evidence is such that different minds may draw different conclusions from it, error of law in the trial entitles the defeated party to a new trial because only so can he have a fair trial by a jury of his peers according to law. A trial dominated, swerved or affected by error of law, is not a trial according to law.

The judgment below must therefore be reversed, and the case must be remanded, with directions to set aside the verdict and grant a new trial, and it is so ordered.

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### OAKLAND MOTOR CAR CO. v. INDIANA AUTOMOBILE CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1912.)

No. 1,891.

#### 1. CONTRACTS (§ 10\*)—REQUISITES AND VALIDITY—MUTUALITY OF OBLIGATION.

Defendant, as a manufacturer of automobiles, and plaintiff, as a dealer, entered into a contract by which defendant gave plaintiff for the term of one year the exclusive right to sell its cars in a certain territory, and agreed to sell plaintiff cars at a stated discount from list price; the contract providing, however, that no order should be binding upon it, unless submitted in writing, clearly specifying as to kinds, styles, date of shipment, etc., and accepted by defendant at least 30 days prior to date for delivery. It further provided that it might be canceled by either party "for just cause" on 30 days' written notice. A further provision gave the right to cancel for a violation without notice. By a supplemental clause, added after the signatures, plaintiff agreed to purchase 50 cars from defendant during the term of the contract, and as many more as it could handle and defendant could supply. Defendant gave notice of cancellation for reasons stated, and plaintiff brought action for damages. *Held*, that the right given to cancel "for just cause" was so indefinite as to leave it to the party to determine what was a just cause, and that in view of such provision, and the further one requiring the approval of orders by defendant before they were binding on it, the con-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tract, for lack of mutuality, could not be held one for the purchase and sale of 50 cars, and enforceable as such against defendant.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.\*]

Mutuality in contracts, see note to *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 543.]

**2. SALES (§ 1\*)—REQUISITES AND VALIDITY—UNCERTAINTY OF SUBJECT-MATTER.**

At the time such contract was made, defendant had in the market three models of cars, and had under construction for the ensuing season a number of other styles, at different prices, all of which was known to plaintiff. The contract named only "Oakland Automobiles," which applied to all of defendant's cars, and did not specify, nor bind plaintiff to the purchase of, any particular model or style. *Held*, that it was not enforceable as a contract for future sale and delivery, for lack of any means contained therein for identifying the subject-matter of such sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3-5; Dec. Dig. § 1.\*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Action at law by the Indiana Automobile Company against the Oakland Motor Car Company. Judgment for plaintiff, and defendant brings error. Reversed.

The Oakland Motor Car Company, plaintiff in error, was defendant below in the suit brought by the Indiana Automobile Company to recover damages for alleged breach of contract. On trial of the issues to a jury, verdict was rendered against the defendant, assessing the damages at \$6,500, and reversal of the judgment thereupon is sought under various assignments of error. The contract relied upon for recovery, through rescission thereof on the part of the defendant below, reads as follows:

"This agreement, made and entered into at Pontiac, Michigan, this 16th day of September, 1908, by and between the Oakland Motor Car Company, of Pontiac, Michigan, hereinafter called the manufacturer, and Indiana Automobile Company, Indianapolis, Indiana, hereinafter called the dealer, witnesseth as follows, viz.:

"1. That the manufacturer hereby grants to the dealer the exclusive right of sale of Oakland automobiles and parts thereof in the following described territory, viz.: State of Indiana, south of the southern line of the following counties: Newton, Jasper, Pulaski, Fulton, Kosciusko, Whitley, Allen.

"It is hereby mutually agreed by and between the parties hereto as follows:

"2. This contract is made for the purpose herein set forth only, and does not in any manner delegate to the dealer the right or authority to transact any business or incur any obligations for or in the name of the manufacturer.

"3. The dealer agrees not to solicit sales from or sell Oakland automobiles to any person or persons residing outside of the above-described territory, and further agrees to refer any inquiry coming from outside of such territory to the manufacturer.

"4. The dealer agrees faithfully to represent and advertise Oakland automobiles and promote the sale thereof to the best of his ability in the territory assigned, and to sell at not less than list price to the user.

"5. The manufacturer will sell to the dealer Oakland automobiles, automobile bodies and chassis at a discount of 25 per cent. from the list price thereof, f. o. b. cars, Pontiac, Michigan, for cash in par funds, it being under-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes



stood that all orders shall be accompanied with a deposit of 20 per cent. of the list price of automobiles, automobile bodies or chassis, and that draft for the balance of the price thereof shall accompany the bill of lading, and that the title to these goods shall remain in the name of the manufacturer until full payment of the purchase price is made, and that the dealer shall make prompt payment on the arrival of such goods at destination on the foregoing basis.

"6. The dealer agrees that he will not hold the manufacturer liable on account of any other dealer selling said automobiles in the territory assigned, but the manufacturer will endeavor so far as possible to protect the interests of the dealer in said territory.

"7. The manufacturer will sell to the dealer repairs and parts of automobiles made by the manufacturer not included in the foregoing at a discount of 25 per cent. from the list price, terms cash with order, f. o. b. cars, Pontiac, Michigan.

"8. The manufacturer will furnish the dealer a supply of catalogues, circulars, etc., as he may publish from time to time free to the dealer, the dealer to pay transportation charges thereon.

"9. It is agreed that the responsibility of the manufacturer for loss or damage shall cease upon delivery of the goods by the manufacturer to the transportation company or in person to the dealer or his representative.

"10. All claims on account of defective material in the construction of said automobiles must be made by the dealer within 60 days after the delivery of automobiles, etc., to the dealer or his customers, and upon any such material being submitted to the manufacturer, properly tagged, giving the number of the automobile from which it was taken, the name and address of the owner, and the date of sale, and such other information as may be necessary to identify the machine, the said manufacturer agrees to replace such parts gratis if upon his examination in the estimate of said manufacturer they may be found to be defective.

"This agreement does not cover defective tires, rims, colls, radiators, and other equipment not manufactured by the Oakland Motor Car Company (or used by them in their equipment). All claims must be made by said dealer on the respective manufacturers of said tires, rims, colls, radiators, and other equipment, names of which manufacturers appear on the defective described parts. The freight or express charges on such parts returned to the manufacturer for credit or replacement must in all cases be prepaid by the dealer.

"11. That no order for automobiles, automobile parts, or attachments shall be binding upon said manufacturer, unless such orders are submitted in writing, clearly specifying as to kinds, styles, date of shipment, etc., and accepted by the manufacturer at least 30 days prior to date for delivery, and such orders shall be subject to delays caused by strikes, fires, or other causes beyond the manufacturer's control.

"12. This contract expires by limitations September 1, 1909, or may be canceled for just cause by either party giving a 30 days' written notice, and that cancellation of this contract shall be sufficient to cancel all orders for automobiles or parts thereof which may have been received from said dealer and not delivered prior to date the cancellation takes effect.

"13. That this agreement has been fully read and understood by the dealer, and that there are no agreements or understandings, either oral, written, or otherwise, which in any manner affect or conflict with the terms and conditions herein.

"14. That any violation of the terms and conditions of this contract by either party may be considered sufficient cause for terminating the same without the notice prescribed.

"In witness whereof the parties hereto have signed this agreement the day and year first above written.

Oakland Motor Car Company,

"[The Manufacturer,]

"By E. M. Murphy, Prest.

"Indiana Automobile Co.,

"[The Dealer,]

"By S. W. Elston.

"This agreement shall in no way be binding upon the manufacturer unless approved by an officer of the Oakland Motor Car Company.

"Approved:

"Oakland Motor Car Company,

"[The Manufacturer,]

"By E. M. Murphy, President.

"Addition to above agreement:

"In consideration of the territory specified herein, the dealer agrees to purchase 50 cars from the manufacturer during the term of this agreement, and as many more as their wants may require and we can supply. The dealer to deposit \$50 apiece on 25 cars and will deposit \$50 on each of the other 25 cars as soon as the sample cars can be delivered."

The issues and facts involved for consideration are stated in the opinion.

Henry W. Wales and Sidney S. Gorham, both of Chicago, Ill., for plaintiff in error.

Morris M. Townley, David B. Gann, and Geo. H. Peaks, all of Chicago, Ill., for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and ANDERSON, District Judge.

SEAMAN, Circuit Judge (after stating the facts as above). The verdict and judgment against the plaintiff in error, defendant below, rest solely on this proposition: That the agreement in suit constitutes a binding contract for purchase and sale of 50 of its two-cylinder automobiles, of the type listed at \$1,250, making their price to the plaintiff below (as dealer) \$937.50 each. While the plaintiff's declaration contains several counts, charging breaches of the agency agreement referred to in various forms, its testimony at the trial was limited to the assumed phase thereof above stated, as averred in the fourth count. Accordingly the trial court instructed the jury, not only (in effect) eliminating all other counts from consideration, but "that the plaintiff has proved a contract whereby the defendant agreed to sell the plaintiff 50 automobiles" so specified as to type and price, together with the further instruction that "the defendant committed a breach" thereof, by notifying the plaintiff, on October 31st, without justification, that it "declined to deliver any further or additional automobiles thereunder," and that the only question for the jury to consider was the amount of "damages to be awarded to the plaintiff" for such breach. It is both obvious and undisputed, therefore, that the judgment can be upheld only upon conclusive evidence of such contract obligation to sell and deliver the particular cars so described. Exceptions are preserved, both to the above instruction and for denial of the defendant's request to direct a verdict in its favor, also for denial of other instructions requested as to the effect of the agreement, and we proceed to consideration of the question thus stated, without taking up the further inquiry suggested, whether the provision referred to was rightly treated as severable from the agency contract for independent enforcement.

The contract in suit was entered into September 16, 1908, with its main provisions in the printed form used by the defendant as manu-

facturer of "Oakland automobiles," for an agreement establishing selling agencies for its products. Referring to the defendant as "the manufacturer" and the plaintiff as "the dealer," it grants to the dealer "the exclusive right of sale of Oakland automobiles and parts thereof" for several counties named in the state of Indiana, and provides (clause 12) that the "contract expires by limitation September 1, 1909, or may be canceled for just cause by either party giving a 30 days' written notice." In respect of all provisions in the body of the contract as signed by the parties, it is both conceded on behalf of the plaintiff and unquestionable, that the terms thereof create no mutual obligation for purchase and sale of the automobiles as between manufacturer and dealer, and that the only agreement in that line is contained in clause 5, providing for sale to the dealer; and this is qualified by the terms of clause 11, that any order sent in by the dealer shall not be "binding upon said manufacturer" unless accepted by it "at least 30 days prior to date for delivery." Another provision, however, appears in writing at the foot of the contract (below the signatures), which is the one relied upon for support of the instruction to the jury, reading as follows:

"Addition to above agreement:

"In consideration of the territory specified herein, the dealer agrees to purchase 50 cars from the manufacturer during the term of this agreement, and as many more as their wants may require and we can supply. The dealer to deposit \$50 apiece on 25 cars and will deposit \$50 on each of the other 25 as soon as the sample cars can be delivered."

When the contract was completed, the plaintiff deposited the \$1,250 above stipulated, and ordered three cars of the two-cylinder type described in the above-mentioned instruction, which were then ready for delivery; and such cars were shipped and settled for in conformity with the agreement. In October, however, the defendant became dissatisfied with the conduct of the agency—which was carried on under the name of the "Independent Automobile Company," and at a place for showroom apart from the plaintiff's other agency—and on October 31st returned to the plaintiff \$1,100 remaining on hand of its deposit under the agreement, with written notice that, "in accordance with the terms of the contract between" them of September 16th, "the said contract is hereby canceled and ended, for just cause and because the terms and conditions of said contract have been violated by you." The notice further specifies the matters complained of, but no issue arises herein in reference to the right to terminate the agency under the contract, and its only bearing on the present issue is to prove refusal on the part of the defendant to make further deliveries under the purchase clause.

The validity of the alleged contract of purchase and sale for future deliveries is challenged upon the twofold grounds of want of mutuality and of uncertainty in the subject-matter of sale, specified in essence as follows: First, that the purchase clause is deprived of mutuality of obligation by either one of two provisions of the contract, namely: (a) Clause 11, providing that no order for cars "shall be binding upon said manufacturer," unless submitted in writing "specifying

as to kinds," and "accepted by the manufacturer at least 30 days prior to date for delivery"; (b) clause 12, providing for cancellation of the contract by either party. Second, that "Oakland automobiles," named in the contract as its subject-matter, were of several types and prices, all embraced therein, and selection therefrom is left at plaintiff's option as ordered from time to time. Under the elementary rules of contract law, both mutuality of obligation and certainty of subject-matter are cardinal requirements for enforcement of any such contract for future sale and delivery, so that error is well assigned for reversal, if either of these propositions must be sustained.

[1] 1. The provisions (11 and 12) relied upon for the objection of want of mutuality are contained in the printed terms; but no doubt is entertainable that both are made applicable to the contract as an entirety, and not severable from the purchase clause, as contended on behalf of the plaintiff. Their effect, therefore, rests on the interpretation of their terms respectively. We believe the import of clause 11 to be unmistakable, in requiring an order to be sent in for each intended purchase, specifying the kind of cars desired, and providing that the manufacturer was not bound for sale thereof without his acceptance for that purpose as described. Thus the plaintiff's agreement to purchase 50 cars during the term was expressly made unilateral, through this stipulation (in effect) that the defendant was at liberty, either to accept or refuse compliance with any tender of purchase thereunder, leaving no basis for implying a promise on the part of the defendant to sell the 50 cars, and no liability for refusal to make further sales to the plaintiff. In reference to clause 12, it is frankly conceded in the brief on behalf of plaintiff "that a contract for future delivery of personal property, which confers upon either party the arbitrary right of cancellation prior to the delivery, would be lacking in mutuality," pursuant to the ruling of this court in the recent case of *Velie Motor Car Co. v. Kopmeier Motor Car Co.*, 194 Fed. 324, 114 C. C. A. 284; but the contention is that the instant provision, to be "canceled for just cause by either party," does not fall within such rule, as it implies "a rightful or lawful cause." We believe use of the terms "for just cause" to be insufficient to exempt the contract from the rule applied in the above-mentioned case, as no means are furnished to ascertain what may have been the particular cause or causes thereby intended by both parties. That it did not mean violations of the contract terms appears from clause 14, which provides for termination for such cause "without the notice prescribed" in the above provision. In *Cummer v. Butts*, 40 Mich. 322, 325, 29 Am. Rep. 530, like agreement for terminating the contract "for good cause," was held to afford no "common and intelligible criterion for the parties, or any determinate sense whatever" as to the cause, so that no breach was committed in terminating the contract. See 1 Benjamin on Sales (4 Am. Ed.) § 51 and note; 1 Beach on Mod. Law of Contracts, §§ 72, 76.

[2] 2. The further objection raised, however, against enforcement of the alleged contract of sale for uncertainty as to the kind of cars which were to be ordered and delivered, we believe to be supported by



the undisputed facts in evidence; and thus presented for review, its consideration seems desirable, without resting our conclusions on the contract terms alone, as above discussed.

The contract was made under these circumstances: Its subject-matter, the "Oakland automobiles," were a new product of low-priced cars, manufactured by the defendant, commencing in the previous year. Up to the date of the contract the product consisted of two-cylinder cars, of three models, one listed at \$1,200 and two at \$1,250 each; but it then had in course of manufacture and nearing completion several types of four-cylinder cars, to be ready for sale in the season named in the contract, and listed at \$1,600. Illustrations and full descriptions of these four-cylinder cars were then on exhibit, together with like exhibits of two-cylinder cars, as incorporated in the catalogue entitled "Oakland 1909." This catalogue was introduced in evidence by both parties, without proof of the date of publication; but we infer that it was not then printed, although its material matter was on hand. The season of the automobile trade usually runs from about October to the following September, and this contract was for the season known as "1909." Four-cylinder types for moderate priced cars were commenced by other manufacturers for that season and their promise of popularity (subsequently realized) was attracting the attention of the trade.

The plaintiff had carried on for five years, at Indianapolis, a prominent selling agency for automobiles, handling several higher priced cars, and desired the agency for a cheaper line. Its manager had learned of the Oakland machine as a good make, and visited the defendant's factory to look over the prospects for such agency, and there entered into the contract in controversy. His acquaintance then obtained with the progress of the work and the purpose of the defendant to have four-cylinder cars ready for the market of the ensuing season (as an additional line of "Oakland automobiles"), and with their illustrations, descriptive matter, and prices, to enter into the catalogue for the season, are uncontroverted facts at the date of the contract, and there is no testimony or circumstance which tends to show any intention or understanding of both parties that the agreement was to be limited to any particular car or cars thereof. Neither the fact of ordering three cars then on hand for immediate delivery, nor the alleged intention on the part of the plaintiff, not communicated to the defendant, can have weight in that direction; and the agreement "to purchase 50 cars from the manufacturer during the term," is not only applicable in terms to either and all of the above-mentioned cars shown by the catalogue and actually produced, but such understanding between the parties must be presumed. In other words, it was left at the option of the purchaser to select the cars for delivery, and there was no meeting of minds between the parties upon the particular cars to be sold, as to model or price. The alleged agreement thus provides no means to identify the cars to be named in any order, either for tender of performance on the part of the defendant or for enforcement at law as to unperformed portions thereof, and is without force

as a contract for future sale and delivery. *Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 81, 52 C. C. A. 25, 57 L. R. A. 696; *Wheaton v. Cadillac Automobile Co.*, 143 Mich. 21, 106 N. W. 399.

We are of opinion, therefore, that the above-mentioned instruction to the jury was erroneous, and that the defendant was entitled to the instruction in its favor which was requested and denied.

Various other errors are alleged, in rulings of the trial court, upon the issue of breach on the part of defendant, objections to testimony as to damages claimed, and in respect of the measure of damages; but the questions raised thereby do not require determination, in view of the above conclusions against liability.

The judgment of the District Court is reversed accordingly, with direction to grant a new trial and proceed thereupon consistently with the foregoing opinion.

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#### HOFFMAN et al. v. MITCHELL.

(Circuit Court of Appeals, Seventh Circuit. November 6, 1912.)

No. 1,900.

#### 1. GAS (§ 7\*)—GAS COMPANIES—RIGHTS IN STREETS—LOWERING OF PIPES TO CONFORM TO GRADE.

A franchise granted to a gas company to lay its pipes in an ungraded street, in the absence of any provision on the subject, does not confer on the company any property rights in the street which are not subject to the public requirements, or relieve it of the duty of lowering the pipes at its own expense, when made necessary by the grading and paving of the street.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 2; Dec. Dig. § 7.\*]

#### 2. GAS (§ 7\*)—GAS COMPANIES—RIGHTS IN STREETS—EXPENSE OF LOWERING PIPES.

Where neither an ordinance providing for the grading and paving of a street nor the estimate required by statute for letting the contract contained any provision with respect to the pipes of a gas company therein, a general provision in the printed form of specifications used, which were not even filed as a municipal record, requiring the contractor to remove or adjust all such pipes at his own expense, does not inure to the benefit of the gas company, to relieve it of the obligation to pay the expense of such removal.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 2; Dec. Dig. § 7.\*]

Appeal from the District Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Petition in equity by John H. Mitchell, receiver of the Mt. Carmel Gas & Electric Company, against F. G. Hoffman and R. R. Townsend, partners as Hoffman & Townsend. From the order entered, respondents appeal. Reversed.

This appeal is from an order of the District Court, made under a petition filed by the appellee—as receiver of the property of the Mt. Carmel Gas & Electric Company, appointed by the court in a cause pending therein—for a restraining order against the appellants and rule entered thereupon requiring

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the appellants to show cause "why they should not be held in contempt" for interference with property held by the receiver, as alleged in the petition, and restrained from further interference. The proceedings up to the entry of the order appealed from were:

An answer to the petition, setting forth the appellants' action in the premises, under a contract let by the city of Mt. Carmel, pursuant to an ordinance thereof, for improvement of Mulberry street, by paving the same; that they were required to excavate such street to an established grade, and in the course of the excavation pipes of the above-mentioned corporation, placed above such grade line, were found in such street, within the area to be excavated, but were unknown to the appellants when they entered upon the work; that their contract made no provision in respect of such pipes; that they advised the superintendent of such corporation of the facts, and agreed with him that they would lower the pipes, keep account of the expense, and leave the question of liability for the expense "to be determined by some appropriate legal proceedings"; that they proceeded with the excavation, and had "uncovered the greater portion of said mains," before they were informed by the receiver that their arrangement with the superintendent was not approved by him; that such receiver insisted upon their lowering of the pipes "at their own expense, which they refused to do"; and their good faith in the premises is well averred, together with the averment that they would have applied to the trial court for leave to proceed with the work, had they understood such leave to be needful. With leave of the court, the appellants also filed a petition thereupon, called in the record a "cross-petition," praying leave to proceed with the excavation, and that the receiver be required to lower the pipes and bear the expense thereof to enable the improvement to be carried on. An answer to this so-called "cross-petition" was filed by the receiver; also replication to the above-mentioned answer to his petition. Thereupon an order was made, in substance, that "these said proceedings be continued generally," that the appellants be restrained from further interference "until the further order of this court," and "that the cross-petition of" the appellants be referred to Master in Chancery Gunn, to take testimony upon the issues thereunder and report the same, "together with the conclusions of law and fact thereon." Testimony was so taken and reported by the master, with findings of fact and conclusions of law in favor of the appellants, and that they were entitled to relief as prayed. Exceptions to the master's conclusions of law were filed on behalf of the receiver, and upon hearing of the matters the order appealed from was entered, as follows:

"The cross-petition of Hoffman & Townsend for an order on the receiver to lower the pipes on Mulberry street in the city of Mt. Carmel, Ill., and the exceptions of the receiver to the report of the master in chancery in said cause coming on to be heard, and the court, having heard the arguments of counsel and being fully advised in the premises, does hereby sustain the exceptions as filed to said report of the master in chancery, and the cross-petition of Hoffman & Townsend is by order of court hereby dismissed; and the said Hoffman & Townsend, who have heretofore been cited to appear to show cause why they were not in contempt of court, are hereby directed and ordered by the court to pay to John H. Mitchell, receiver of the Mt. Carmel Gas & Electric Company, the sum of eight hundred seventy-six and  $\frac{1}{100}$  dollars (\$876.01), which amount is the amount agreed upon by the parties interested as the cost of replacing and putting in condition the property of the Mt. Carmel Gas & Electric Company on Mulberry street in the city of Mt. Carmel, in the county of Wabash and state of Illinois, and putting the property in equally as good condition as the said Hoffman & Townsend found it; and that on payment of the said sum of eight hundred seventy-six and  $\frac{1}{100}$  dollars (\$876.01) within sixty days, and the same being reported to this court, that then the rule be discharged; that the same be in full satisfaction of the contempt complained of, and otherwise to remain in full force and effect until the further order of this court."

George F. Rearick and James A. Meeks, both of Danville, Ill., and P. J. Kolb, of Mt. Carmel, Ill., for appellants.

Walter C. Lindley, of Danville, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The order or decree from which this appeal is brought may rightly be treated as final in the controversy, under our understanding of the issues presented, although it does not expressly determine the question of contempt mentioned in the rule to show cause entered upon the filing of the receiver's petition for a restraining order against the appellants, pending direction of the court in the premises. All parties in interest were before the court, and all their matters in controversy were there submitted for hearing, with the issues (both of law and fact) well defined. The findings of fact, as reported by the master with the testimony, were not within the exceptions filed on behalf of the receiver and sustained by the court, so that both findings and testimony were plainly cognizable for final determination of the entire controversy upon the merits. In accord with this view, as we infer, the order overrules (in effect) the master's conclusion of law that appellants "are entitled to the relief prayed for in their cross-petition," and dismisses such (so-called) cross-petition. It then proceeds under the citation: That the appellants are "directed and ordered by the court to pay" to the receiver \$876.01, as "the amount agreed upon by the parties interested as the cost of replacing and putting in condition the property of the Mt. Carmel Gas & Electric Company on Mulberry street," that on payment of such sum within 60 days, and report thereof to the court, "the rule be discharged," and "that the same be in full satisfaction of the contempt complained of, and otherwise to remain in full force and effect until the further order of the court."

Whatever may be the import of these references to the rule to be discharged upon "satisfaction of the contempt complained of," we believe each of the petitions before the court presented only this ultimate question of law: Was it the duty of the receiver, not only to lower and place the pipes of the Gas & Electric Company, in conformity with the grade of the street, but to bear the expense of such work? Or were the appellants legally chargeable for the expense thereof? Neither the facts averred in the receiver's petition, nor any evidence in the record, as we believe, involve conduct in the nature of contempt of the authority of the court in the premises. The petition shows that the pipes were located in Mulberry street, within the grade lines for which grading was in progress under an ordinance of the city for improvement of the street; that the only action complained of was the public work thus carried on by the appellants as contractors under the ordinance, in excavation of the street and thereby reaching and uncovering the pipes so located above grade line; and that, without other interference, the above-mentioned question was in controversy between the receiver and the appellants. For determination of that issue, the trial court granted leave to the appellants to file their



so-called cross-petition to that end. Issue was joined thereupon and referred to the master for hearing; and it further appears that all subsequent proceedings for lowering the pipes were arranged between the parties, leaving alone to be ascertained the liability of one or the other party for the expense thereof. In the absence of any order or direction of the court in the premises, we do not understand that the operations of the appellants above mentioned, either constituted an invasion of property rights in custodia legis, in any sense amounting to contempt, or that it was so treated by the trial court when the issue upon the merits was allowed and referred, as above stated. So the contentions on the part of the appellee in the present argument, as to the effect of the alleged contempt, are without force, and the issue of law, presented by the master's findings of fact and ruling thereupon, plainly arises for determination.

[1] The ordinances of the city of Mt. Carmel, pursuant to which the appellants entered into the contract and performed the excavation, were one establishing the grade of Mulberry street—which had not been established when the pipes in controversy were placed by the owner—and the other providing for improvement and paving of the street at the expense of abutting property, upon estimates to be made and filed and contracts to be let in conformity with statute. Their validity is not challenged, nor are the pipes mentioned in either ordinance; and neither of the franchises under which the heating and gas pipes respectively are placed by the owner in Mulberry street contains any provision purporting to relieve the owner of the usual duty to adjust their location in conformity with the grade line, whenever improvement of a street was required. Thus, whatever grant of use in a street may be within the power of a municipality, we believe the doctrine to be settled that the franchises above mentioned confer no property rights which are not subject to the public requirements for changing their location, at the expense of the owner, without compensation from the municipality or abutting owners. *New Orleans Gas Co. v. Drainage Comm.*, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831, and authorities there cited.

[2] Support for the order, therefore, rests on the proposition that the municipality required the contractors to lower these pipes, under the terms of the contract for the improvement. It is unquestioned that neither the ordinance, nor the estimate required by statute for letting the contract, contained any provision for such undertaking or expense, and the sole basis for the contention appears in a paper in evidence, entitled "Specifications for Mulberry Street Improvement," containing among the printed "General Requirements" this clause:

"Section 9. The contractor shall at his own expense remove or adjust all sewer drains, gas, or water mains, or any other property that may be in the way of this improvement, and will be held responsible for any damages done thereto."

We are impressed with no view of the clause referred to which would authorize the interpretation thus sought in favor of the appellee as provision on the part of the municipality to relieve the owner of his duty to lower the pipes and make the expense thereof a public

charge. Under the facts above stated the municipality was neither required nor authorized to do so, and no provision to that end was made in the ordinance or estimate. Presumptively, it was not the purpose of the authorities thereof, through these general terms of the printed form of specifications for public work, to confer such benefit as a gratuity, chargeable as an expense of the improvement, to be borne by the abutting lot owners. It further appears, however, that the so-called "specifications" above mentioned were unauthenticated as an act of the municipality. The master found, in accord with the evidence, that they were not even filed in the office of the city clerk, as referred to in the contract and required by statute, but appeared only in the office of the county surveyor, who was not an officer of the city. While incorporation in the ordinance may not be required under the present statute—as theretofore held in *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471—no doubt is entertainable that they must be made a part of the record for authentication as a municipal requirement (*Kilgallen v. Chicago*, 206 Ill. 557, 559, 69 N. E. 586), and that the clause relied upon was inadmissible for any purpose of the issue, if not for all purposes.

The order of the District Court, therefore, cannot be upheld under the evidence, and the report of the master was erroneously overruled. Such order is reversed accordingly, with direction to dismiss the proceedings against the appellants, and grant the relief prayed in their (so-called) cross-petition.

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**BORDEN ICE CREAM CO. et al. v. BORDEN'S CONDENSED MILK CO.**

(Circuit Court of Appeals, Seventh Circuit. November 14, 1912.)

No. 1,904.

**1. TRADE-MARKS AND TRADE-NAMES (§ 10\*)—NAMES SUBJECT OF OWNERSHIP—NAMES OF PERSONS.**

A personal name is not subject to exclusive appropriation as a trade-mark, even though registered as such.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 14; Dec. Dig. § 10.\*]

Right to use one's own name as trade-mark or trade-name, see notes to 17 C. C. A. 579; 27 C. C. A. 357.]

**2. TRADE-MARKS AND TRADE-NAMES (§ 78\*)—UNFAIR COMPETITION—RIGHT TO EQUITABLE RELIEF.**

Relief against unfair competition is granted by a court of equity only on the ground that complainant's business is injured thereby.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 88; Dec. Dig. § 78.\*]

**3. TRADE-MARKS AND TRADE-NAMES (§ 78\*)—UNFAIR COMPETITION—USE OF PERSONAL NAMES.**

Complainant, Borden's Condensed Milk Company, held not entitled to an injunction to restrain the use by defendant of the name "Borden" in its corporate name of "Borden Ice Cream Company," where complainant had never made or sold commercial ice cream, which was the business for

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which defendant was incorporated, so that the two companies have never come into competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 88; Dec. Dig. § 78.\*

Unfair competition in use of trade-mark or trade-name, see notes to 20 C. C. A. 165; 30 C. C. A. 376.]

▲ **TRADE-MARKS AND TRADE-NAMES (§ 68\*)—"UNFAIR COMPETITION."**

The fundamental test of "unfair competition" is not whether the public is likely to be deceived as to who is the maker or seller of goods, but is whether or not the defendant is, in effect, by his conduct, passing off his goods as complainant's goods, or his business as complainant's business.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. § 68.\*

For other definitions, see Words and Phrases, vol. 8, p. 7174.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaat, Judge.

Suit in equity by Borden's Condensed Milk Company against the Borden Ice Cream Company, Charles F. Borden, George W. Brown, Edgar V. Stanley, William H. Powers, and Harry Lawler. From an order granting a preliminary injunction (194 Fed. 554), defendants appeal. Reversed.

This is an appeal from an interlocutory order of injunction entered in the District Court, restraining the appellants "from the use of the name 'Borden' in the manufacture or sale of ice cream and like articles, and the manufacture or sale of milk products in any of their forms, without plainly and in written or printed form attached to all cartons of such commodities, and upon all wagons or other vehicles used in the delivery of such commodities, and on all letter heads and other stationery going out to customers and to the public, and in all places where the name 'Borden's Ice Cream Company' may hereafter appear in the transaction of any business by the defendants, advising purchasers and the public in an unmistakable manner that the product of the defendants is not that of the complainant, 'Borden's Condensed Milk Company.'"

The word "Borden" in the corporate name of the appellee was taken from the name of Gail Borden, who founded the business in the year 1857, and since that time it has been and is now a trade-name of great value, identified almost universally with the business of milk and milk products of the appellee and its predecessors. The trade-name "Borden," or the word "Borden," constitutes one of the principal assets of the appellee, and is widely known and identified with the good will and public favor enjoyed by it throughout the United States.

On May 31, 1899, the appellee was incorporated under the laws of the state of New Jersey, with broad corporate powers, and specifically authorized "to manufacture, sell and otherwise deal in condensed, preserved and evaporated milk and all other manufactured forms of milk; to produce, purchase and sell fresh milk, and all products of milk; to manufacture, purchase and sell all food products; to raise, purchase and sell all garden, farm and dairy products; to raise, purchase and sell, and otherwise deal in, cattle and all other live stock; to manufacture, lease, purchase and sell all machinery, tools, implements, apparatus and all other articles and appliances used in connection with all or any of the purposes aforesaid, or with selling and transporting the manufactured or other products of the company; and to do any and all things connected with or incidental to the carrying on of such business, or any branch or part thereof."

It may be stated in this connection that the charter of the company con-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tains no express authority to manufacture or sell what is known commercially as ice cream.

The record shows that the appellee uses in the disposition of its products some thirty-two brands, each one of which either contains the name "Borden," or is used in connection with the name "Borden's Condensed Milk Company." Of these brands sixteen specifically refer to condensed or evaporated milk, seven to candy, two to malted milk, one to coffee, one to butter, one to butter-milk, one to fluid milk, two to cream, and one to malted milk ice cream; and that trade-marks have been registered on most of the brands.

Appellee has developed in the state of Illinois and the city of Chicago, and elsewhere, a large business in the sale of fresh milk and cream and evaporated milk to confectioners for use by them in making commercial ice cream. It has expended large sums of money in promoting and advertising its business, and particularly in extending the sale of the so-called "Borden's Peerless Brand Evaporated Milk, Confectioners' Size," a high quality of evaporated milk inclosed in cans, especially designed for use in the manufacture of ice cream.

For more than two years prior to the filing of the bill in the District Court, the appellee had been manufacturing a form of ice cream known as "Borden's Malted Milk Ice Cream," which product is, as the name implies, an ice cream made with malted milk as its basic element, and is especially adapted for use in hospitals. This malted milk ice cream, which hitherto has been used only in hospitals, the appellee is about to place on the market for general use in competition with commercial ice cream.

On May 25, 1911, the appellants Charles F. Borden, George W. Brown, and Edgar V. Stanley applied to the Secretary of State of the state of Illinois for a license to incorporate under the name of "Borden Ice Cream Company." On July 31, 1911, the appellee notified the individual appellants that the term "Borden" had become so firmly established in connection with the products of the appellee the use of that word in connection with any company dealing in milk products would lead to the presumption that they were the products of the appellee, and demanded that the word "Borden" be eliminated from appellants' company name.

On the same day appellee protested to the Secretary of State of the state of Illinois against the issuance of any charter under the name of "Borden Ice Cream Company," but on the 16th of August, 1911, a charter was duly issued to the "Borden Ice Cream Company," by which it was authorized "to manufacture and sell ice cream, ices and similar products."

The appellant Charles F. Borden had never before been engaged in the ice cream business, or in buying or selling milk or milk products, or in any similar business, and is not the principal person connected with the appellant Borden Ice Cream Company. The appellant Lawler is an ice cream manufacturer, and has subscribed to 47 out of a total of 50 shares of stock of the Borden Ice Cream Company. Charles F. Borden has subscribed to one share of stock, and has not paid for that.

The bill charges, upon information and belief, that it is the intention of appellant Borden Ice Cream Company to use the word "Borden" for the purpose of trading upon the reputation of appellee's goods and products, and for the purpose of deceiving and defrauding the public into the belief that such product is the product of the appellee; that such "improper, deceitful and fraudulent use of the name 'Borden' will be a great and irreparable injury to the complainant's [appellee's] property right in its trade-name; and that the reputation of the products of complainant [appellee] will be greatly injured thereby; and that the business of complainant [appellee] will be injured;" and that there will be great confusion in the business carried on by the original company because of such improper use; and that it will be impossible for present and prospective customers to know that the product of the Borden Ice Cream Company is not the product of Borden's Condensed Milk Company.

The bill and the affidavits on file do not show any facts tending to sustain the allegation of irreparable injury to the old company or its business, or showing or tending to show that the old company has been or will be injured



in any way in the business which it is now engaged in. Moreover, it does not appear that the malted milk ice cream manufactured by the old company will in any way come into competition with the commercial ice cream proposed to be put on the market by the new company.

The bill was filed before the defendant had started to do any business. The answer admits most of the material allegations, but denies all fraudulent purpose.

George W. Brown and Wharton Plummer, both of Chicago, Ill., for appellant.

Pringle & Fearing, of Chicago, Ill., for appellee.

Before BAKER and SEAMAN, Circuit Judges, and CARPENTER, District Judge.

CARPENTER, District Judge (after stating the facts as above). [1] A personal name, such as "Borden," is not susceptible of exclusive appropriation, and even its registration in the Patent Office cannot make it a valid trade-mark. *Howe Scale Co. v. Wyckoff*, 198 U. S. 134, 25 Sup. Ct. 609, 49 L. Ed. 972; *Elgin Natl. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247.

There is no charge made in the bill that the appellants are infringing, or propose to infringe, upon any technical trade-mark of the appellee, so we may dismiss any claim for relief upon that score.

[2] The only theory upon which the injunction in this case can be sustained is upon that known as unfair competition. Relief against unfair competition is granted solely upon the ground that one who has built up a good will and reputation for his goods or business is entitled to all of the resultant benefits. Good will or business popularity is property, and, like other property, will be protected against fraudulent invasion.

The question to be determined in every case of unfair competition is whether or not, as a matter of fact, the name used by the defendant had come previously to indicate and designate the complainant's goods. Or, to put it in another way, whether the defendant, as a matter of fact, is, by his conduct, passing off his goods as the complainant's goods, or his business as the complainant's business.

[4] It has been said that the universal test question in cases of this class is whether the public is likely to be deceived as to the maker or seller of the goods. This, in our opinion, is not the fundamental question. The deception of the public naturally tends to injure the proprietor of a business by diverting his customers and depriving him of sales which otherwise he might have made. This, rather than the protection of the public against imposition, is the sound and true basis for the private remedy. That the public is deceived may be evidence of the fact that the original proprietor's rights are being invaded. If, however, the rights of the original proprietor are in no wise interfered with, the deception of the public is no concern of a court of chancery. *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609.

Doubtless it is morally wrong for a person to proclaim, or even intimate, that his goods are manufactured by some other and well-known concern; but this does not give rise to a private right of action, unless the property rights of that concern are interfered with. The use by the new company of the name "Borden" may have been with fraudulent intent; and, even assuming that it was, the trial court had no right to interfere, unless the property rights of the old company were jeopardized. Nothing else being shown, a court of equity cannot punish an unorthodox or immoral, or even dishonest, trader; it cannot enforce as such the police power of the state.

In the case now under our consideration the old company (the appellee) never has manufactured what is known as commercial ice cream. The new company (the appellant) was incorporated for the sole purpose of manufacturing and putting on the market such an article.

Nonexclusive trade-names are public property in their primary sense, but they may in their secondary sense come to be understood as indicating the goods or business of a particular trader. Such trade-names are acquired by adoption and user, and belong to the one who first used them and gave them value in a specific line of business. It is true that the name of a person may become so associated with his goods or business that another person of the same or a similar name engaging in the same business will not be allowed to use even his own name, without affirmatively distinguishing his goods or business.

The secondary meaning of a name, however, has no legal significance, unless the two persons make or deal in the same kind of goods. Clearly the appellants here could make gloves, or plows, or cutlery, under the name "Borden" without infringing upon any property right of the old company. If that is true, they can make anything under the name "Borden" which the appellee has not already made and offered to the public. *George v. Smith* (C. C.) 52 Fed. 830.

[3] The name "Borden," until appellants came into the field, never had been associated with commercial ice cream. By making commercial ice cream the appellants do not come into competition with the appellee. In the absence of competition, the old company cannot assert the rights accruing from what has been designated as the secondary meaning of the word "Borden." The phrase "unfair competition" presupposes competition of some sort. In the absence of competition the doctrine cannot be invoked.

There being no competition between the appellants and appellee, we are confronted with the proposition that the appellee, in order to succeed on this appeal, has and can enforce a proprietary right to the name "Borden" in any kind of business, to the exclusion of all the world.

It is urged that appellee has power, under its charter, to make commercial ice cream, and that it intends some day to do so. If such intention can be protected at this time, it might well be that appellee, having enjoined appellants from making commercial ice cream, would rest content with selling its evaporated milk to ice cream dealers, and

never itself manufacture the finished product. But, as was well stated by Judge Coxe, in *George v. Smith*, *supra*:

"It is the party who uses it first as a brand for his goods, and builds up a business under it, who is entitled to protection, and not the one who first thought of using it on similar goods, but did not use it. The law deals with acts and not intentions."

Appellee also urges that it makes and sells large quantities of evaporated or condensed milk to manufacturers of ice cream, and that if the appellants are permitted to use the name "Borden" in the ice cream business dealers probably will believe that its ice cream is made by appellee, and will in consequence buy the finished product rather than the component parts, and that appellee's sales of evaporated or condensed milk will fall off, to its manifest damage. Such result would be too speculative and remote to form the basis of an order restraining men from using in their business any personal name, especially their own.

Appellee is in this position: If it bases its right to an injunction upon the doctrine of unfair competition, no competition of any kind has been shown by the record. If it relies upon some supposed damage which may result from appellants' use of the name "Borden" in connection with inferior goods, the action is premature, because the appellants, as yet, have neither sold nor made anything.

The order of the District Court must be reversed; and it is so ordered

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LIVERPOOL & LONDON & GLOBE INS. CO., Limited, v. HARDING.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1912.)

No. 3,720.

(*Syllabus by the Court.*)

**INSURANCE (§ 229\*)—CANCELLATION OF POLICY BY INSURER—NOTICE AND TENDER—FOREIGN CORPORATION.**

Under the provision of an insurance policy that it may be canceled by the insurer by giving notice of cancellation and tendering a ratable proportion of the premium to the insured, mailing a proper notice, or a copy of it, and the return premium in a letter postpaid and addressed to the insured at its post office address, or delivering a copy of the notice and the return premium to an agent in charge of its office and business, are sufficient to effect the cancellation, where the insured is a foreign corporation, and all its officers are absent from the state in which its office, its principal place of business, and the property insured are situated.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 500-503; Dec. Dig. § 229.\*]

In Error to the Circuit Court of the United States for the District of Minnesota; Page Morris, Judge.

Action by Herbert N. Harding against the Liverpool & London & Globe Insurance Company, Limited. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

N. H. Chase, of Minneapolis, Minn. (M. H. Boutelle, of Minneapolis, Minn., on the brief), for plaintiff in error.

L. K. Luse, of Superior, Wis. (L. T. Powell and C. Z. Luse, both of Superior, Wis., on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The Liverpool & London & Globe Insurance Company, Limited, a corporation, sued Herbert N. Harding, its agent, for damages for his failure to obey its order to cancel its policy of insurance on certain buildings, machinery, and fixtures of the Northern Pine Crating Company, a corporation, which were situated in the village of Cass Lake in the state of Minnesota, where Harding resided, and there was a verdict and judgment for the defendant. This writ of error questions that judgment.

The Northern Crating Company was a corporation of the state of Wisconsin, but its manufacturing plant, its principal place of business, and its office for the transaction of business were at Cass Lake, in the state of Minnesota. Its officers, who controlled its business, were E. E. Kenfield, its president, O. A. Lamoreaux, its treasurer, who were engaged in business under the firm name of Kenfield & Lamoreaux, at Washburn, in the state of Wisconsin, and its secretary, M. S. Lamoreaux, who resided in Chicago and never went to Cass Lake. John G. Oman was the bookkeeper of the company. He resided at Cass Lake, worked in the office of the company there, but did not have charge of its insurance. In June, 1909, when the transactions were had which condition the controversy in this case, Kenfield was not at Cass Lake, O. A. Lamoreaux was not there after the 1st of June, and after his departure Oman, the bookkeeper, was the employé of the company in charge of its office and business. The Crating Company held a policy of insurance against fire on its property at Cass Lake for \$3,000, issued by the plaintiff, which contained the familiar clause:

"The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of 10 days from such notice."

The defendant, Harding, was the agent of the plaintiff. He had issued this policy to the Crating Company on the plaintiff's behalf, he had authority from the latter to cancel it, and it was his duty to make the cancellation promptly whenever requested by the plaintiff so to do. *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409, 31 N. W. 454; *Franklin Ins. Co. v. Sears* (C. C.) 21 Fed. 290, 293.

One of the excuses for his delay in giving notice to the insured of the cancellation of the policy pursuant to the order of the company, which the defendant persistently urged at the trial, was that the only officers of the company upon whom he could serve a legal notice of cancellation were absent from the state of Minnesota, and that he would have been obliged to go to Washburn, in the state of Wisconsin, where they were engaged in business, a distance of 200



miles, to give them notice and to tender to them the return premium. It is assigned as error that the court below so charged, and a careful reading of the record of the proceedings below discloses the fact that this theory dominated the trial, the charge, and the result. Was it sound? The property insured was at Cass Lake, in the state of Minnesota. It was owned and insured by a foreign corporation, all of whose officers were then, and generally, absent from the state. The principal, if not the only, place of business of the insured corporation was at Cass Lake. There were the buildings, the machinery, and the office with which it conducted its business, and there necessarily was the agent of the corporation in charge of that property, that business, and that office, in the prevailing absence of the officers of the company. Cass Lake, Minn., was the post office address of the Crating Company, and the record discloses the fact that the notice of cancellation, addressed and mailed to it at that place on June 19, 1909, was received by it, answered, and acted upon. The notice by the terms of the policy was to be given to the corporation, and that entity could not be heard to say that one whom it empowered to receive for it its letters from the Post Office Department was not authorized to receive for it the notices and the contents which those letters contained. A notice by mail, which is received by the party to be notified, is sufficient, where no other method of giving the notice is prescribed, and the legal presumption is that a letter properly addressed to the party to be notified, postpaid and mailed, is received by the addressee. *Crown Point Iron Co. v. Ætna Ins. Co.*, 127 N. Y. 608, 619, 28 N. E. 653, 14 L. R. A. 147. The Revised Laws of Minnesota of 1905 (section 4109) provide that service of a summons in a civil action may be made on a foreign corporation having property and doing business in the state of Minnesota by delivering a copy thereof to any of its officers or agents within the state, and a higher degree of service of a notice of cancellation of an insurance policy ought not to be necessary.

Our conclusion is that under the provision of an insurance policy that it may be canceled by the insurer by giving notice of cancellation and tendering a ratable proportion of the premium to the insured, mailing the notice, or a copy of it, and the return premium in a letter postpaid and addressed to the insured at its post office address, or delivering a copy of the notice and the return premium to an agent of the insured in charge of its office and business, are sufficient to effect the cancellation, where the insured is a foreign corporation, and all its officers are absent from the state in which its office, its principal place of business, and the property insured are situated. A foreign corporation may not perpetuate its insurance under such a policy by selecting officers who absent themselves from the state where its property insured, its office, business, and post office address are situated, and failing to give express authority to its agent in charge thereof to accept notice of cancellation and the return premium. Because the court below fell into an error in this regard, the judgment below must be reversed, and the case must be tried again.

Other specifications of error were made and have been discussed by counsel. But as the conclusion already reached must radically change the course of the next trial, and the evidence therein may differ from that now before us, so that the issues of law urged upon our consideration at this time may become moot questions, or disappear entirely, the case will not now be farther considered.

Let the judgment below be reversed, and the case be remanded for a new trial.

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In re BECKWITH.

(Circuit Court of Appeals, Seventh Circuit. November 15, 1912.)

No. 1966.

**MANDAMUS (§ 47\*)—SUIT FOR INFRINGEMENT—ACCOUNTING—PROCEDURE.**

Leave granted to a complainant in a suit for infringement to file a petition for an alternative writ of mandamus to present the question whether, on an accounting before a master, he was entitled to require defendant to submit sworn statements of account under equity rule 79 (29 Sup. Ct. xxxvi) which right was denied by the District Court.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 93, 94; Dec. Dig. § 47.\*]

In the matter of the application of Arthur K. Beckwith for leave to file a petition for an alternative writ of mandamus. Leave granted.

Harry C. Howard, of Kalamazoo, Mich. (Fred L. Chappell, of Kalamazoo, Mich., of counsel), for petitioner.

A. L. Morsell, of Milwaukee, Wis., and Samuel W. Banning and Walker Banning, both of Chicago, Ill., opposed.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

PER CURIAM. Application is presented on behalf of the complainant for leave to file a petition for an alternative writ of mandamus, to enforce proceedings for an accounting for infringement of his patent, pursuant to the mandate of this court, on affirmance of a decree in his favor, in the case entitled Malleable Iron Range Co. v. Beckwith, 189 Fed. 74, 110 C. C. A. 638. It appears that the matters of accounting thereupon have been referred by the trial court to a master; that such master issued a summons under equity rule 79 (29 Sup. Ct. xxxvi), requiring the defendant to submit sworn statements of account (3 Foster's Fed. Prac. 2264), as specified in the summons; that the defendant had produced and tendered books of account and records, but refused to make and submit the required statements of account, and moved to quash the summons; that the master denied the motion to quash, and certified to the District Court the question of enforcement of the order, as for contempt; and that thereupon the District Court overruled the master's requirement of sworn statements, stating that equity rule 79 was "entirely inapplicable" thereto, and directed that the "summons be quashed and the accounting proceed" accordingly.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The ruling thus stated obviously withholds from the complainant submission on the part of the defendant of statements of the account of infringing matters in any form, other than the above-mentioned tender of the general books of account, so that the primary issue to be raised by the proposed petition for the writ is whether the petitioner is entitled to the benefits of the above-mentioned equity rule. If that rule is applicable to require such statements in the accounting referred to, we believe no remedy is open to the petitioner for its enforcement, otherwise than through the writ of mandamus. The objections, therefore, to entertainment of the petition are overruled, but all questions upon the merits can be determined only when the issues are joined and submitted. With no disputed facts, it is probable that the pleadings can present the questions, both of applicability of the equity rule and of substantial rights involved therein, for hearing before the commencement of the January session of this court.

Leave is granted, accordingly, to file the petition within 10 days, so that issues may be joined for an early hearing.

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In re WELCH MFG. CO.

(Circuit Court of Appeals, First Circuit. January 6, 1913.)

No. 1,001.

**1. MANDAMUS (§ 7\*)—NATURE OF WRIT—DISCRETION.**

Though mandamus has become a civil suit, it is nevertheless strictly an extraordinary remedy, granted only in extraordinary cases, and dependent, also, on the exercise of a wise judicial discretion.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 5; Dec. Dig. § 7.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4323-4330; vol. 8, pp. 7714, 7715.]

**2. MANDAMUS (§ 16\*)—SCOPE OF WRIT—COMPELLING WITNESS TO ANSWER QUESTIONS.**

Where the Circuit Court of Appeals was the appellate tribunal having jurisdiction to review an action for infringement of a patent, and in case of an appeal it would hold that certain questions asked of a witness on cross-examination were inadmissible on the merits, it would not grant mandamus requiring the trial judge to compel the witness to answer the questions.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 48, 59, 60; Dec. Dig. § 16.\*]

Petition by the Welch Manufacturing Company for writ of mandamus to direct the judge of the District Court for the District of Massachusetts to compel the witness to answer certain questions put on cross-examination in an equity suit pending in that court for infringement of patent. Writ denied.

See, also, 201 Fed. 563.

Fred L. Chappell, of Kalamazoo, Mich., for petitioner.

Nathan Heard, of Boston, Mass., opposed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a petition for a writ of mandamus to the judge of the District Court for the District of Massachusetts, which requests that he be required to direct answers to be taken to certain questions put on cross-examination of a witness in a suit in equity pending in that court, charging an infringement by the petitioner of certain letters patent of the United States. The witness declined to answer the interrogatories involved. It is plain that the questions involved were immaterial and inconsequential, and that, on ultimate appeal to this court from a decision of the District Court on the merits of the bill, they would not be considered, and would have no effect. Nevertheless the plaintiff relies on *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521, as obligatory on the District Court in the premises, so that, therefore, on this proceeding, he claims that all we have to do is to require that court to enforce the rule there laid down by the Supreme Court.

It is not necessary that we should detail the circumstances with reference to the fact that the questions arose originally before an examiner, and were then finally disposed of by the learned judge of the District Court on an application to him, nor whether the question whether *Blease v. Garlington* applied in any event under the circumstances, and more especially the question whether *Blease v. Garlington* deprived the District Court of its control over the cross-examination, which apparently that court held to be protracted to an unreasonable extent, because the fact that the questions involved would ultimately be held immaterial and inconsequential by this court, if the case came to final determination on the merits, relieves us from any duty of proceeding to a decree on a petition for writ of mandamus.

It is apparent that the questions which the petitioner submitted, and which were disallowed by the District Court, are ineffectual. No such testimony as called for by these questions would be admissible on the hearing on the merits. Under these circumstances, the petition must be denied for two reasons:

[1] The first one is of a general character, because any proceeding by mandamus, although it has become now a civil suit, is of a prerogative nature, and is strictly an extraordinary remedy granted only in extraordinary cases, and dependent also on the exercise of a wise judicial discretion. *High on Extraordinary Legal Remedies* (3d Ed., 1896) § 6. A second and more particular reason is that the writ will never be granted where, if issued, it would prove unavailing, or "when it would be ineffectual to aid the party aggrieved." *Id.* § 14. In this case it would be unavailing, because the same court, the Court of Appeals, which is now asked to issue this writ, would, if the writ issued, and the evidence was offered, strike out the evidence on appeal.

[2] If the action of this court was to be revised as of course by some other court of equal or superior jurisdiction, it is possible to suppose that the result might be otherwise; but, in the theory of the law,



the ultimate tribunal is the same in each case, namely, the Court of Appeals, and it would be absurd that this court should proceed here to a judgment which hereafter it would be sure to determine was ineffectual for any practical purpose. The mere fact that there is a possibility that, on a petition for a writ of certiorari, the case might go to the Supreme Court, is not relevant.

Since this opinion was drawn, the petitioner has called our attention to a decision of the Circuit Court of Appeals for the Seventh Circuit. *In re Beckwith*, 201 Fed. 518, in which the opinion was passed down on November 15, 1912. This was on an application for leave to file a petition for an alternative mandamus with reference to proceedings before a master. We have no issue with that opinion whatever, because it states expressly that a question was raised whether the petitioner was entitled to the benefit of equity rule 79; and the opinion states hypothetically the result if that rule is applicable, and also the result if it is not applicable. By that opinion the question sought to be raised by the application is shown to be a suitable question for mature consideration, while here we are able to determine in advance that no question whatever is open. It is plain that the case thus brought to our attention in no way bears on our conclusion here, and that it requires no further consideration.

The petition is dismissed, with costs for the respondent.

ALDRICH, District Judge (concurring). I concur in the foregoing conclusion that, upon petition for mandamus, in a case where the situation is so fully presented as to make it clear upon hearing that there is no meritorious substance in the matter presented, the extraordinary remedy of mandamus should not be ordered by a court which would be the appellate court, on writ of error or upon appeal, to review the same questions. I incline to the view, however, that it was competent and admissible for the party, upon whom was the burden to sustain the patent, to call the patentee as a witness to the question whether the principle involved in the patent was old or new. And if it was proper to do that as a general proposition, it was not inadmissible to cross-examine, within reasonable scope in respect to the subject-matter of the direct examination, the ultimate question whether the principle was old or new, to be determined, of course, by the court under the patent as explained by the proofs. But there is enough in the record to show, not only that there was no weighty substance in the matter proposed by the cross-examination, but that it was ruled as discretion that the proposed examination would exceed a reasonable scope. This being so, this is not a situation which involves one of those cases of extreme or extraordinary exercise of discretion, justifying disturbance of discretionary *nisi prius* rulings.

**WALSH v. FIRST NAT. BANK OF MAYSVILLE, KY.**

(Circuit Court of Appeals, Sixth Circuit. January 7, 1913.)

No. 2,251.

**1. BANKS AND BANKING (§ 134\*)—SET-OFF—BANK DEPOSIT.**

In the absence of fraud or collusion, a bank has the right to apply a balance of a regular deposit standing to the credit of a bankrupt on the date of the bankruptcy to the payment of notes due it from the bankrupt.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. § 134.\*]

**2. BANKRUPTCY (§ 303\*)—PREFERENCE—SUFFICIENCY OF EVIDENCE.**

A finding by a bankruptcy court that the evidence did not show a bankrupt to have been insolvent at the time of its payment of a debt to a bank, nor establish fraud or collusion in such payment, affirmed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.\*]

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit in equity by H. L. Walsh, trustee in bankruptcy of the Tiger Shoe Manufacturing Company, bankrupt, against the First National Bank of Maysville, Ky. Decree for defendant, and complainant appeals. Affirmed.

Allan D. Cole, of Maysville, Ky., for appellant.

Garrett S. Wall, of Maysville, Ky., for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and McCALL, District Judge.

McCALL, District Judge. H. L. Walsh, trustee in bankruptcy of the Tiger Shoe Manufacturing Company, filed the petition in this case against the First National Bank of Maysville, Ky., to recover \$2,089.35. It is alleged that the bankrupt, while insolvent, and within four months prior to the adjudication in bankruptcy, with the intent to give the bank a preference over other creditors of the same class, transferred to the bank property of the value of \$2,089.35; that the bank, at the time of accepting said transfer, knew, or had reasonable grounds to believe, that the Shoe Company was insolvent; and that the transfer was made to the bank with the intent to prefer it over other creditors of the same class.

Certain statements are made in relation to the conduct of the bankrupt and the bank (the defendant) upon which is based the further allegation that they acted in collusion in the matter of the transfer, for the fraudulent purpose of giving defendant a preference.

The material allegations in the petition relating to the insolvency of the bankrupt on the date of the alleged unlawful transfer of property to the defendant, the knowledge of the defendant of such insolvency, the intent of the parties to give the bank a preference over other creditors, and the allegations relating to collusion between the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bankrupt and the defendant to give the bank a preference, are all denied in the answer to the petition.

The case was heard upon the pleadings and proof. The court below dismissed the petition, and the petitioner has appealed and assigned errors.

The undisputed facts are that the Tiger Shoe Manufacturing Company, the bankrupt, was indebted to the First National Bank of Maysville, Ky., in the sum of \$2,000, with interest, evidenced by two promissory notes, in equal amounts, of date January 4, 1901, and June 9, 1901. The notes had matured. On or about September 24, 1901, the wife of the secretary and treasurer of the bankrupt loaned the bankrupt \$3,000 upon a mortgage given by it for \$5,000. The amount so loaned was deposited to the bankrupt's credit with the defendant bank, and the amount paid to the bank in satisfaction of the two notes for \$1,000 each, with interest, was paid by a check drawn by the secretary and treasurer of the bankrupt on the amount so deposited.

The only question presented is as to whether or not the payment of the two notes is a voidable preference.

[1] In the absence of collusion, fraud, or insolvency of the debtor, the bank had a right to apply so much of the deposit as was necessary to the payment of its debt. It did not need a check to enable it to get the money. *New York County Nat. Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380; *Germania Savings Bank & Trust Co. v. Loeb* (C. C. A., Sixth Circuit) 188 Fed. 285, 110 C. C. A. 263.

[2] However, as was said by the court below:

"The real claim of the appellant is that Hopper [secretary and treasurer of the bankrupt] and his wife were acting in collusion with the defendant bank, in order to enable it to get its money and not be subject to a suit to recover it back as a voidable preference."

Judge Cochran found that there was not sufficient evidence to prove the charge that at the time of making the payment to the bank the Tiger Shoe Company was insolvent, nor that the bankrupt and the defendant were acting in collusion, and accordingly dismissed the petition.

After an attentive examination of the record, we find no reason to differ from the conclusion reached by the court below. The case of *Kimmerle v. Farr*, 189 Fed. 295, 111 C. C. A. 27, relied on by appellant, contains nothing in conflict with that conclusion.

We are of the opinion that the evidence well warranted the judgment of the District Court.

Affirmed, with costs.

## SUBMARINE ROCK BREAKING CO. v. SUBMARINE CO. et al†

(Circuit Court of Appeals, Third Circuit. December 2, 1912.)

No. 1,621.

## PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—SUBAQUEOUS ROCK BREAKER.

The Rowland reissue patent, No. 12,933 (original No. 907,407), for a subaqueous rock breaker, discloses patentable novelty and invention, and covers a new combination, and a device which was the first, and is to this time the only, successful deep-water rock breaker; also *held* infringed.

Appeal from the District Court of the United States for the District of New Jersey; Joseph Cross, Judge.

Suit in equity by the Submarine Rock Breaking Company against the Submarine Company and others. Decree for complainant, and defendants appeal. Affirmed.

For opinion below, see 193 Fed. 63.

James & Malcolm G. Buchanan, of Trenton, N. J., and Coale & Hayes, of Boston, Mass., for appellants.

Edward C. Davidson, of New York City, for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Submarine Rock Breaking Company, the owner of reissue patent No. 12,933, granted March 30, 1909, to Charles L. Rowland, for a subaqueous rock breaker, filed a bill against the Submarine Company and others charging infringement of said patent. In an opinion reported at 193 Fed. 63, that court held the patent valid and infringed. From a decree in accordance therewith this appeal was taken.

That opinion so fully and justly discusses all the questions here involved that a further statement by this court could but repeat what was there said. We content ourselves, therefore, with briefly setting forth the conclusions to which our study of this case has led us:

First. The proofs in this case show that a rock breaker of the Rowland device successfully breaks rock under water 20, 30, or 40 feet, and that it was the first, and it thus far is the only, successful deep-water rock breaker devised.

Second. This device for the first time disclosed the use, in the submerged end of a pneumatic caisson, of a removable sliding chisel actuated by a striking ram.

Third. During the breaker's operation this chisel remains seated on the rock until the latter is broken by repeated blows of the ram reciprocated in the caisson.

Fourth. This continuous chisel seating insures successive blows at the same point, obviates the formation of a bed of broken débris on the top of the rock, with consequent cushioning of subsequent chisel blows, the clogging of the caisson by such débris, and eliminates side or sliding blows.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied February 12, 1913.



Fifth. These features were new in co-operative combination, made a deep-water subaqueous rock breaker possible and successful, and involved patentability.

Sixth. The machine of the defendant involves all these features, and infringes the patent in suit.

Adopting, therefore, the opinion of the court below as a full expression of this court's views, its decree is affirmed.

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CARDWELL v. E. J. WILKINS CO.

(Circuit Court of Appeals, Second Circuit. December 9, 1912.)

No. 28.

**PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—WALLET.**

The Cardwell patent, No. 940,853, for a wallet designed to carry paper money, is void for lack of invention; also held not infringed, if conceded validity.

Appeal from the District Court of the United States for the Southern District of New York; C. M. Hough, Judge.

Suit in equity by James R. Cardwell against the E. J. Wilkins Company to restrain infringement of patent No. 940,853. Decree for defendant, and complainant appeals. Affirmed.

D. Anthony Usina and Linthicum, Belt & Fuller, all of New York City (Charles C. Linthicum, of New York City, and William O. Belt, of Chicago, Ill., of counsel), for appellant.

Edward Q. Keasbey and George M. Keasbey, both of Newark, N. J., for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The Cardwell patent is for a wallet designed to carry paper money. The first claim only is involved and it sufficiently describes the patented device. It is as follows:

"A wallet comprising a substantially flat sheet of suitable wallet material presenting a superficial area approximating that of a bank note and having creases extending longitudinally and transversely and dividing the sheet into substantially four equal parts, whereby paper money laid upon the sheet may be readily interfolded with the wallet, and a wing extending from the main sheet of the wallet adapted to be folded over the paper money, material of the sheet being removed where the lines of the creases intersect to permit the sheet rapidly to fold."

The wallet is made by taking a flat sheet of leather, or similar material, a little larger than a bank note and creasing it longitudinally and transversely so that it will be divided into four substantially equal parts. A wing of the same material is attached to the main sheet to hold the money in place and at the point in the center where the creases intersect the material is cut away to permit the sheet to fold readily. In short, the alleged invention consists of a bill-fold creased so as to fold longitudinally and transversely with a hole cut in the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

material at the point where the creases intersect. The practice of carrying paper money by folding a roll of bills lengthwise and then across was well known at the date of the application.

It is manifest that a wallet to cover money so folded must conform to the size of the bills and must be folded as the bills are folded. At the central point where four thicknesses of leather are added to the thickness of the bills, it is manifest that the bunching and buckling will be lessened by removing the leather. We do not think it required an exercise of the inventive faculties to do this. The King patent of December 1, 1908 shows the precise construction in this particular. The specification says:

"The apertures 19-20 materially facilitate the folding, and prevent the wrinkling or buckling of the papers at the corners when folded."

It is unnecessary to discuss the question suggested in the appellant's brief that the King patent is not a fair reference; it is enough that it confirms our opinion that any intelligent mechanic desiring to prevent buckling would remove as much of the material as possible at the point where the buckling occurs.

The Caldwell patent may describe a convenient wallet for one who desires to carry his bills in a separate book, and folded in the particular manner described. Its novelty in this respect gave it a certain popularity with the public but we cannot believe that it required invention to make a leather bill-fold and cut away the leather at the point where the bills and leather would obviously buckle and bunch. It was the work of the mechanic and not of the inventor; it required no more inventive genius to make the hole at the intersection of the two seams than it did to make the eyelet hole in the upper right hand corner of the wallet, to hold the chain hook.

But, in any event, the claim is not infringed. In no circumstances can a broad construction be given to the claim. It must, in view of the prior art, and the extreme simplicity of the improvement, be limited to the precise structure shown and described, and, as so limited, there can be no pretense of infringement. The material of the defendant's sheet is not removed where the lines of the creases intersect to permit the sheet readily to fold. This opening is clearly described and is pointed out by a reference letter *f* on the drawings. The description says:

"In order to facilitate the folding of the wallet the material composing the main sheet is discontinued just where the longitudinal and transverse creases intersect, so that said material will not buckle and bunch at this intersection."

It then proceeds to show that this buckling is prevented by making a distinct aperture at the point where the creases intersect. The drawing shows this aperture surrounding the center point, the material being taken equally from the upper and lower fold, half being above and half being below the dividing line *c*.

The defendant's wallet has no such aperture; its opening, if the space between the upper folds which are entirely separated from each other, can be called an aperture is wholly in the upper fold. Nothing

is cut away from the lower fold below the dividing crease and the tendency of the lower fold to buckle at the point of intersection is in no way lessened by the fact that there is an open space directly above it in the upper half. In other words, nothing is removed from the lower side of the fold at the point of intersection. Such removal is clearly shown in the drawings and described in the specification, but is not found in defendant's structure.

The decree of the Circuit Court is affirmed with costs,

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NURNBERGER METALL UND LACKIERWARENFABRIK VORMALS  
GEBRUDER BING, AKTIENGESELLSCHAFT, v. NEW  
TOY MFG. CO.

(Circuit Court of Appeals, Second Circuit. December 9, 1912.)

No. 162.

PATENTS (§ 328\*)—INVENTION—WALKING TOY FIGURES.

The Müller patent, No. 1,035,098, for mechanism for producing a walking motion in toy figures, *held void for lack of invention on a motion for preliminary injunction.*

Appeal from the District Court of the United States for the Southern District of New York; E. Henry Lacombe, Judge.

Suit in equity by the Nurnberger Metall und Lackierwarenfabrik Vormalis Gebruder Bing, Aktiengesellschaft, against the New Toy Manufacturing Company. From an order denying a motion for a preliminary injunction restraining the defendant from infringing the claim of letters patent No. 1,035,098, granted to Heinrich Müller, of Nuremberg, Germany, for an improvement in means for producing a walking movement in toy figures, complainant appeals. Affirmed.

Marcellus Bailey, of Washington, D. C., and Kerr, Page, Cooper & Hayward, of New York City, for appellant.

E. W. Scherr, Jr., and Baird, Cox and Scherr, all of New York City, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The patent contains a single claim which is as follows:

"In a mechanism for producing a walking motion in toy figures, the combination of a body member, hollow legs pivoted thereto, a fixed support within each of the hollow legs, a wheel freely mounted on the lower end of each support, and a crank connection between the wheel and leg members whereby upon the rotation of the wheels the legs are given a reciprocating motion."

The object of the patentee was to produce in toy figures, especially animals, which are pushed or drawn forward, a walking or running movement, the legs moving alternately and successively backward and forward. The drawings show the mechanism applied to the legs of a dog, but it is applicable to any toy figure, and such a figure, if found

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the prior art, will, of course, anticipate if the movement of the legs is produced by the same or equivalent means. Four German patents appear in the record without translations.

Ordinarily this circumstance would justify the court in refusing to consider them, at least until satisfactory translations are furnished. In the present case, however, the construction of the toys in question is made sufficiently plain by an examination of the drawings to enable the court to understand the simple mechanism employed. The prior art shows that, by the application of mechanical means, toys representing human beings and animals were made to walk, or that appearance was imparted to them automatically. The Huber patent shows a crank connection between a wheel and the pivoted legs of the toy causing them to move alternately and giving to the figure the appearance of walking. Taking the Huber device in connection with the toys of the other prior patents, we are convinced that it required only mechanical skill to produce the walking dog of the Müller patent. It was necessary to make four legs walk instead of two and it was also necessary to conceal the crank wheel and connections within the legs, but any skilled mechanic would have wit enough to do this.

A walking dog was, quite likely, a pleasing innovation in the toy trade, but mere novelty requiring no exercise of the inventive faculties is not patentable.

We think there is too much doubt upon the question of estoppel to warrant a ruling at this stage of the litigation that the defendant was in such privity with Whitehouse, who was in interference with Müller in the Patent Office, as to prevent it from asserting the invalidity of the patent. It should be an exceedingly clear case of estoppel to justify the court in sustaining a patent which the prior art shows to be invalid.

The order is affirmed.

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#### RANSOME CONCRETE CO. v. GERMAN-AMERICAN BUTTON CO.

(Circuit Court of Appeals, Second Circuit. December 9, 1912.)

No. 126.

#### PATENTS (§ 328\*)—INFRINGEMENT—REINFORCED CONCRETE FLOOR.

The Ransome patent, No. 694,580, for a reinforced concrete floor extending to the face of a building, claims 5 to 10, inclusive, each of which contains other features besides such extension, *held not infringed*. (Coxe, Circuit Judge, dissenting as to claims 7 and 9.)

Appeal from the District Court of the United States for the Western District of New York; John R. Hazel, Judge.

Suit in equity by the Ransome Concrete Company against the German-American Button Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 197 Fed. 172.

This cause comes here upon appeal from a decree of the District Court, Western District of New York, holding letters patent No. 694,580, granted

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



March 4, 1902, to E. L. Ransome, for concrete construction, to be valid and infringed. The opinion of the District Judge will be found in (D. C.) 197 Fed. 172.

The following excerpts from the specifications indicate the character of the construction covered by the patent:

"My invention relates to the construction of buildings of reinforced concrete; and it consists in the extension of a reinforced concrete floor over the external piers or walls of a building and in the formation of this extension into an exterior belt course, and when the floor rests upon external piers it further consists in integrally combining with the floor beam-like extensions above and below to carry the floor from pier to pier and at the same time to form the window heads or curtain walls terminating in window heads for the story below and the window sills or curtain walls terminating in window sills for the story above."

Referring to the drawings, which need not be here reproduced, the patentee says:

"I carry out my invention as follows: After the wall or piers have been brought to the required height, the molds for the floor are set in place, and the floor is extended over the wall or piers and molded into a belt course *A*, as in Figs. 2 and 3. When the floor *A* has to rest upon piers, it is made with the downward extension *B*, which extends to the windows *C*, of which it forms the head, and rests upon piers *D*, which it caps, as at *B'*. Between the piers it can be reduced to any required thickness, as at *B''*, Fig. 2. This extension is reinforced with the tension bar *E*, which by preference extends the length of the building. To the floor *A*, by preference after it has hardened and the piers *G* have been built, is also added the upper extension *F*, placed between the piers *G*. This extension is made of one integral piece with the floor by means of the coil joint *H* or other suitable union, and it extends upward to the window *K*, of which it is the sill. It is by preference rabbeted into the piers. The advantages of this floor are: First, it thoroughly binds the building together, extending as it does entirely across the walls and piers; second, it affords an architectural feature at a trivial cost; third, by the downward extension a deep beam is formed for supporting the floor load, while it also fulfills all the functions of a window head and curtain wall; fourth, by the upward extension the depth of the beam is further increased and extended from *V* to *Y*, Fig. 2, and thus its tensional and compressive stresses are greatly lessened.

"By the term 'belt course' I include any other distinctive feature into which the exterior thickness of the floor could be molded."

The claims in controversy are as follows:

"5. A reinforced concrete floor extending to the exterior face of a building and there forming a belt course with a downward extension forming heads or lintels to the windows below, substantially as described.

"6. A reinforced concrete floor extending to the exterior face of a building and there forming a belt course, capping the piers and windows below, substantially as described.

"7. A reinforced concrete floor extending to the exterior face of a building with an upward window sill extension, substantially as described.

"8. A reinforced concrete floor extending to the face of a building and there forming a belt course with an upward window sill extension, substantially as described.

"9. A reinforced concrete floor extending to the face of a building with downward and upward extensions, substantially as described.

"10. A reinforced concrete floor extending to the face of a building and there forming a belt course and with downward and upward extensions, substantially as described."

Charles Neave, of New York City, for appellant.

E. S. Beach and Edmund Wetmore, both of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Defendant contends that the patent does not involve patentable subject-matter and that it is invalid for lack of invention and because of anticipation. These questions need not be here discussed. Had the suit been brought on claim 2, which is broadly for "a reinforced concrete floor extending to the exterior face of a building and capping the piers thereof, substantially as described," it would be necessary to pass upon them, because defendant's reinforced concrete floor does extend to the exterior face of the building and does cap the piers thereof. Unless the words "substantially as described" operate to narrow this claim, it would be clearly infringed.

Complainant, however, has not sued upon this claim, but rests its case upon other claims, into each of which there enter one or more elements, other than the floor extending over the piers. Thus a "belt course," formed by the floor at the exterior face of the building, is an element of claims 5, 6, 8, and 10. A "downward extension," substantially as described, is an element of claims 5, 9, and 10. An "upward extension," substantially as described, is an element of claims 7, 8, 9, and 10.

The weight of the testimony indicates that the "belt course" is an architectural feature into which the extended floor is molded. The illustrations of defendant's structure, whether in process of construction or completed, do not present any such architectural feature to the untrained eye. The relative appearance of the columns and the floor edge is the same as in the structure of the prior art, known as the mill of Mr. Charles Six, illustrated on page 20 of the exhibit book. Of this latter structure the complainant's witness Prevot, himself an architect, says that the drawing "does not show exterior belt courses at the level of each floor, but only lintels between piers; the piers arising continuously and unbroken, and therefore does not show a belt course," and, further, "the belt course of the patent being something that extends continuously around the building and is not merely between the piers." So far as this element of a "belt course" is concerned, we are satisfied, although there is more conflict in the testimony, that defendant's structure should be classified with the prior art, as represented by the Six Mill, which has no belt course, and does not infringe any claim which is qualified by having the belt course enumerated as one of its elements.

The "downward extension" is for the purpose indicated in the patent: "A deep beam is formed for supporting the floor load," as well as fulfilling the functions of window head and curtain wall. If it were only to fulfill these last-named functions, it might be quite shallow in cases where the windows were made so high as to come close to the floor above them; but to contribute substantially to the support of the floor load it must be the deep beam which the patent describes. The patentee evidently contemplated its having a depth greater than ordinary; the strength of a beam is proportioned to its depth. He shows a deep beam formed by his integral downward extension, he calls for a deep beam, he says one of its functions is to support the floor load, he says that when there is a similar integral upward extension between piers "the depth of the beam is further increased—and thus its

tensional and compressive strains are greatly lessened." In the opinion of a majority of the court, the defendant has not any such deep beam. It has only the usual shallow beam between piers, which was to be found in the art before the Ransome patent, which contributes to sustain the floor load merely to the extent that such beams have theretofore contributed, and not to the greater extent which the patentee seems to accomplish by the use of a beam with a distinctively deep web.

As to the "upward extension" it seems to a majority of the court essential to the patentee's structure that such extension should be integral with the floor, united with it, not by a mere joint which may be wind and water tight, but so rigidly that each part, floor and extension, will reinforce the other in resisting strains and stresses. The testimony is conflicting, but does not satisfy the majority that the mere superposition of a concrete block or wall on a floor of concrete, already set and hardened, without the aid of some equivalent to the coil joint of the patent, to bind the upper extension to the floor as rigidly as the lower one is bound, will effect the close union, the "integral structure," which the patent calls for. Defendant's structure shows merely the "part of the wall between piers" of the earlier art, not the integral upward extension of claims 7, 8, 9, and 10.

In the opinion of the majority the decree should be reversed, with costs of this appeal, and the cause remanded, with instructions to dismiss the bill.

COXE, Circuit Judge (dissenting). I am unable to agree with the majority of the court in reversing the decree as to all of the claims in issue. As I understand the invention, it consists in constructing a concrete building so that the vertical piers and the horizontal floors are practically molded together to form a strong, compact and homogeneous whole. The uprights and the floors are so firmly united that each supports the other, thus adding strength and durability to the building. The spaces between the piers above and below the floors are filled by upward and downward extensions which give additional strength and symmetry to the building. This construction produced a decided improvement in concrete buildings far beyond the capacity of the skilled mechanic. The defendant's best reference is the Bon Marché stable exhibit, but the most favorable view that can be taken of that structure is that it leaves the question of anticipation in doubt and is therefore insufficient to defeat the patent. The patent, marking as it does, a distinct forward movement in the art, is entitled to a liberal construction and a fair range of equivalents. I agree with the majority in thinking that the claims which have the "belt course" as an element are not infringed. The belt course is an ornamental cornice or band extending beyond the face of the building and the photographs of the defendant's structure do not show a horizontal course extending around the building as shown in Figure 3. Claims 7 and 9 do not, however, have the belt course as an element. They are as follows:

"7. A reinforced concrete floor extending to the exterior face of a building with an upward window sill extension, substantially as described."

"9. A reinforced concrete floor extending to the face of a building with downward and upward extensions, substantially as described."

The elements of claim 7 are:

First, a reinforced concrete floor extending to the exterior face of the building.

Second, an upward window sill extension.

Claim nine has the foregoing elements with a downward extension added.

That these claims are infringed I have no doubt.

An examination of the photographs of the defendant's structure clearly shows an upward extension which brings it within claim seven.

They also show the downward extension or a clear equivalent therefor. The photographs together with the testimony as to the manner in which these extensions are constructed and the function performed by them make it clear to my mind that the decree, so far at least as these claims are concerned, should be affirmed.

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MOORE FILTER CO. v. TONOPAH-BELMONT DEVELOPMENT CO.†

(Circuit Court of Appeals, Third Circuit. November 4, 1912.)

No. 1,612.

1. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—FILTERING PROCESS FOR TREATMENT OF METAL-BEARING SLIMES.

The Moore patent, No. 764,486, for a filtering process, for recovering the metal contained in metal-bearing slimes, was not anticipated and discloses patentable invention; the process shown being a radical departure from the whole prior art and an original and pioneer step in metal recovery by filtration, to make possible the further application of the cyanide treatment of slimes. Claims 4 and 5 also *held* infringed.

2. PATENTS (§ 175\*)—PROCESS PATENT—INFRINGEMENT.

As the apparatus shown in a process patent is only to show that the process may be practically applied, it follows that such illustrative apparatus does not limit the process patentee to that type of machine alone; but the test of infringement of a process patent is whether the apparatus used, no matter what its form, utilizes the process.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 250, 250½; Dec. Dig. § 175.\*]

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Suit in equity by the Moore Filter Company against the Tonopah-Belmont Development Company. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 195 Fed. 530.

Gifford & Bull, of New York City, for appellant.

William Houston Kenyon and Harold Binney, both of New York City, for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied February 13, 1913.



BUFFINGTON, Circuit Judge. In the court below the Moore Filter Company, the owner of patent No. 764,486, granted July 5, 1904, to George Moore, for a filtering process, filed a bill charging the Tonopah-Belmont Development Company with infringement thereof. On final hearing that court, in pursuance of an opinion reported in 195 Fed. 530, dismissed the bill on the ground that infringement was not shown. Thereupon the complainant took this appeal.

[1] As applied in the present case, the patent concerns the process of filtering metal-bearing slimes, and is known as the Moore process. The respondent's filter is for the filtration of like slimes, and embodies the Butters process. Both processes utilize the cyanide ore treatment, and the question before us is twofold: First, does Moore's process involve invention? and, second, does the respondent's Butters filter make use of the Moore process? The cyanide ore process came into use about 1887, and is the real foundation of the tremendous increase of gold production in the last two decades. It is now the prevalent method of treatment. In it the ore is first crushed and then placed in tanks containing a solution of cyanide of potassium. This solution percolates through the crushed pulverized mass, and, being a solvent of gold, carries off such gold as is subjected to its action. This is called "leaching," and any crushed ore through which percolation took place was termed "leachable." For example, if the ore treated was of such a character that, when crushed, it was reduced merely to the condition of sand, then the recovery of its metal by the cyanide solution might be effected by two methods. In the first method the cyanide solution would be poured on a bed of sandy crushed ore and be allowed to percolate through it. In its passage the solution dissolved the metal and passed off as a clear liquid to zinc boxes, or other well-known means of reclaiming metals in solution. This very simple method was called leaching. The second was decantation, wherein the crushed sandy material, after having been agitated in the cyanide solution, was permitted to settle, so that the clear liquid containing the dissolved metal might be decanted. Thus, so long as the crushed grain was so sandlike as to permit leaching, or would settle quickly and completely enough to permit decantation, reasonably satisfactory results were reached by the cyanide process with rich ores; but even with these the treated ore thrown on the dumps often contained large in the aggregate, though small per ton, unleached metals. This was due to the fact that the solvent did not and could not penetrate the coarse ground particles. If, however, the ore was crushed finer, to permit the more intimate action of the solution, a pasty mass, called "slimes," was formed, which was unleachable.

The result of this was that great quantities of treated ore went to the dump heap, and while laboratory filtration methods showed the presence, and indeed the extraction, of such metals, yet no one devised any commercial means or process by which this metal-laden dumpage or slime could be avoided or utilized. As a value-containing, but unavailable, feature these ore dumps occupied a relation to gold and silver mines like that of a slag pile to a blast furnace or a

culm bank to an anthracite mine. The proofs show the acute recognition of this grievous waste and the vain efforts of a great industry to avoid it. Thus in the Engineering and Mining Journal, under date of October 8, 1892, in an article on "The Cyanide Process in South Africa," by Charles Butters and another, it is said:

"Another difficulty frequently encountered in the application of the cyanide process is the treatment of 'battery slimes'; i. e., the very finely divided material produced during the crushing, and which has a tendency to accumulate in pasty masses. These either resist the penetrating action of the cyanide or retain the dissolved gold during the leaching operation. No satisfactory method of breaking such material has yet been devised. The evil may be lessened by mixing the slimy tailings with clean, coarse sand."

An editorial in the same Journal, dated April 15, 1893, says:

"After a certain amount of experience with any process, its weak points are seen, and opportunities for improvements present themselves. To this rule the cyanide process is no exception. One of the great difficulties experienced in this process, or, indeed, in any lixiviation process, is the treatment of the slimes of an ore otherwise well suited to reduction by the method. They pack upon the filter, forming beds impermeable to the solution, and, even if mixed with large quantities of coarser material, are rarely attacked, *although laboratory experiments will show that their precious metal contents are extremely soluble*. Of such material the Robinson Gold Mining Company, of South Africa, operating one of the largest cyanide plants on the Transvaal, has accumulated 60,000 tons, and the management has long despaired of treating it successfully, as the gold would not amalgamate, nor would the cyanide permeate the mass, if it were charged into vats. The average assay value was between \$7 and \$8 a ton; but the fineness, it is estimated, is such that it would pass a 225-mesh screen."

The same Journal, on August 11, 1894, contains an article on "The Cyanide Process in the Transvaal Mines," which says:

"One of the great bugbears of the cyanide men on the Witwatersrand has been the treatment of slimes, by which is meant the very fine, or, in the case of free milling ores, the clayey, portions of the tailings. Many suggestions have been made for the treatment of these; but the only really practical scheme, so far, appears to be to allow them to dry thoroughly and by screening or otherwise to reduce them to a fine powder. This powder is thoroughly mixed with sand tailings, and the mixtures will usually percolate fairly well."

In an editorial in the same Journal, in speaking of the cyanide process, it is said:

"Undoubtedly the process is well adapted to certain ores, but these appear to exist in but few localities, and we have yet to learn how to extend the use of the process to more common material."

In an article on that process, contributed by Virgoe to the same Journal in 1894, he says:

"Filter presses have been tried in South Africa, but without satisfactory results, owing to their cost and the power required to work them. No mechanical means have yet been devised for the satisfactory separation of pulp and solution in the case of poor leaching ores. *Such an invention would revolutionize the metallurgical world as far as the wet reduction of ore is concerned.*"

Commenting on this article, a correspondent in September, 1894, wrote the Journal:

"Regarding the leaching properties of the ore or tailings to be treated, I am quite in accord with Mr. Virgoe, for badly percolating material (such as battery slimes) is quite the greatest bugbear of the cyanide man."

The following year (1895) Charles Butters, writing to the Journal, said:

"The treatment of slimes is a question of importance, as at present there are many hundreds of thousands of tons of unleachable material lying useless on the hands of the various companies on the Witwatersrand."

And not only was the problem recognized and the need felt, but the agitation of it continued for years. In 1898 the same Journal, after discussing the various efforts in the Transvaal to treat rejected slimes, says:

"Speaking generally, about 75 per cent. of the tailings from the Witwatersrand mills have been treated by cyanide in the usual practice, leaving about 25 per cent. to go into the slimes pit. There is, therefore, a large accumulation of these slimes, besides those which come from current working. What proportion of the old heaps can be treated at a profit is yet to be ascertained; but it seems possible that an appreciable addition to the gold output may come from this source hereafter."

In the same year, referring to the Australian mines, the Journal says:

"A great number of experiments are at present being conducted on the Kargoorlie ores. Nearly all known processes, and several never before heard of, have their advocates. Of course, some valuable knowledge will be gained by all this experimenting, and just as surely a great deal of very expensive machinery will in a short time be consigned to the scrap pile. \* \* \* As yet the finer slimes have not been successfully treated on a large scale; but some one of the ingenious adaptations of the agitation or filter-press processes, now in the experimental stage, will undoubtedly solve the problem."

Indeed, the whole matter was summed up four years later, when, in an article in the Journal of July, 1902, on "A New Treatment of the Slime Problem in Cyaniding Talcose Ores," a writer, Stackpole, says:

"Any metallurgist can appreciate the obstinacy of these sticky masses of mud, which, no matter how treated, would take almost a prohibitive length of time to percolate. Although experiments show that over 90 per cent. of the values in the clay is soluble, the ordinary methods only permit an extraction of 50 per cent."

The first suggestion for the solution of this world-wide problem is found in the Journal of December 5, 1903, being a communication from George Moore, wherein he described the process for which the patent in suit was issued to him the year following. We deem a quotation from that article proper at this point, not only as being in the line of historical sequence of the art, but for the further reason that our conclusion that Moore fully realized the scope of his invention, and disclosed the same in his specification, is fortified by the fact that he had explained and disclosed it fully to the engineering world a year before his patent issued. In his article, after describing his process as installed at a certain mine, and asserting that the advantages of his process were:

"First, a saving of from 40 to 60 cents per ton in labor; second, a saving of a like amount in extraction; third, a saving of over 50 per cent. in the cost of installation"

—he says:

"The saving on extraction is due to the fact that, while *the filter is in the slimes tank and the suction in operation*, an equalizing action is taking place, rendering all parts of the cake of equal resistance to the flow of solution and wash water, so that, when placed in the washing tanks, a perfect displacement of solutions is accomplished. For example, we might consider that it would be possible for one spot on the 2,880 square feet of slimes cake to have more of the coarser slimes or fine sands than the other parts; then there would be less resistance to the flow at this point; therefore the flow would be accelerated here, the slimes would be brought up, and would cover this point more rapidly than the other parts, until, by this increased coating, the resistance to the flow would become the same as at all other points. Thus, when lifted out from the slimes compartment, the entire basket of filters is in condition for washing, and, in practice, we extract all of the soluble gold."

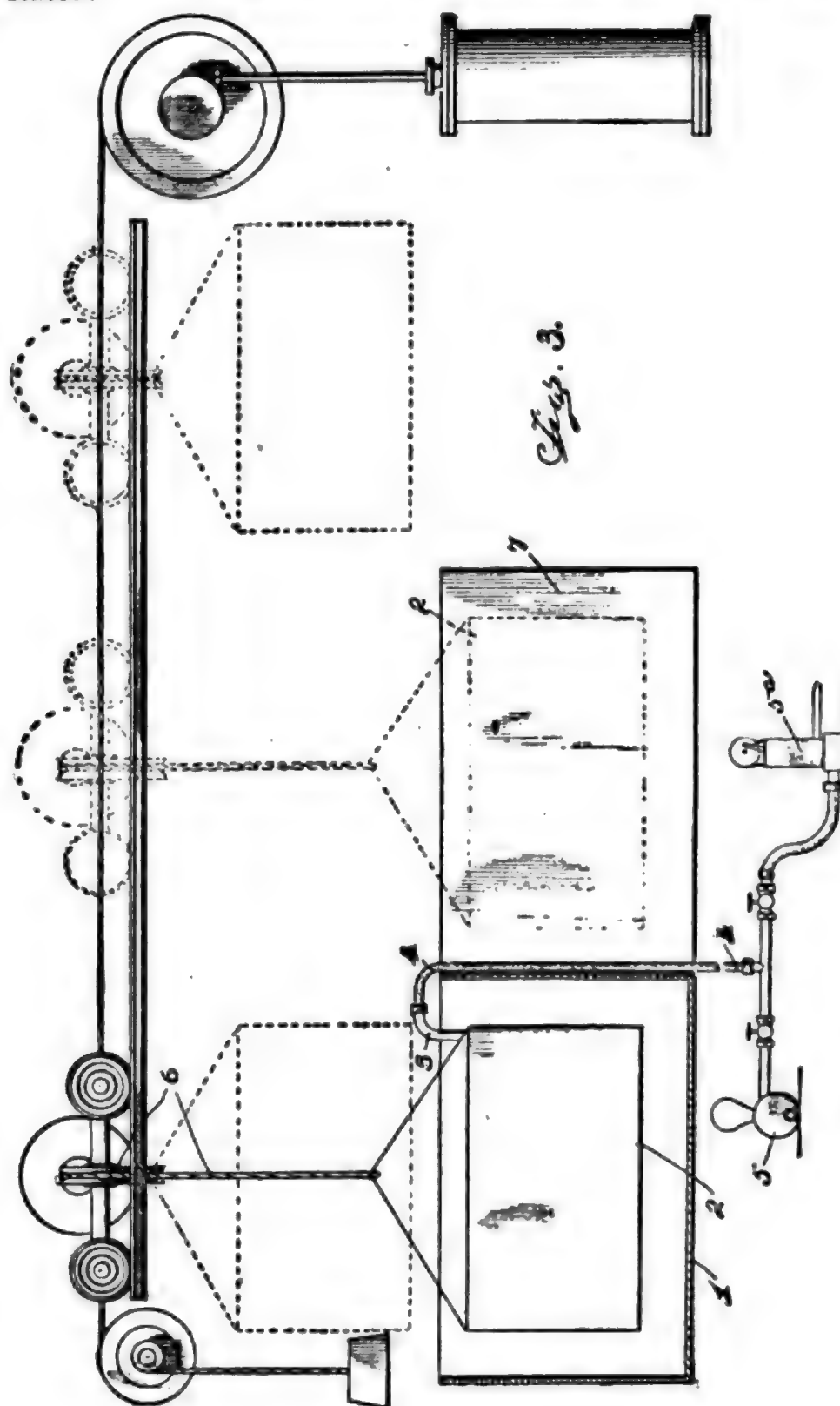
After a careful study of Moore's patent, we have reached the conclusion that his process is a radical departure from the whole prior art, and was an original and pioneer step in metal recovery by filtration. Like all important inventions, its merit is its simplicity, and its novelty consists in his utilizing the simple elemental processes of nature. These processes he has, of course, neither discovered nor invented; but he has utilized them, in combination, in a manner never before used, and has thereby secured a new result. Briefly stated, the gist of Moore's instruction to the mining world was to filter an unleachable mass in such a manner as to cake the pasty slime so uniformly and evenly that the resistance of the slimy mass to percolation became uniform and even in every part of the cake. The result of such uniform and even cake resistance was that, when the cake was attacked by the percolating solvent, its percolation was correspondingly uniform, even, and diffusive through the uniformly resisting cake. The solvent having by this uniform and even resistance been itself uniformly and evenly percolated through the mass, it followed that, when this percolated solvent was in turn subjected to a propulsive washing current, such propulsive current, finding no path of least resistance in the uniformly resisting cake or the uniformly percolated solvent, moved forward uniformly and evenly to expel such uniformly distributed percolated solvent. The creation of this uniform and even resistance in the cake is the gist of Moore's process, and such uniformity, as we shall see, is secured by the slime being submerged when subjected to suction. The crux of Moore's process cannot be better or more tersely summarized than in his own words, quoted above:

"The saving on extraction is due to the fact that, while the filter is in the slimes tank [and that means submergence] and the suction in operation, an equalizing action is taking place, rendering all parts of the cake of equal resistance to the flow of solution and wash water, so that, when placed in the washing tanks, a perfect displacement of solutions is accomplished. For example, we might consider that it would be possible for one spot on the 2,880 square feet of slimes cake to have more of the coarser slimes or fine sands than the other parts; then there would be less resistance to the flow at this point; therefore the flow would be accelerated here, the slimes would be brought up, and would cover this point more rapidly than



the other parts, until, by this increased coating, the resistance to the flow would become the same as at all other points. Thus, when lifted out from the slimes compartment, the entire basket of filters is in condition for washing, and, in practice, we extract all of the soluble gold."

And this is only stating in other words what he set forth in his specification. Referring to the accompanying drawing, the specification states:



"In carrying out the process with the means disclosed in the accompanying drawings, adapted particularly for use in connection with the slimes of precious metals, I introduce a solution to be filtered into a suitable tank 1, in which I place a filtering device or means 2, in the present instance made up of a series of filter plates communicating with a common discharge tube 3. A flexible or other suitable tube 4 connects the tube 3 with any preferred form of hydraulic pump 5 and compressed air pump 5a, and the filtering means 2 is permitted to remain within the tank 1 until the solid matter within the liquid being filtered has coated the walls of the filtering device to the desired thickness—say, for example, about three-quarters of an inch or more in most cases, but varying somewhat with the character of the slimes which are being handled—and then the same is lifted as by pulley and cable mechanisms 6, out of and away from the tank, and the pump 5 stopped and pump 5a operated, so as to apply air pressure to the back of the canvas or to pass a current of air or cleansing current in an opposite direction to the movement of the liquid in the prior step, whereby the solid matter collected by the filtering device 2 will be discharged therefrom."

Applying this description to the illustration, it will be seen that the filter leaves are completely submerged in a tank filled with fluid slimes, and suction is then applied to the interior of the leaves. Applying suction to a filter completely submerged is to form an enveloping case or cake of a pasty nature in the filter. As the cake builds up, it develops a thickness and compactness, which gives the entire cake a capacity of uniform resistance to percolation; for, so long as the resistance is not uniform, the consequent increased rate of deposit at that point would set up, and continue until the rate of flow there became equal to the rate of flow at all other points. The significance of this uniform resistance capacity of the cake, and that it was obtained by filter submergence, is stated in the specification, where the patentee, in order to show that, after the filtering process is completed, an entire enveloping cake of uniform resistance capacity can be simultaneously discharged by compressed air, says that such action is owing to the process having produced an enveloping cake of uniform and even resistance capacity. His language is:

"In order to effectively discharge the incrustated slimes from the filter by the agency of compressed air, it is important that the slimes be in the form of a compact layer of requisite resistance and of sufficient thickness, because otherwise when the air pressure is applied portions only of the slimes are blown off, thereby relieving or reducing the air pressure and rendering it ineffective for the removal of those slimes which remain, and necessitating the use of other means—such as scrapers, brushes, and washing—for the complete cleaning of the filter surface. This difficulty is wholly overcome in my process by immersing the filter into the tank containing the slimes in suspension and depositing them in the manner described, the effect of which is to automatically deposit the slimes in a homogeneous layer, as will be readily understood. Hence, when the slimes have been thus deposited to the requisite thickness, the compressed air does not blow holes in the layer of slimes and only partially clean the filter, but it strips off the entire layer of slimes and effectively cleans the filter without the use of auxiliary cleansing mechanism."

Indeed, of the fact that the result of subjecting a submerged filter to suction is an enveloping cake of uniform and even resistance there can be no doubt under the proofs in the case. To question it is to dispute the operation of the laws of nature. In "Cyaniding Gold and Silver Ores," Edition 1907, Mr. Julian, who was called as an expert

by respondent, and who nowhere questions his prior statement, in describing the advantages of submerged leaf filters subjected to interior suction, says:

"One of the chief characteristics of this class of filters is that during the formation of the cake, if the resistance to percolation should vary at any points over the filter surface, an adjustment immediately sets in, owing to the parts of greatest permeability taking on the deposit quickest. This increases the resistance at those points until it brings the rate of percolation equal all over the cake. Washing out the dissolved metals is then done uniformly."

And in his testimony Dr. Chandler, the distinguished scientist and expert for respondent, says:

"Uniformity of resistance of the cake is the natural result of the laws of filtration. Increasing thickness of cake at any one point greatly reduces rapidity of filtration at that point, and thus equalizes the thickness of the cake. When the thickness of the cake reaches a point at which filtration becomes very slow, the continuance of filtration at one part a little longer than at another part will not make any material difference in thickness. Even doubling the time of filtration would have little effect, if filtration is carried to the point of nearly maximum thickness and resistance, a condition which the Moore patent seems to indicate is desirable."

In view of these well-understood natural laws of filtration, and of the subject-matter of the specification and the application of the process as illustrated by description and drawings, there can be no question that, to those skilled in the art, the cake of uniform and even resistance produced by Moore's process is aptly described by him in his specification as—

"Immersing the filter into the tank containing the slimes in suspension and depositing them in the manner described, the effect of which is to automatically deposit the slimes in a homogeneous layer, as will be readily understood."

The specification in the language following:

"However, this cleansing step of the process need not be taken until an intermediate auxiliary step has been performed, which consists in introducing the element 2, after having been coated with the solids, into a tank 7 of water, the drawing or sucking operation of pump 5 being continued while the element 2 is being subjected to the said water bath. When this step is employed, the next succeeding is the operation just described. It will be obvious that the water bath may be employed or not, as desired, the same being preferable when the filter is used for filtering precious ores; the said step tending to wash out the remaining metal held in solution or solvent thereof within the solids coating the filtering device"

—discloses an optional additional step in the process, which step is made an element in the claims here in controversy. The proofs show that in this step important results are obtained, in that substantial quantities of the gold-carrying cyanide solution still remaining in the cake are recovered, and that this recovery is due to the uniform and even resistance capacity conferred on the cake by the disclosed process.

It is contended, however, that the Moore patent is invalid by reason of the disclosures of the prior art. But in our view this contention is based on a failure to recognize the true significance of what Moore really did. Practically his problem was to make commercially possible the recovery of a minute amount of valuable metal from a large quan-

tity of mud. Of the fact of the metal being there, there was no doubt; for that fact, and, indeed, that it was possible to extract it, the tedious and costly method of laboratory filtration showed. It suffices to say that no one of the numerous patents cited did such work, used such process, or effected such results; and if none of them led their inventors or users to the use of any process whereby such work could be done, or even led to a suggestion in their descriptive matter of the possibility of the use of any such process as Moore's, it follows they taught Moore no more than they taught others.

So far as the patent here in question is involved, Moore's disclosure was the process he originated, and not the machine with which he illustrated the use of his process in accordance with the statutory requirement that he file a written description "of the manner and process \* \* \* of using it." To find, therefore, here and there in prior patents, and disassociated from each other, all the mechanical appliances of the combination apparatus which Moore thus illustratively used is not to prove that Moore's process is not original. Viewed from a patent standpoint, the significance of a machine lies, not in its form, but in the principle on which it works, as will be seen in the requirement of section 4888:

"In the case of a machine, he shall explain the principle thereof."

It suffices, therefore, to say that very few of these patents are for even a process, and, as none of them operated on the principle or process of Moore, they cannot be held to forestall or minimize the originality of Moore's subsequent disclosure. And in giving these patents their due relation to Moore's disclosure the fact must not be overlooked that the slime problem which Moore solved only came into existence from the use of the cyanide process, which began, as we have seen, about 1887. It will therefore be manifest that no patents preceding that date, and none subsequent thereto which did not apply to the cyanide process, were calculated to solve the cyanide percolating difficulties that arose in the use of that process.

So, also, to say that, following prior laboratory practice, it was possible to leach and extract the unrecovered ore left in a pasty mass by the cyanide process is not to destroy Moore's patent; for this is to lose sight of the practical value of Moore's process as a workable, economic treatment, as compared with theoretical possibility of laboratory practice. By repeated dilution the laboratory could, and we will assume did, recover with practical completeness all such unrecovered metal; but this had been done with an expenditure of time, labor, and expense out of all proportion to the value of the metal. When, therefore, Moore disclosed a process by which such recovery was made enormously profitable, and by which he turned a dump heap, which, under all known processes, machines, and laboratory methods, was worthless, into profitable ore, we are constrained to give little weight to the suggestion that his process was either anticipated, a mere advance incident to the art, or involved no invention.

So, also, it is said that the step described in his claim, viz., "further impoverishing the solids by a cleansing operation," was merely the



washing or dilution of the prior art. Considered in its literalism and in isolation, such contention may seem plausible; but, considered as a step in Moore's process, it takes on new significance and value. Bearing in mind that, in the prior steps of the process covered by this claim, the completely submerged filtering medium has formed a cake of uniform resistance at all points, and by reason of such uniformity the solvent has percolated and is permeating the cake, it follows that the step which follows is a nondiluting and bodily displacement of the solvent, and not a diluting intermingling. This displacement, in contrast with dilution, not only saves the time and expense of repeated dilution and refilling, but also obviates excessive dilution of the solvent solution and the necessity of rehandling large volumes of diluted solutions in the recovery of the metal.

It seems, therefore, that the "further impoverishing the solids by a cleansing operation" of Moore's process, owing to the prior step whereby a cake of even and uniform resistance is secured by submergence, is not a mere washing or diluting step, but is one wherein there is exerted a uniform pressure or pushing action through the entire cake surface, thereby in effect advancing a wall of water pressure to force ahead of it from the cake the value-bearing solvent liquid and leave in the cake an equal volume of nonvalue-bearing water. This final result is secured by, first, having built up a cake of uniform resistance to solvent fluid flow, and, secondly, by again submerging the filtering medium and its built-up cake in the nonvalue-bearing displacing fluid. By this displacement by pressure difference only Moore pushes ahead, instead of washes through, the cake-contained metal-carrying fluid. As showing the practically complete metal extraction by the Moore process, we restrict ourselves to the uncontradicted testimony of results at a South Dakota mine, where the original slime contained gold at the rate of \$7.90 per ton of dry slime. After filtration alone, the cake still contained \$2.75 per ton of dry slime. After being then subjected to the displacement step, there was left in the cake but 4 cents of gold per ton of dry slime.

Being of opinion, therefore, that Moore's process was novel, useful, and inventive in character, his patent is valid, and we next turn to the question of infringement. As claims 4 and 5 furnish sufficient bases for deciding that question, so far as the respondent's device is concerned, and as some questions, not necessary to be here decided, exist as to claim 10, we restrict ourselves to a consideration of claims 4 and 5.

[2] In considering the question of the infringement of a process patent, it must be borne in mind that the monopoly secured by the claims is, generally speaking, a monopoly of the process, and the test of infringement is whether such process is utilized by the infringer. As the apparatus shown in a process patent is only to show that the process may be practically applied, it follows that such illustrative apparatus does not limit the process patentee to that type of machine alone. If that were the case, a process patent would be of little value. So distinctively and separate in the patent law are process and apparatus for utilizing such process that where, after a patent for a pro-

cess by one inventor, a second inventor might patent a novel apparatus for utilizing the process, the situation would arise that the inventor of the process could not employ his process in such machine without license from the machine patentee, and the latter could not use the process in his machine without license from the process patentee. It will therefore be evident that the test of process infringement is not the similarity of apparatus, but rather whether the apparatus, no matter what its form, utilizes the process.

Tested by this standard, it is clear to us the respondent's device infringes. In form the particular apparatus shown in Moore's patent and the apparatus of respondent vary in the number of tanks, in the difference between changing the fluid which envelops the filtering medium, as in respondent's device by allowing the filtering medium to remain stationary in one tank while the submerging fluid is first drawn off, and the second submerging bath is then drawn into the same tank, while in Moore's the filtering medium is raised from the submerging bath in the first tank, and then lowered into the second submerging bath in a second tank. But this difference in numbers of tank and of respective withdrawal and replacing of different baths in no way affects the identity of the process, for it is manifest that Moore could in his patent specification have shown the use of his process just as well by using respondent's apparatus, had he known of it, as his own. Both alike use the principle of submergence and intra-leaf suction to create the uniform and even resistance of the cake, and both alike use the principle of intra-leaf pressure, Moore using air, and the respondent water, to shed the uniformly-resisting cake from the filter; for the mere fact of the output being carried off as a dry product in Moore's case to a dump heap and in respondent's in fluid form to a slime pit, does not go to the substance of the process. In the essentials that involve the invention the two are alike. Had an apparatus such as respondent's, operated as it is, been in use prior to Moore's there would have been no invention either in the process or in the apparatus shown in Moore's patent; and what, if preceding a patent, would have anticipated it, equally infringes if subsequent. We therefore hold the fourth claim is infringed.

As we are of opinion, and so find from the proofs, that there is in respondent's device a "removing the medium while continuing the drawing action," the fifth claim is also infringed.

The decree of the court below is therefore reversed, and the cause remitted, with instructions to enter a decree adjudging claims 4 and 5 valid and infringed, and for such action by that court in the way of injunction and accounting as it shall deem fitting.

## FISHER v. AUTOMOBILE SUPPLY MFG. CO., Inc.

(District Court, E. D. New York. December 31, 1912.)

**I. PATENTS (§ 155\*)—DISCLAIMER.**

A patentee is not entitled by a disclaimer to obtain a reissue, and thus to avoid the scrutiny of the Patent Office.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 227½; Dec. Dig. § 155.\*]

**2. PATENTS (§ 328\*)—INVENTION—FLEXIBLE HOLLOW SHAFT.**

The Schmidt and Grundmann patent, No. 969,660, for a flexible hollow shaft or tube, claims 1, 3, and 4, as changed by the disclaimer filed September 26, 1912, are void on their face for lack of invention in view of the prior art.

At Law. Action by Charles Fisher against the Automobile Supply Manufacturing Company for infringement of letters patent No. 969,660, for a flexible metal tube or shaft, granted to Schmidt and Grundmann September 6, 1910. On demurrer to amended complaint. Sustained in part.

See, also, 199 Fed. 191.

F. Warren Wright, of New York City, N. Y., for plaintiff.

C. A. L. Massie and Ralph L. Scott, both of New York City, N. Y., for defendant.

CHATFIELD, District Judge. In the present action, which was brought at law to recover damages for alleged infringement of patent, a previous motion requiring the plaintiff to amend his complaint, in order to make it more definite and certain with respect to certain patents of the prior art, resulted in the amendment of the complaint by the insertion of an allegation that the infringement complained of was not through the use of a device under the Almond patent, No. 434,748, granted August 19, 1890, or the Scognamillo patent, No. 785,523, granted March 21, 1905.

As was shown in the opinion upon which the motion was granted (D. C.) 199 Fed. 191, the complaint was indefinite, in that the defendant could not tell from the pleadings whether the plaintiff intended to allege that these patents were not a protection to the defendant, if he was manufacturing thereunder, or whether the plaintiff meant to allege that the defendant was making a structure, not in accordance with those patents. A further result of that motion was that upon the 26th day of September, 1912, the plaintiff filed with the Patent Office a disclaimer, in the following language:

"Except where the abutting surfaces of the two wires meet and rest against each other for a considerable area, and the radius of curves of the two abutting surfaces are of substantially the same radius." (As to claims 1 and 3.)

And:

"Except where the two concave lateral surfaces are of substantially the same radius." (As to claim 4.)

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The claims of the Schmidt and Grundmann patent, No. 969,660, granted September 6, 1910, are as follows:

"1. A flexible hollow shaft, comprising in combination a spirally coiled wire of circular cross-section, and a spirally coiled body having concave lateral faces abutting against each turn or convolution of said wire.

"2. A flexible hollow shaft, comprising in combination a spirally coiled wire of circular cross-section, and a spirally coiled body having concave lateral faces between the turns or convolutions of said wire and abutting against the outside and the inside of each turn or convolution of the wire, as set forth.

"3. A flexible hollow shaft comprising in combination a spirally coiled wire of circular cross-section, and a spirally coiled body having concave lateral faces between the turns or convolutions of said wire and abutting against the outside of each turn or convolution of the wire, as set forth.

"4. In a flexible hollow shaft comprising in combination a spirally coiled wire of circular cross-section, and a spirally coiled wire having two concave lateral faces receiving the adjacent sides of the wire of circular cross-section, substantially as shown, and for the purpose specified."

While the claim of the Almond patent above referred to is as follows:

"2. The flexible tube composed of the inner coil *D*, combined with the outer coil *A*, of triangular cross-section, having concave faces *a*, the coil *D* having curved faces *b* corresponding to the concave faces *a* of the coil *A*, the convolutions of the coil *A* being interposed between the convolutions of the coil *D*, so that the concave faces *a a* are in contact with the convex faces *b*, substantially as herein shown and described."

Almond shows in his specifications the following method of making the outer coil:

"The triangle of the outer coil *A* may be equilateral and straight-sided, as in Fig. 4; but I much prefer to make the contact-faces *a a*, which butt against the coil *D*, of concave form, the curvature being on a circle of which the center lies in the axis of the mandrel *B*. This curved or concave triangle in contact with the inner coil *D* is shown in Fig. 3 and has the advantage of giving a still greater contact-face and of producing a tighter joint when the tube is bent; but Fig. 5 shows a still better form in that the inner coil *D* has contact-faces *b* on the same curve as the contact-faces *a* of the concave triangles *A*."

And it is evident that by this language of the Almond specification he has taught the method of construction shown by the Schmidt and Grundmann patent in claims 1, 3 and 4.

Inasmuch as the Almond patent has now expired, we need not consider whether this particular structure was properly covered by the general language of his claims, for, even if a charge of infringement could have been defeated upon that ground, nevertheless the right to use this method of construction was thereby given to the public, and could not be patented by Schmidt and Grundmann.

The defendant has interposed a demurrer to these claims of the Schmidt and Grundmann patent, charging, in substance, that by filing the disclaimer above referred to the Schmidt and Grundmann patent has been rendered invalid for lack of patentable novelty. As was held in the case of *Towne Steering Wheel Co. v. Lee* (C. C. A.) 199 Fed. 777, the power to sustain a demurrer of this nature is within the jurisdiction of this court, but should be exercised with the utmost cau-



tion, and any doubt should be resolved against the defendant. By the terms of the disclaimer, the only invention which can remain must be in the use of concave lateral surfaces on the outer coil of substantially the same radius as the abutting surfaces of the inner spirally coiled wire. (It cannot be presumed that the plaintiff intended to claim invention by having the entire concave surface of the external spirally coiled body made with a uniform radius, as that manifestly was the principle shown in every type of the Almond patent.)

Objection is presented by the defendant that the patentees disclosed only what was shown by their specifications and claims, and were entitled to such invention only as was stated in their original patent. The defendant suggests that the invention now claimed as the result of this disclaimer was not the invention of the original patent, but rather is an attempt to avoid the effect of the defense already interposed in this suit by the defendant's reliance on the Almond patent.

[1] It may be assumed that a patentee is not entitled by a disclaimer to obtain a reissue, and thus to avoid the scrutiny of the Patent Office. *White v. E. P. Gleason Mfg. Co.* (C. C.) 17 Fed. 159, and *Hailes v. Albany Stove Co.*, 123 U. S. 582, 8 Sup. Ct. 262, 31 L. Ed. 284. This ground of demurrer, however, adds nothing; if the claim itself as modified by the disclaimer does not show invention. If the court holds that no invention is shown, it is, of course, unnecessary to determine whether or not the original inventor intended to claim invention for the particular point now presented as the valid portion of his patent.

Further grounds of demurrer are based upon the alleged inability of the plaintiff to point out a material and substantial distinguishable and separate part of the thing patented. It is suggested that a disclaimer may be filed as to one claim, leaving the remaining claims as stated. It is said that a claim can be divided only where the part disclaimed refers to some definite separable portion of the device. But, again, it is impossible to determine whether a portion of the device patented here could be divisible, if the court holds that nothing has been patented.

The defendant also claims under his demurrer that the Schmidt and Grundmann patent is invalidated by the Almond patent in the form in which the original patent was issued to Schmidt and Grundmann; that, therefore, the Schmidt and Grundmann patent cannot be rendered valid as to a new claim by a disclaimer; and that the only way to test the issue of invalidity would be by application for a reissue, except as the question might be disposed of by a trial before the court. This is but another form of stating the same point which has been already passed upon, and if the disclaimer of a part (which can be separated and plainly ascertained) does not leave a definite claim of some patentable novelty, when tested by the prior art presented in the record, or which is a matter of common knowledge to the court, then the whole patent is invalid, and the disclaimer has not changed the situation.

The defendant urges that the delay of the plaintiff in filing a disclaimer until after the motion to amend, and even then for some time

after it had become apparent that he could not prevail under the language of the original claims, should be made a basis for dismissing the complaint. But this does not seem to the court to be sufficient of itself. In the present case such delay or such tardy action indicates that the plaintiff could not hope to prevail upon his original patent. But by this tardy action he has limited himself to something which upon its face is invalid, when viewed from the language of the specifications of the Almond patent.

[2] As to claim 2 of the Schmidt and Grundmann patent, the pleadings do not show whether it is the basis of any charge of infringement against the defendant. The court is not able to determine upon the face of the patent, and, in the absence of the prior art, whether the alternate form of construction by which the outer spirally coiled wire is changed to a spirally coiled metallic member, which shall bear upon both inner and outer curved surfaces of the inner spiral coil, is a valid invention. The defendant alleges that on its face this second claim shows merely mechanical progress. But that issue should not be disposed of on demurrer.

The demurrer will be sustained as to claims 1, 3, and 4, but as to claim 2 the demurrer will be overruled, and the plaintiff may within five days amend further by charging infringement of that claim, if that be deemed advisable, and the defendant may have 10 days to answer thereto.

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#### AMERICAN GRAPHOPHONE CO. v. PICKARD.

(District Court, W. D. New York. October 3, 1912. On Rehearing, December 23, 1912.)

On Rehearing.

#### 1. COURTS (§ 290\*)—JURISDICTION OF FEDERAL COURTS—SUITS ARISING UNDER PATENT LAWS.

A suit which raises a question of infringement is one arising under the patent law, of which a federal District Court has exclusive jurisdiction under Judicial Code, § 256, subd. 5 (Act March 3, 1911, c. 231, 36 Stat. 1160 [U. S. Comp. St. Supp. 1911, p. 234]), although the construction of a contract is also involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 832; Dec. Dig. § 290.\*]

Jurisdiction of federal courts in suits relating to patents, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

#### 2. PATENTS (§ 294\*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION—COMITY.

An assignee for the benefit of creditors has no greater right than his assignor with respect to the sale of patented articles which were purchased by the assignor under a license containing price restrictions, and a federal District Court, in a suit for infringement against the assignee, has power to enjoin a sale by him in violation of such restrictions, even though authorized or directed by a state court.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 473; Dec. Dig. § 294.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the American Graphophone Company against C. A. Pickard, as assignee of the Hill Piano Company. On motion for preliminary injunction. Motion granted.

Elisha K. Camp, of New York City, for complainant.

Wilson C. Price and James L. Weeks, both of Jamestown, N. Y., for defendant.

HAZEL, District Judge. The injunction in this case is denied on the ground that to grant it would in effect stay the general assignment proceedings pending in the state court. The affidavit of the defendant shows that he is the general assignee for the benefit of creditors of the Hill Piano Company, and that, in accordance with an order of the County Court of Chautauqua county, he, as such assignee, advertised the property in question for sale, a copy for the order of which sale is attached to the opposing papers.

In this situation, in view of the nature of the contract of sale which is the subject of this litigation, the writ of injunction should not be granted by this court. By section 720 of the Revised Statutes (U. S. Comp. St. 1901, p. 581) the issuance of an injunction is prohibited where its effect is to stay proceedings in any state court except in cases relating to bankruptcy proceedings. Aside from this, the rule of comity requires that one court shall not interfere by injunction with the pending proceedings of another court of concurrent jurisdiction, and hence I think the plaintiff corporation must be relegated by a motion to intervene, or other process, to the Chautauqua County Court for any injunctive relief to which it may deem itself entitled.

The injunction heretofore granted is vacated.

On Rehearing.

Elisha K. Camp, of New York City, for complainant.

Weeks & Ross, of Jamestown, N. Y., for defendant.

HAZEL, District Judge. [1] The denial at the hearing of a preliminary injunction to the complainant proceeded on what I now think was an erroneous assumption that the suit was based solely on contract and was not strictly an action arising under the patent laws. If this assumption were correct, the earlier decision would doubtless have been necessary under section 720 of the Revised Statutes, which forbids federal courts to stay proceedings of a state court of concurrent jurisdiction. But a closer examination of the bill shows that the gravamen is the indirect infringement of complainant's patents by the breach of the conditions upon which the patented articles were to be sold. The question then arises as to whether the threatened violation by the defendant of the contract containing restrictions as to the selling price constitutes contributory infringement.

The Supreme Court of the United States, in *Henry v. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, has set this precise question at rest. There it was expressly held that an action which raises a question of infringement is an action arising under the patent law

and may be instituted in the District Court, even though the construction relating to the contract is also involved. Nor is it sufficient to bar an action in the District Court that in general the rule of comity requires that this court should not enjoin the sale of property in the possession of the state court. In the present case effect must be given to the nature of the action and the relief sought, a relief which the federal courts alone can grant. *Hupfeld v. Automaton Piano Co.* (C. C.) 66 Fed. 788.

[2] It appears herein not only that the patented articles were bought from complainant by the Hill Piano Company subject to terms and conditions relating to the selling price, but also that notice thereof, together with notice that the articles were covered by complainant's patents, was brought home to the defendant assignee before this action was instituted. Under such circumstances the defendant assignee could not by the assignment to himself for the benefit of creditors secure any greater right to sell the patented articles than had his assignor, i. e., a license subject to price restrictions. *Oliver et al. v. Rumford Chem. Co.*, 109 U. S. 75, 3 Sup. Ct. 61, 27 L. Ed. 862; *York Mfg. Co. v. Cassell*, 201 U. S. 345, 26 Sup. Ct. 481, 50 L. Ed. 782; *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; *United Wireless Tele. Co. v. National Electric Signaling Co.* (C. C. A.) 198 Fed. 385. In the latter case it is held that, where a defendant has infringed a patent and is subsequently adjudged a bankrupt, the court has power to enjoin the sale by the trustee in bankruptcy of the infringing apparatus. By analogy this principle applies to this case.

Next, it is contended by the defendant that the complainant violated its contract conferring upon the assignee exclusive right to sell the patented articles within a specified locality. It is argued that, if the defendant had remained the sole salesman, the selling price fixed by the maintenance contract would have been obtainable from intending buyers; but said contract does not, I think, bear out the claim of exclusive territorial agency and was terminable by the complainant. At any rate, it appears that only after the assignment by the Hill Piano Company, which has since been adjudicated bankrupt, did the complainant designate another selling agent. This, in my opinion, is insufficient to require a denial of the injunctive relief prayed for, and therefore the injunction may now issue.

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In re W. O. CRAIG MFG. CO.

(District Court, W. D. Arkansas, Ft. Smith Division. December 14, 1912.)

No. 374.

**FIXTURES (§ 21\*)—CONDITIONAL SALE OF MACHINERY—PRIORITIES AS BETWEEN VENDOR AND MORTGAGEE OF REALTY—"REAL PROPERTY."**

Under the law of Arkansas as settled by decision, the general rule is that title to personal property sold may be retained by the vendor until the purchase price is paid, and such title is good as against any subsequent purchaser or lienholder without regard to the question of no-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



tice; but with regard to machinery which, from its character, is intended to be permanently located, the rule is modified, and such machinery, set in place for the purpose to which it is adapted in such a way and under such conditions as to indicate permanency, must be regarded as "real property," and the title of a purchaser or mortgagee of such real estate without notice is superior to that of the vendor of the machinery.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 47-56; Dec. Dig. § 21.\*

For other definitions, see Words and Phrases, vol. 7, pp. 5939-5951; vol. 8, pp. 7778, 7779.

What constitutes a contract of conditional sale, see note to *Dunlop v. Mercer*, 86 C. C. A. 448.]

In the matter of the W. O. Craig Manufacturing Company, bankrupt. On petition in intervention of Triumph Electric Company to reclaim property, and objection of J. O. Patterson. Petition dismissed.

John I. Worthington, L. W. Gregg, and Hill, Brizzolara & Fitzhugh, all of Ft. Smith, Ark., for intervener.

Guthrie, Gamble & Street, of Kansas City, Mo., and Read & McDonough, of Ft. Smith, Ark., for objector.

YOUMANS, District Judge. The W. O. Craig Manufacturing Company, a corporation, was adjudicated a bankrupt on the 27th of July, 1912. This concern was formerly the Siloam Springs Cold Storage & Ice Company; the former name having been substituted for the latter. Under the latter name the bankrupt bought from the Triumph Electric Company, under the trade-name of the Triumph Ice Machine Company, on two orders, dated, respectively, January 28, 1911, and February 25, 1911, certain machinery for an ice manufacturing plant at Siloam Springs, Ark. Notes were given for the purchase price. These notes are unpaid. The written contract between the bankrupt and the intervener contained the following provisions:

"The title to all material furnished by the company shall remain in it until full purchase price has been paid in cash, with full right of repossession by the company upon purchaser's default of any act or payment due under this contract; and purchaser agrees that company shall have the right to retain all the moneys, that may have been paid by the purchaser, as liquidated damages for purchaser's default. Purchaser agrees to do all acts necessary to protect such retention of title in the company, and the taking of any security whatsoever shall not operate as a waiver nor as otherwise affecting this retention of title. The company, at its election, shall be entitled to a conveyance of said material by way of mortgage, in order to secure the payment of the purchase price. Should the purchaser become insolvent or default in the performance of or payment of any part of this contract, including any obligation given for any part of it or failure to execute notes as agreed upon, the whole purchase price shall forthwith become due."

In the spring of 1911 this machinery was installed in a building constructed for that purpose on a piece of land adjacent to a railroad. The land appears to have been put to no other use. On the 3d day of June, 1911, to secure the repayment of a loan of \$30,000 made on that date, the bankrupt, under its name of the W. O. Craig Manu-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

facturing Company, executed a mortgage to the Commerce Trust Company, of Kansas City, Mo., on its plant and personal property used in connection with its ice and ice cream manufacturing business.

This mortgage and the notes secured thereby were afterwards assigned to J. O. Patterson. After the adjudication in bankruptcy, Patterson, in the bankruptcy proceedings, claimed all the property described in the mortgage, and sought to have the same sold and the proceeds applied to the payment of the mortgage debt. This was contested by the intervener, which claimed the machinery sold by it to the bankrupt by virtue of the retention of title in its contract of sale. The property was by the referee ordered sold free from liens, it being provided, however, that an amount, out of the proceeds of the sale, sufficient to pay intervener's claim, should be retained by the trustee, to await the decision on the intervention of the Triumph Electric Company. The intervention is based on the clause of the contract above quoted. Patterson filed an answer to the intervention. The answer sets up two grounds of defense to intervener's claim: (1) That the contract between the intervener and the bankrupt contained a guaranty as to the producing capacity of the plant, and that the plant will not produce the amount of ice guaranteed by the contract. (2) That the machinery claimed by intervener became part of the real estate, and passed to the mortgagee under the mortgage subsequently executed, and that it afterwards passed to Patterson under his purchase at the sale made by the trustee.

With regard to the alleged failure of the plant to produce the guaranteed capacity, the testimony is not sufficient to show such failure. It does not appear that the conditions required in the contract of guaranty were complied with. That conclusion having been reached, it is unnecessary to consider the question as to whether Patterson is in an attitude to oppose a defense on the alleged violation of the guaranty.

The real question in the case is whether the property in controversy became a part of the realty and passed under the mortgage, or remained personal property subject to the terms of the contract between the bankrupt and the intervener.

As between the vendor and the W. O. Craig Manufacturing Company, there is no question but the machinery retained the character of personal property. The controversy, however, does not arise between them. The material purchased was set up as a completed ice plant, intended to be permanent, in a building specially constructed for that purpose, on a piece of ground of comparatively small area, conveniently situated near a railroad for the manufacture and shipment of ice. As between the mortgagor and mortgagee, the machinery was a part of the realty. J. O. Patterson, as assignee of the notes and mortgage and as purchaser at the trustee's sale, stands in the shoes of the original mortgagee. There is nothing to show that either the mortgagee or Patterson had notice of the retention of title by the Triumph Ice Machine Company. The question as to the superior right must be determined by the law of the state of Arkansas, as held in the case of *In re Sunflower State Refining Company* (C. C. A.) 195 Fed. 180. This case arose in Kansas, and was decided under a statute of that

state requiring the filing in the office of the register of deeds of a writing or promissory note, evidencing the conditional sale of personal property, and retaining the title to the same in the vendor until the purchase price is paid in full. There is no such statute in Arkansas or any other statute on the subject. The law therefore must be found in the decisions of the Supreme Court of the state. It clearly appears from these decisions that the title to personal property can be retained by the vendor until the purchase price is paid, and that the title of such vendor may be enforced against any subsequent purchaser or lienholder, without regard to the question of notice. *Carroll v. Wiggins*, 30 Ark. 402; *Andrews v. Cox*, 42 Ark. 473, 48 Am. Rep. 68; *McIntosh v. Hill*, 47 Ark. 363, 1 S. W. 680; *McRea v. Merrifield*, 48 Ark. 160, 2 S. W. 780; *Simpson v. Shackelford*, 49 Ark. 63, 4 S. W. 165.

With regard to machinery which from its character is intended to be permanently located, the rule is modified as to a subsequent purchaser or lienholder. Such machinery may remain personal property until paid for, or until the debt secured by the mortgage is paid. *Ozark v. Adams*, 73 Ark. 232, 83 S. W. 920. In this case and in the case of *Choate v. Kimball*, 56 Ark. 55, 19 S. W. 108, three rules were laid down for determining whether a given article is a chattel or an immovable fixture, as follows:

- (1) Real or constructive annexation of the article in question to the realty.
- (2) Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected.
- (3) The intention of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed; the relation and situation of the party making the annexation, and the policy of the law in relation thereto; structure and mode of the annexation and the purpose or use for which the annexation has been made.

With regard to the first rule it is clear that there was a real annexation of the machinery in question to the realty. With regard to the second rule, it is equally clear that the machinery was specially adapted to the part of the realty to which it was connected. The third rule, so far as it takes into consideration the actual intention of the parties, cannot be applied to this case because the owner, as shown by the testimony, had one intention in his dealings with the intervener and another in making the mortgage to the Commerce Trust Company. So far as the intervener is concerned, the owner intended and contracted that the machinery should remain personal property. So far as the mortgagee is concerned, the owner intended and contracted that it was part of the realty. Under such conditions, according to the Arkansas cases, the rights of the parties must be determined by the element of notice. In the case of *Ozark v. Adams*, *supra*, the court said:

"The ponderous character of the machinery, its special construction for the purpose for which the lease was given, the difficulty of detachment and necessity of reconstruction and readaptation when refitted to another mill, are all indicia of the intention to become permanent."

Any man contemplating the purchase or the taking of a mortgage on the ice plant would have been warranted in assuming that the machinery was part of the realty. It is not sufficient to say that the vendor did all he could do under the law to protect his title, and security. It is equally true that the mortgagee did all it could do under the law to investigate the title. In the case of *Choate v. Kimball*, supra, the decision relates to sawmill machinery and was based on two points: (1) That the machinery in question was placed on the land subsequently to the execution of the mortgage. (2) That the parties contracted with reference to the custom of the country, which was, "to put such articles upon lands for temporary use, and to remove them as removal became desirable."

The case of *Brannon v. Vaughan*, 66 Ark. 87, 48 S. W. 909, is directly in point. In that case land had been sold and a bond for title given. The purchase price had not been paid. It was provided that, on default in the payment of the purchase money when due, the contract to convey should be forfeited at the election of the vendor. The vendee went into possession. By agreement with him, and with the knowledge and consent of the vendor, a third person erected on the land a house, with the privilege of removing it. A similar agreement was made by the vendee with still another person, by which a room was added to another house on the land. The vendor had no notice of this second agreement, and did not consent thereto. The vendee failed to meet his second payment and forfeited his rights under the contract. The parties who constructed the house and the room tore them down and removed the lumber. The owner of the land brought suit in replevin for the lumber thus taken. It was held that he could not recover as to the house with regard to the agreement for the removal of which he had notice prior to its construction, but it was held that he could recover with regard to the room, of the agreement for the removal of which he had no notice.

This case was followed in the case of *Peck-Hammond Co. v. Walnut Ridge School District*, 93 Ark. 77, 123 S. W. 771. In the last-mentioned case, a contractor had entered into a contract with the school district to erect a schoolhouse and to install therein a heating plant. The heating plant was purchased from the Peck-Hammond Company by the contractor, and the contract between them provided that the title to the material furnished should remain in the vendor until paid for. The heating plant was installed in the schoolhouse, and the contractor failed to complete the building and to pay for the plant. The school district knew nothing of the terms of the contract between the contractor and the Peck-Hammond Company. The company instituted a suit in replevin for the heating plant. It was held that it could not recover. In its opinion the court said that there was "a necessary inference that the heating plant was affixed permanently to the structure, and a conclusive presumption that it should become a part of the realty." This was the ruling of the court, notwithstanding the fact that in the contract between the contractor and the Peck-Hammond Company the title to the heating apparatus was expressly



retained. The court held that such provision in the contract did not affect the school district because it had no notice of it.

In the case of the Kansas City Southern Railway Company v. Anderson, 88 Ark. 129, 113 S. W. 1030, 16 Ann. Cas. 784, it was held that machinery in a planing mill was a part of the realty in a suit to condemn the property for railway purposes, and the railway company was required to take and pay for the machinery under its condemnation proceedings.

From the cases cited, the rule to be deduced is that machinery set in place for the purpose to which it is adapted, in such a way and under such conditions as to indicate permanency, must be regarded as real estate, and that the title of the purchaser of such real estate without notice is superior to that of the vendor of the machinery, the title to which was retained in a contract of sale.

The petition of the intervener will therefore be dismissed.

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BIXLER et ux. v. PENNSYLVANIA R. CO.

(District Court, M. D. Pennsylvania. January 4, 1913.)

No. 430.

**1. ABATEMENT AND REVIVAL (§ 12\*)—PENDENCY OF SUIT IN STATE COURT—RIGHT TO SUE IN UNITED STATES COURT.**

A prior suit pending in a state court is not a bar to a suit in the District Court of the United States between the same parties and on the same cause of action.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87-91, 94, 95, 98; Dec. Dig. § 12.\*]

Pendency of action in state or federal court as ground for abatement of action in the other, see notes to Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Mining Co., 47 C. C. A. 205; Barnsdall v. Waltemeyer, 73 C. C. A. 521.]

**2. JUDGMENT (§ 828\*)—"JUDGMENT OF NONSUIT"—BARRING SUBSEQUENT ACTION—"JUDGMENT ON THE MERITS."**

A "judgment of nonsuit" is not a "judgment on the merits," and the entry in a state court of a compulsory nonsuit is not a bar to an action on the same cause of action in the District Court of the United States.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4493-4495, 4825-4827.]

**3. LIMITATION OF ACTIONS (§ 55\*)—DEATH OF SERVANT—ACCRUAL OF CAUSE OF ACTION.**

A cause of action under the Employer's Liability Act (Act April 22, 1908, c. 140, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), and supplements thereto, for the death of an employé of a railroad company engaged in interstate commerce, accrues on the death of the employé from the injuries sustained in the service, and not on the appointment of his personal representative, competent and empowered to sue for his death.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. LIMITATION OF ACTIONS (§ 125\*)—COMMENCEMENT OF ACTION—DEATH OF SERVANT—SUBSTITUTION OF PARTIES.

A recovery under the Employer's Liability Act (Act April 22, 1908. c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), and supplements, for the death of an employé of a railroad company engaged in interstate commerce, is for the benefit of the surviving widow, husband, or children of the employé, and, if none, for his parents, and the personal representative prosecuting the action appears only as a nominal party; and where a deceased employé left no surviving widow or children, but parents, the parents are, under the act and under Purdon's Dig. Pa. (13th Ed.) p. 3238, the sole beneficiaries, and where they bring suit in their individual names within the statutory period, and they are appointed administrators of the deceased, they may be substituted as parties plaintiff in their representative capacity after the running of limitations, since the substitution does not change the cause of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 542; Dec. Dig. § 125.\*]

At Law. Action by Isaac P. Bixler and wife against the Pennsylvania Railroad Company. Motion to abate denied.

William M. Hain, Wm. H. Middleton, and Samuel H. Orwig, all of Harrisburg, Pa., for plaintiffs.

Charles H. Bergner and Lyman D. Gilbert, both of Harrisburg, Pa., for defendant.

WITMER, District Judge. Suit was brought by the plaintiffs, Isaac P. Bixler and Hermina E. Bixler, his wife, against the defendant, the Pennsylvania Railroad Company, under the act of Congress of April 22, 1908 (35 Stat. 65, c. 149 [U. S. Comp. St. Supp. 1911, p. 1322]), and supplements, generally known as the "Employer's Liability Act," to recover for the death of plaintiffs' son, who at the time of the accident, resulting in his death, was in the employ of the defendant, engaged, as alleged, in interstate traffic. The accident occurred July 17, 1910, on defendant's road near Marietta, Pa., when the engine, in which plaintiffs' deceased was riding, while rounding a sharp curve and running at a high speed, was derailed, killing the employé instantly.

This action was instituted June 12, 1912. Plaintiffs' statement having been filed, October 31, 1912, defendant entered an appearance and pleaded the general issue, "not guilty." The case came on for trial December 10, 1912, and after jury was sworn the defendant moved to abate the plaintiffs' action for the following reasons: (1) That by the record it appeared that the employé, alleged to have been killed, died July 17, 1910, and the present action was instituted June 12, 1912, by, for, and on behalf of the father and mother of said decedent, and not by the personal representatives of the deceased; that no action, for the death of such employé, has, within two years from the day the cause of action accrued, been instituted by the personal representatives, as required by the act of Congress known as the "Employer's Liability Act." (2) That by the records in the court of common pleas of Dauphin county there appears to have been entered, in an action between the same parties and for the same cause of action a judgment against the plaintiffs—a compulsory nonsuit. Whereupon the plaintiffs replied deny-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing the defendant's right to abate, offering to amend by substituting the personal representatives, Isaac P. Bixler and Hermina E. Bixler, administrators of Samuel E. Bixler, deceased. The defendant opposed the proposed amendment, and the questions raised were fully argued.

[1, 2] While the plea of the pendency of a prior suit in another jurisdiction has in some courts been allowed, it was decided in *Stanton et al. v. Embry, Adm'r*, 93 U. S. 548, 23 L. Ed. 983, that such prior suit in a state court is not a bar to a suit in a Circuit Court of the United States; nor is the action barred by the entry of a compulsory nonsuit. A judgment of nonsuit is not a judgment on the merits, and therefore it is no bar to another suit upon the same cause of action. 23 Cyc. pp. 1136, 1137. It does not determine the rights of the parties, and is no bar to a new action. *Homer v. Brown*, 16 How. 354, 14 L. Ed. 970. "A new trial, upon which nothing was determined, cannot support a plea of *res adjudicata*, or have any weight as evidence at another trial." *Manhattan Life Insurance Co. v. Broughton*, 109 U. S. 125, 3 Sup. Ct. 100, 27 L. Ed. 878.

[3] The act, removing the common-law obstacles, under which the plaintiffs seek to recover, in part, reads as follows:

Sec. 1. "That every common carrier by railroad while engaging," etc., "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such common carrier," etc.

Sec. 6. "That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

Some argument was indulged regarding the exact time when the cause of action accrued, whether when the employé was injured and died, or when proper parties appeared who were competent and empowered to bring suit. That the cause of action accrued when the employé died from the injuries suffered in the employer's service is not in doubt. The cause of action for damages for the death of the employé, Bixler, was perfected and immediately accrued when he was killed. *Dodge v. Town of North Hudson (C. C.)* 188 Fed. 492. Hence a cause of action, if otherwise perfect, existed for such death when suit was instituted. The important question remaining is whether the action brought by the parents of the deceased in consequence thereof may be maintained or amended.

[4] In the event of death of an employé, the cause of action shall inure "to his or her personal representatives, for the benefit of the surviving widow, or husband, children of said employé, and, if none, then for the said employé's parents," etc. In the case before us the recovery, if any, is for the benefit of the parents of the deceased employé, though the action is to be prosecuted by his executor or administrator. The latter have no interest whatever in the recovery, and appear only as nominal parties in the action. The important matter is the award of damages. It is not an action for a fixed penalty for a wrong done, but an action for the recovery of the amount of damages the benefi-

ciaries have sustained by reason of the death; and since the object of the recovery will be the same, the parents being as well the sole beneficiaries under the Pennsylvania statutes (Stewart's Purdon's Digest, vol. 3, pages 3238-3241), it may be enforced by the parents, regardless of the entitlement of the action. *Dodge v. Town of North Hudson*, supra; *Missouri, K. & T. Ry. Co. v. Wulf*, 192 Fed. 919, 113 C. C. A. 655; *St. Louis & S. F. R. Co. v. Herr*, 193 Fed. 950, 113 C. C. A. 578; *Van Doren v. Pennsylvania R. Co.*, 93 Fed. 266, 35 C. C. A. 282; *Stewart v. Baltimore & Ohio Railroad Co.*, 168 U. S. 445-449, 18 Sup. Ct. 105, 42 L. Ed. 537. In the former case, regarding provisions similar to these under consideration, Judge Ray made use of the following excerpt as illustrative of the principle:

"This statute is a remedial one, enacted for the purpose of compelling those who negligently cause the death of persons to compensate the surviving husband, widow, or next of kin of the person so killed, and, like all such statutes, should be so construed as to give, instead of withholding, the remedy intended to be provided. *Lamphear v. Buckingham*, 33 Conn. 237; *Haggerty v. Central R. Co.*, 31 N. J. Law, 349. The important portion of the section is that which gives a right of action, and not that part which provides who may enforce it. The latter is an incidental provision." *Lang v. Houston, etc., R. Co.*, 75 Hun, 151, 27 N. Y. Supp. 90, affirmed 144 N. Y. 717, 39 N. E. 858.

In the *Stewart Case*, supra, the statute giving the right of action, or, more properly speaking, removing the common-law obstacle to recovery, the action being to recover for the tort or negligence, required the action to be brought in the name of the state of Maryland; but it was brought in the District of Columbia in the name of the personal representative, and this was sustained by the Supreme Court, saying:

"The two statutes differ as to the party in whose name the suit is brought. In Maryland, the party is the state; in this District, the personal representative of the deceased. But neither the state in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply nominal plaintiff. While in the District the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debt of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them for the taking away of their relative. \* \* \* In an action for tort, like this one, it is evident that the real party in interest is not the nominal plaintiff, but the party for whose benefit the recovery is sought; and the courts of either jurisdiction will see that the damages awarded pass to such party."

In the case of *Van Doren v. Pennsylvania R. R. Co.*, decided in this circuit, the court, in expressing doubt as to the necessity of an amendment, where suit was brought in the name of the widow, administratrix of the deceased, she being the sole beneficiary, changing her title to that of her own individual right, so as to comply with the Pennsylvania statute, said:

"The proposed amendment would not, if properly allowed, have changed the cause of action or affected in any manner the measure of proof necessary to establish the alleged tort. It would not have changed the issue to be tried, or have increased or diminished the amount to be recovered. It could not have operated to the prejudice of the defendants. It would merely have changed the capacity in which the suit should be prosecuted by Laura



L. Van Doren from that of administratrix to that of widow of the decedent, thereby conforming to the Pennsylvania statute. It could have been of no consequence to the defendant who should ultimately receive the amount of any verdict against it, if the final judgment rendered in the action would bar a second suit for damages for the death of Henry Van Doren; and that the judgment would have operated as such bar we have no doubt, it appearing that the distribution of the fund would not be in any manner affected."

The motion to abate the action is denied, without regard to the defendant's plea of the general issue heretofore entered, and, while doubting the necessity of amending, by substituting as parties plaintiff the parents of the deceased as administrators, it will be so ordered, thereby complying with the practice indicated by the court in the latter case.

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In re NUTTALL et al.

(District Court, S. D. New York. December 27, 1912.)

**1. BANKRUPTCY (§ 391\*)—PROSECUTION OF ACTIONS IN STATE COURTS PENDING BANKRUPTCY PROCEEDINGS—INJUNCTION.**

Under Bankruptcy Act July 1, 1898, c. 541, § 2 (15), 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), authorizing the bankruptcy court to make such orders as may be necessary for the enforcement of the act, and section 11a, providing that a suit founded on a claim from which a discharge would be a release, and which is pending against one at the time of the filing of the petition against him, shall be stayed until after adjudication or dismissal, the bankruptcy court may restrain the further prosecution of actions pending against a bankrupt when the bankruptcy proceedings are instituted or commenced thereafter pending the proceedings, provided the claim sued on is one for which a discharge in bankruptcy will be a release, and may also restrain further prosecution of pending actions interfering with a proper and speedy enforcement of the act.

[Ed. Note.—For other cases, see Bankruptcy Cent. Dig. §§ 637-655; Dec. Dig. § 391.\*]

Enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank of Providence*, 16 C. C. A. 90; *Central Trust Co. of New York v. Grantham*, 27 C. C. A. 575; *Copeland v. Brunning*, 63 C. C. A. 437.]

**2. BANKRUPTCY (§ 391\*)—DISCHARGE—EFFECT—CLAIMS FOUNDED ON FALSE PRETENSES OR FALSE REPRESENTATIONS.**

The bankruptcy court will, pending application for the discharge of a bankrupt, restrain the prosecution in a state court of an action against him, founded on a claim that the bankrupt, while insolvent, purchased goods on credit with the undisclosed intention to pay therewith relatives and with the undisclosed intention to go into bankruptcy, but not making any representations nor concealing any fact as to his financial condition, since the question, whether the claim filed and proved in bankruptcy is based on false pretenses or false representations so as to be unaffected by a discharge in bankruptcy under Bankruptcy Act July 1, 1898, c. 541, § 17 (2), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), is doubtful, and the bankrupt should have opportunity to plead his discharge, if granted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637-655; Dec. Dig. § 391.\*]

**3. BANKRUPTCY (§ 421\*)—CLAIMS PROVABLE—EFFECT.**

Where a claim is founded on an open account or on contract, express or implied, and may be proved under Bankruptcy Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), if the creditor

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

waives any tort and files his claim, the claim is provable and barred by a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 772-774, 779-786; Dec. Dig. § 421.\*]

**4. BANKRUPTCY (§ 435\*)—DISCHARGE—AVAILABILITY AS A DEFENSE.**

A bankrupt may not plead a discharge as a defense until it is granted, and a discharge is not available unless pleaded.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 824-839; Dec. Dig. § 435.\*]

**5. FRAUD (§ 1\*)—DEFINITION.**

A legal "fraud" can be committed only by fraudulent representations of fact, or by such conduct or artifice for a fraudulent purpose as will throw one off his guard and cause him to omit inquiry or examination which he would otherwise make.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 1-7; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2943-2954; vol. 8, p. 7666.]

In the matter of the bankruptcy of John A. Nuttall and another, individually and as copartners of the firms of the Empire Knitting Mills and John A. Nuttall & Company, bankrupts. Application on order to show cause for an order restraining Leonard Paulson and others from prosecuting an action in the Supreme Court of the state of New York against the bankrupts. Granted.

Thomas S. Fagan, of Troy, N. Y., for the motion.

J. S. Carter, of Cohoes, N. Y., opposed.

RAY, District Judge. The defendants in an action in the Supreme Court of the state of New York, John A. Nuttall and Lillian M. Herick, were duly adjudicated bankrupts on the 8th day of January, 1912, individually and as copartners of the firms of Empire Knitting Mills and John A. Nuttall & Co. They have applied for a discharge in bankruptcy, and such application, specifications of objection having been filed thereto, is now pending undetermined. Long delay in such proceedings is unnecessary. The claim of the plaintiffs in said action, Leonard Paulson, Cortland Linkroum, and James Hooker, amounting to \$998.95, was duly scheduled, and a discharge therefrom prayed, and the said plaintiffs have proved their said claim in said bankruptcy proceedings, still pending, and same was allowed. Shortly after the petition was filed, said claimants, Paulson, Linkroum, and Hooker commenced an action in the Supreme Court of the state of New York on the same indebtedness so scheduled and later proved and allowed. The defendants allege and claim that the said debt and demand is of such a character and nature that a discharge in bankruptcy will be a full release to them therefrom. The said plaintiffs contend, however, that the claim or cause of action sued upon is a liability for obtaining property by false pretenses or false representations, and that the complaint so shows on its face, and that there can be no recovery at all unless such a cause of action is made out on the trial. The plaintiffs claim that under section 17 (2) a discharge in bankruptcy will not be a release. All this the defendants deny. The claim

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proved was in contract and contained no charge of obtaining property by false pretenses or false representations. This proof of claim has not been withdrawn.

[1] It is settled law that the bankruptcy court may restrain the further prosecution of all actions pending against the bankrupt when the bankruptcy proceeding is instituted or commenced thereafter during the pendency of such bankruptcy proceedings, provided the claim or demand sued upon is one from which a discharge in bankruptcy will be a release. Section 11a, Bankruptcy Act, relating particularly to suits begun before bankruptcy proceedings are instituted, and section 2 (15), which specifically authorizes the bankruptcy court to "make such orders \* \* \* in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." In the latter class of cases it is not essential that the suit be founded on a claim of such a nature that the judgment or debt represented thereby will be released by the discharge. If the prosecution of the suit to judgment and the enforcement of the judgment during the pendency of the bankruptcy proceedings will interfere with the proper and speedy enforcement of the provisions of the act or tend to embarrass the court, its prosecution may be enjoined. *Collier on Bankruptcy* (9th Ed.) 262, 263; *In re Basch* (D. C.) 3 Am. Bankr. Rep. 235, 97 Fed. 761; *In re Gutman & Weak* (D. C.) 114 Fed. 1009, 8 Am. Bankr. Rep. 252.

[2] But it has been decided that the claim sued upon must be *clearly* dischargeable or a stay should be granted. *In re Sullivan*, 2 Am. Bankr. Rep. 30. In *Collier on Bankruptcy* (9th Ed.) 266, it is said:

"The stay should usually be granted if the bankrupt is threatened with arrest or will be needlessly harassed."

In this case, at bar, it is not at all clear that the complaint states a cause of action for obtaining property by false pretenses or false representations within the meaning of the act. The sum and substance of the complaint is:

(1) That defendants prior to December 27, 1911, had purchased goods of plaintiffs, and, so far as appears, paid for them, and had not disclosed any financial embarrassment or insolvency.

(2) That on or about December 27, 1911, the defendants by letter requested plaintiffs to quote their best prices for 50,000 pounds of white cotton yarn, deliveries to commence at once, 5,000 pounds weekly, and that December 30, 1911, plaintiffs visited the defendants at their mill, and, on information and belief, that for the purpose of inducing plaintiffs to deliver said yarn the defendants then and there made to plaintiffs the false and fraudulent representations and statements in substance following:

"We will pay you 20½ cents a pound for 20,000 pounds of 30s white cotton yarn to be shipped at once, and we will pay you 20½ cents a pound for 30,000 pounds of such yarn to be shipped, 5,000 pounds a week commencing February, 1912."

These are mere promises to pay for goods which they seek to purchase. These are all of the false representations alleged to have been actually made.

(3) That plaintiffs refused this offer, but offered to sell same at 21 cents a pound, and that thereupon the defendants agreed to purchase 20,000 pounds at 21 cents per pound, shipment made at once, and 30,000 pounds at same price per pound, shipments in parcels of 5,000 pounds each commencing February, 1912.

(4) On information and belief that the defendants then contemplated filing a petition in bankruptcy, and the ordering of such goods and the agreement to pay for same was in furtherance of a deceptive and fraudulent scheme on the part of the defendants to induce plaintiffs to ship a part or all of said first lot of 20,000 pounds before filing their petition in bankruptcy and to enable them to transfer the warehouse receipts for same to certain relatives.

(5) That, relying on the supposed good faith and honesty of the defendants in ordering and agreeing to pay for such goods, same were shipped and delivered in part on the 2d and 3d days of January, 1912.

(6) That on the delivery of such goods the defendants placed same in warehouse and procured warehouse receipts for same and executed transfers of same, but retained same until after their bankruptcy.

(7) That on learning of defendants' insolvency the plaintiffs demanded such goods but same were not returned.

(8) On information and belief that defendants knew, or *should have known*, of their insolvency when they ordered the yarn and that they could not pay for same.

(9) That defendants were not in need of the yarn when ordered.

(10) On information and belief that defendants had been conducting business at a loss for three years, and knew, or should have known, they were insolvent when they ordered the goods.

(11) That the defendants' purpose was to get such property and use same in the manner stated to protect their relatives on alleged antecedent debts. There is no allegation that defendants made any representation or statement whatever in connection with the purchase of such yarn, except that they promised to pay for same, and the substance is that the defendants knew, or *ought to have known*, of their *inability to pay and then intended to go into bankruptcy and not pay*.

The complaint alleges that the plaintiffs have not filed and proved their claim; but the moving papers allege that such claim has been filed and proved, and this was conceded on the argument.

There is a difference between mere fraud and false pretenses and false representations. The complaint, in substance, states that defendants intending to get property from plaintiffs with which to pay certain relatives, and intending to go into bankruptcy, when it ought to have known they were insolvent, offered to purchase goods and pay for them. It is not alleged that plaintiffs made any inquiries as to defendants' financial condition, or that defendants made any representations or concealed any fact on inquiry made, express or implied. There was no relation of trust or confidence. There is no allegation of conduct calculated to mislead or prevent inquiry.

[5] In *Dambmann v. Schulting*, 75 N. Y. 55, and again in 85 N. Y. 622, where the case came again before the court, it was held that a party can commit a legal fraud in a business transaction with an-



other, only by fraudulent misrepresentations of fact, or by such conduct or artifice for a fraudulent purpose as will mislead the other party, or throw him off his guard and cause him to omit inquiry or examination which he would otherwise make, and that, when there is no such relation of trust or confidence between the parties as imposes upon one an obligation to give full information to the other, the latter cannot proceed blindly, omitting all inquiry and examination, and then complain that the other did not volunteer to give the information he had. This case was examined, quoted, approved, and followed in the Supreme Court of the United States. *Cleaveland v. Richardson*, 132 U. S. 318, 329, 330, 10 Sup. Ct. 100, 33 L. Ed. 384. In that case the Supreme Court also cited and approved *Graham v. Meyer*, 99 N. Y. 611, 1 N. E. 143, where it was held that a compromise made by a debtor with his creditor cannot be assailed on the ground that the debtor omitted to disclose his financial condition, and that "when he is not questioned in regard thereto and does nothing to mislead, he is not bound to make any such disclosure." When a person purchases property, there is always a promise to pay therefor, express or implied, and if this promise is not fulfilled we may infer and even find that the party did not intend to keep it. This is especially true when the promisor has no property or means of payment at the time, only expectations. But in the absence of some untrue express voluntary statement made to secure the property as to ability to pay, or of some untrue statement as to such ability made in answer to inquiries, can it be said that the mere offer to purchase and pay an agreed price named, accompanied by an intent not to pay, is obtaining property by "false pretenses or false representations"? When the Bankruptcy Act was enacted, to be excepted from the operation of the discharge, a liability for obtaining property by false pretenses or false representations had to be reduced to judgment. The main reason for this provision in that form is well stated by Werner, J., in *Tindle v. Birkett*, 183 N. Y. at page 271, 76 N. E. 25, quoting the Supreme Court. The section has since been amended so that *liabilities* for obtaining property by false pretenses or false representations are not affected by the discharge. This fact, if it be a fact, can be shown as well in the bankruptcy court when the claim is proved as in the state court so far as preventing the operation of a discharge therein is concerned.

[3] But the point to which attention is invited is that stated by Judge Werner in the *Tindle Case*, which was affirmed by the Supreme Court of the United States, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762, and where it was held:

"Where a claim is founded upon an open account, or upon contract express or implied, and can be proved under section 63a of the Bankruptcy Act, if the claimant desires to waive the tort and take his place with the other creditors, the claim is one provable under the Act and barred by the discharge."

In the language referred to he says, quoting the Supreme Court:

"If a creditor has a claim against a debtor for goods sold, which would ordinarily be covered by a discharge in bankruptcy, he is strongly tempted to allege, and if possible to prove, that the goods were purchased *under a*

*misrepresentation of the assets of the buyer, and thus to make out a claim for fraud which would not be discharged in bankruptcy."*

I doubt if our courts will ever hold that the purchase of goods at an agreed price, accompanied by an intent on the part of the purchaser not to pay for them, in the absence of any representation whatever as to the ability of the purchaser to pay, or any representation of a fact tending to induce a sale and secure a delivery of the property, and in the absence of any acts or conduct tending to avoid or prevent inquiry as to financial condition, creates a liability for obtaining property by false pretenses or false representations. Such a holding will be a far advance on the doctrines enunciated in *Dambmann v. Schulting*, *Graham v. Meyer*, and *Cleaveland v. Richardson*, *supra*. In *Atlanta Skirt Co. v. Jacobs*, 8 Ga. App. 299, 68 S. E. 1077, 25 Am. Bankr. Rep. 895, the court did hold that:

"A false representation may consist in the purchasing of goods with no present purpose of paying for them and in contemplation of a fraudulent insolvency. To buy goods without a present intention to pay is a false representation of one's intention. Therefore to buy goods without a present intention to pay will avoid a discharge."

This I am not prepared to sanction. Is it a false pretense or representation not to disclose one's intent not to pay? It may be that the defendants were guilty of fraud (*Ames v. Moir*, 138 U. S. 306, 312, 11 Sup. Ct. 311, 34 L. Ed. 951); but a debt created by the fraud of a person thereafter adjudged a bankrupt is dischargeable, unless same was created by his fraud "while acting as an officer or in any fiduciary capacity" (*Crawford v. Burke*, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; *Tindle v. Birkett*, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762). Of course, this does not apply to the "fraud" involved in "obtaining property by false pretenses or false representations."

The language of the Bankruptcy Act of March 2, 1867, c. 176, § 33, 14 Stat. 533, as to debts or liabilities excluded from the operation of a discharge, was different. That section provided:

"No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved and the dividend thereon shall be a payment on account of such debt."

Under that act any debt created by actual fraud, as distinguished from implied fraud, was not discharged. By reference to section 63a, "Debts which may be proved," we find:

"Debts of the bankrupt may be proved and allowed against his estate which are: \* \* \* (4) Founded upon an open account, or upon a contract express or implied."

It cannot be doubted that this debt of these plaintiffs was founded on a contract, and may it be proved as such without reference to any alleged false pretenses or representations, allowed and a dividend declared, and at the same time prosecuted in the state court as a liability "for obtaining property by false pretenses or false representations"? If so, of what force is the decision of the Supreme Court in *Tindle v. Birkett*, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762,

above quoted? Or is it to be the law that the liability may be proved in the bankruptcy court as a debt founded upon a contract under section 63a (no reference to any fraudulent pretenses or representations), and again in the Supreme Court of the state as a liability for obtaining property by false pretenses or false representations, so as to then establish it as a debt not affected by the discharge? If so, *Tindle v. Birkett*, supra, is of little force. But I am not called upon to finally decide these questions. It is not clear, but, on the other hand, extremely doubtful, that the claim set out in the complaint of these plaintiffs in the state court is one from which a discharge will not be a release, and hence the motion should be granted.

[4] The defendants cannot plead their discharge until it is granted, and, should I allow this action to go to judgment before the question of their discharge is finally determined, they would be deprived of a valid defense should such discharge be finally granted; at least they would be deprived of the opportunity to present it. In *Collier on Bankruptcy* (9th Ed.) 391, it is said:

"As the law now stands, the frauds which will bar discharge are those connected with the obtaining of property by false pretenses or false representations."

See *Mackel v. Rochester* (D. C.) 14 Am. Bankr. Rep. 429, 135 Fed. 904; *Bullis v. O'Beirne*, 195 U. S. 606, 619, 620, 25 Sup. Ct. 118, 49 L. Ed. 340.

And at page 404, *Collier* says:

"A discharge being only available in bar, it must be regularly pleaded."

And at page 364, the same author says:

"The better practice is to procure a stay of all pending suits, and to stay those which may be brought while the proceeding is pending, and then when the discharge is granted to plead it."

The plaintiffs here will suffer nothing by a stay. When the question of discharge is determined, the action can proceed, and the state court, in the first instance, will determine whether it is a bar to the action.

Motion granted.

# YOUNG v. WELCH MFG. CO.

(District Court, D. Massachusetts. July 29, 1912.)

No. 269.

## 1. WITNESSES (§ 269\*) — CROSS-EXAMINATION — EQUITY SUITS IN FEDERAL COURTS.

The rule announced in *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521, requiring all testimony offered in an equity suit to be received and recorded, regardless of objection to its competency, relevancy, or materiality, does not enlarge the limits of cross-examination as recognized in the federal courts, which restrict it to matters disclosed on the direct examination.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 949-954; Dec. Dig. § 269.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. WITNESSES (§ 209\*)—CROSS-EXAMINATION—EQUITY SUITS IN FEDERAL COURTS.**

A petition to require a witness in an infringement suit to answer certain questions on cross-examination considered, and granted in part.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 209.\*]

In Equity. Suit by Samuel D. Young, trustee, against the Welch Manufacturing Company. On defendant's motion for an order to compel witness under examination to answer certain questions. Granted in part.

See, also, 201 Fed. 519.

Nathan Heard, of Boston, Mass., for complainant.

Fred L. Chappell, of Kalamazoo, Mich., for defendant.

DODGE, Circuit Judge. The bill in this case alleges infringement by the defendant of United States letters patent No. 987,183, which the plaintiff claims to hold by assignment from the patentee, and asks for an injunction and an accounting. An answer and replication having been filed, the plaintiff's testimony is being taken before a special examiner under an order of this court entered June 15, 1912, pursuant to the sixty-seventh equity rule.

The present motion is made on the defendant's behalf. It asks that Oscar L. Smith, a witness produced on behalf of the complainant in rebuttal, be required to answer certain questions put to him in cross-examination. It sets forth extracts from the record, certified by the examiner, containing the questions to which the motion relates, with the objections noted thereto by counsel, and the answers made by the witness, so far as any answers have been made. The entire record before the examiner, also certified by him, has also been submitted.

[1] For the general rule applying under such circumstances, which has been declared and applied in not a few reported cases, reference may be made to *Dowagiac, etc., Co. v. Lochren*, 143 Fed. 211, 74 C. A. 341, 6 Ann. Cas. 573; *Nelson v. U. S.*, 201 U. S. 92, 26 Sup. Ct. 358, 50 L. Ed. 673. All are, of course, based upon *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521. The rule is that all evidence offered is to be taken and recorded, including that held to be incompetent or immaterial, in order that the appellate court, should the case ultimately come before it, may pass upon its competency or materiality, render a final decree, and thus conclude the litigation, without remanding the case in order to procure evidence held to have been wrongfully excluded. From this general rule—

"the evidence of a privileged witness, evidence plainly privileged, and evidence which clearly and affirmatively appears to be so incompetent, irrelevant, or immaterial that it would be an abuse of the process or power of the court to compel its production or to permit its introduction, are excepted." *Missouri, etc., Co. v. Hamilton*, 165 Fed. 283, 91 C. C. A. 251; *First Nat. Bank v. Abbott*, 165 Fed. 852, 855, 91 C. C. A. 538.

The above applies when the competency, relevancy, or materiality of the testimony sought to be elicited is in question. But I agree

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.



with the learned judge for the New Jersey district in believing that it is not to be regarded as enlarging the limits upon cross-examination recognized in the federal courts, and should not be so applied as to permit such a result. See *Æolian Co. v. Standard, etc., Co.* (C. C.) 176 Fed. 811; *Ferry-Hallock Co. v. Orange, etc., Co.* (C. C.) 185 Fed. 816. In the first of these cases it was said that "in *Blease v. Garlington* no judicial consideration was given as to the proper scope of cross-examination" (176 Fed. 814); and in both cases the court refused to compel answers, because the attempted cross-examination was not confined to the matters disclosed on direct examination. When, as in the present case, the direct examination is in rebuttal, there is the more reason for confining cross-examination within the limits referred to. Moreover, in view of the fact that an order to answer must be enforced, if at all, by contempt proceedings against the witness, it is clear that the court cannot be expected to order any question to be answered which is ambiguous in form, or whose terms do not afford reasonable opportunity for a definite and intelligent answer. And, lastly, I do not understand that, because the examination is under the sixty-seventh equity rule (29 Sup. Ct. xxxiii), the court has lost any of that discretionary power to restrict cross-examination which it possesses under circumstances not infrequently arising.

[2] Proceeding to consider the different questions to the witness which are specified in the petition, it appears that the witness said, in answer to Cross-Int. 264, that he did not understand the question clearly enough to give an intelligent answer. Nothing which appears in the petition enables me to say that this reply was not made in entire good faith, nor does any attempt appear to have been made to render the question more intelligible to the witness.

In reply to Cross-Int. 271, the witness said that the question was decidedly technical, involved matters pertaining to differences in patents, that he was not qualified to testify upon such matters, and could not answer such a question. I find no sufficient ground for believing that this answer was not given in good faith, nor can I find that the witness was in fact qualified to give testimony which he said he was not qualified to give.

Cross-Int. 366, after an introductory statement by counsel, with which it seems to me to have been unnecessary to incumber the record, concludes by asking the witness to give a condensed statement, or, if he could not do this, an elaborate statement, "of what you think your invention really is." The exact scope of the patent is a question in the case to be determined by the court. What the inventor may think its scope is, is, of course, plainly immaterial upon the question of its scope. It does not appear that the witness assumed to be an expert or was testifying in that capacity. But he is the inventor and the original patentee. He had undertaken in his direct examination in rebuttal (Int. 22) to give "a brief history of what led up to" his invention, and to state how that invention was brought about. His own notion, therefore, of what his invention really is, may, if

disclosed, have some bearing upon the weight to be given to some of his statements made in the course of his "brief history." At least, it is impossible to say now that it cannot possibly have any such bearing. I think, therefore, that he should make the best answer he can. There has been no outright refusal to answer. He has only stated that he did not feel competent to answer. I do not think any order of court is called for at present.

Cross-Ints. 476, 477, and 478 may be considered together. The witness was asked (Cross-Int. 478), "Did you make such a statement to Rogers, Peet & Co.?" What is meant by "such a statement" appears from Cross-Int. 476, asking the witness if he had not theretofore "stated quite elaborately and at length your views as to what you had invented to Rogers, Peet & Co., when you were threatening them with suit and attempting to dissuade them from purchasing wardrobe cases manufactured by the defendant herein." The witness said, in answer to Cross-Int. 476, that the discussions with Rogers, Peet & Co. related to the proposed installation or sale of wardrobes to be made in accordance with a design not like the defendant's structure, that the discussions were since this suit was brought, and that the notice to them was largely conditioned upon the result of this suit, in connection with a pending interference suit. This seems to admit that there were discussions with the firm referred to. The inquiry whether in those discussions the witness had stated his views as to what he had invented, or not, is a preliminary question only, and does not seem to raise distinctly the question whether the witness could be called upon to repeat the statements then made, if any, regarding his views of his invention. I find nothing, however, in the witness' direct examination, which seems to me to give cross-examining counsel a right to call upon him to repeat the statements to Rogers, Peet & Co., if made. Cross-Int. 478 also asks whether or not statements made to them were not accompanied with a statement from the witness' counsel or patent attorney. This inquiry seems to me even less justified. I must, therefore, decline to order the witness to answer this question.

Cross-Ints. 479 and 480 ask the witness to say whether he did not send certain original letters, papers purporting to be copies of them being shown him, to Rogers, Peet & Co. and others. This is asking him, not only whether he sent letters to the persons named, but also to say, without the originals before him, whether or not the papers shown him were copies. The inquiry whether he had sent such letters or not seems to me not opened by anything in the direct examination, and I must decline to order the witness to answer. It may be added that they have not been identified by the examiner, and, strictly speaking, form no part of the record.

Cross-Ints. 808-810: In Cross-Int. 807 the witness had been asked whether certain features in Fig. 3 of the patent in suit did not constitute what might be called, within the limits of its action, a "self-righting rack construction." Objection was noted, but the witness did not refuse to answer. He said it did not. Asked

to explain why not (Cross-Int. 808), he declined to do so, because the expression above quoted was "probably quoted from another invention which he controlled, and which is now involved in an interference in the Patent Office"; also because the question was calculated to get information on that subject. Cross-Ints. 809 and 810 pursue the same topic. It is conceded that the three questions involve an application for a patent by the witness upon which interference proceedings are pending, and it is contended that section 4908, Rev. Stats., excuses the witness from answering. Having stated, without objection, that what was called to his attention in the patent in suit did not constitute a "self-righting mechanism," I think he should answer these questions so far as to explain why not. I do not think he is called upon to answer regarding what is involved in the interference, further than necessary for such explanation.

Cross-Ints. 876-879: 876 and 877 are the only questions which the witness declined to answer. 876 would require him to construe a paper offered in evidence by the defendant, during his cross-examination, and which the defendant asked to have marked as an exhibit, against the plaintiff's objection. The record fails to show that it has been properly made evidence in the case, or that the witness has given any such testimony about it as made this request proper in cross-examination. 877 is argumentative merely, and it assumes the witness to have stated, about the paper referred to, what the record does not show him to have stated. I must decline to make any order regarding these questions.

Cross-Int. 888 is in renewal of the inquiry made in Cross-Ints. 479 and 480, which I have declined above to order the witness to answer.

Cross-Int. 902 again questions the witness regarding his pending patent application referred to above in Cross-Ints. 808-810. I am unable to believe that I am justified in compelling an answer.

Cross-Int. 903 is merely preliminary. Whether what it may lead to is objectionable, or not, cannot be known at this stage. The witness should answer this question.

Cross-Ints. 904-906: 904 asks the witness if he had not "asserted" what follows in the question. When or where asserted, or to whom, is not stated. Without these specifications, I do not understand that a witness can properly be asked in cross-examination whether he has not made statements claimed to be at variance with his direct testimony. 905 and 906 are based on the assumption that he has made the "assertions" or statements recited in 904. I cannot order him to answer these questions.

Cross-Int. 945: The witness answered this by saying that he did not feel competent to point out the matter called for, if any, in the original specification and claim. Being unable to say that this answer was untrue, or not, in good faith, I cannot undertake to compel further answer.

Cross-Ints. 951-954: The only refusal to answer consists in the

statement, made in reply to 952, that the question called for expert knowledge and interpretation, which the witness was not qualified to give. My ruling must be the same as in regard to 945.

Cross-Ints. 958, 969, 970: There has been no express refusal to answer these questions. That the witness did not go so far as he could reasonably be expected to go in answering them is not clear to me, and I am unable to believe that any order to him to go further would be justified.

Cross-Int. 973: The witness did not refuse to answer, but asked that the question be made more definite. The cross-examiner insisted that his question was clear and required an answer. In Cross-Int. 972, immediately preceding, the witness had been asked:

"If you can find the precise language in the original, I wish you would point it out. I believe you have already endeavored to point out the substance."

To this he had answered that he found the phraseology different in some respects, but the substance appeared to be the same in both paragraphs. In view of this, it seems to me reasonably clear that by "anything like," in Cross-Int. 973, similarity in substance, and not in phraseology, was intended. But if the witness had already endeavored to "point out the substance," the question, so understood, is a mere renewal of the same inquiry. Conceding, what seems to me at best doubtful, that the line of inquiry attempted in this question was justified by anything in the direct examination, to pursue it further, under the circumstances, can mean only argument with the witness regarding the comparison of documents, which the court can compare for itself. Whether to permit this, or not, seems to me clearly within the discretion of the court, and, being unable to see that any useful purpose can be served by permitting it, I must decline to require further answer.

The result is the witness is ordered to answer Cross-Int. 808 to the extent above indicated, and to answer Cross-Int. 903. The petition is denied, so far as it relates to the remaining questions specified.

The petition further asks that the witness be directed "to answer questions generally," and "to answer all questions fully without argument." If, under any circumstances, such an order could be justified, nothing shown me in this record seems to me to afford sufficient justification in this case. Considering that the 101 direct questions put to this witness, with his answers, occupy 53 pages of the record, while in cross-examining him 872 questions have been put, and 233 pages of the record occupied, I think an unusually strong reason should appear for action by the court tending to protract the examination further.



## THE MONROE C. SMITH.

## THE WILLIAM E. REIS.

(District Court, N. D. Ohio, E. D. October 3, 1912.)

No. 2,455.

**COLLISION (§ 91\*)—STEAM VESSELS MEETING—FAULT.**

A collision on the St. Clair river at night between two large lake steamers, both loaded, the Reis coming down and the Smith passing up, after the vessels had exchanged passing signals of one blast, *held*, on the evidence, due solely to the improper navigation of the Smith in keeping too close to the Canadian channel bank, which caused her to take a broad sheer to port and strike the Reis on the port side, although such course was not required by the position or course of the Reis, which were such that the vessels would have passed in safety, but for such sheer.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 187-192; Dec. Dig. § 91.\*]

In Admiralty. Suit for collision by the Cleveland Steamship Company, owner of the steamer William E. Reis, against the steamer Monroe C. Smith; the United States Transportation Company, claimant. Cross-libel by the owner of the Smith against the Reis. Decree against the Smith.

Goulder, Day, White, Garry & Duncan and Holding, Masten, Duncan & Leckie, all of Cleveland, Ohio (Harvey D. Goulder, and Frank S. Masten, both of Cleveland, Ohio, of counsel), for libellant and cross-respondent.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio (Hermon A. Kelley and George W. Cottrell, both of Cleveland, Ohio, of counsel), for respondent and cross-libellant.

DAY, District Judge. This case grows out of the collision which occurred in the waters of the St. Clair river on the evening of November 1, 1907, between the steamer William E. Reis, belonging to the Cleveland Steamship Company, and the steamer Monroe C. Smith, belonging to the United States Transportation Company. The boats were modern steel steamers—the Reis being 416 feet long, with a 50-foot beam; the Smith, 380 feet long, with a 50-foot beam. The Reis was down-bound laden with iron ore; the Smith was up-bound laden with coal. The collision occurred after nightfall. The weather was dark and rainy, but lights could be seen for a considerable distance, and the banks of the river were visible. Both of the vessels seem to have been properly equipped, and the officers and crew properly stationed on each. There is no doubt but that the lights were proper, and that single blast passing signals were exchanged timely. The scene of the collision was that part of the south channel of the St. Clair river which lies between Walpole Island, on the Canadian side, and Russell Island, on the American side. On the easterly shore of Russell Island the government maintains three lights, marked on the chart and referred to in the testimony as "Russell Island Upper

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Light," "Russell Island Middle Light," and "Russell Island Lower Light," respectively. The width of the navigable channel abreast of Russell Island is in the neighborhood of 1,000 feet; but the width of the river from bank to bank is from 1,500 to 1,700 feet between shore lines.

There is no dispute as to the number, character, or order of the signals; it being conceded that the Smith first blew a passing signal of one blast, indicating her intention to pass the Reis in the usual manner provided by the rules, namely, port to port, and that the Reis replied with one blast. Later the Smith repeated her signal of one blast, to which the Reis again replied with one. Shortly thereafter the Smith blew an alarm of several short, sharp blasts, and the Reis answered with an alarm. Inasmuch as there is no controversy concerning the sufficiency of the crews or lights, or the order of signals, it is important to inquire as to the courses and positions of the vessels at the time of this collision.

It is the claim of the Reis: That, being bound down at slow speed, owing to the darkness and rain, on picking up the buoy at the head of Russell Island, and knowing definitely her position, she increased to half speed. That she met and passed the Sill up-bound in the vicinity of Indian Dock, and as she was clearing the Sill ported slowly in the usual and proper course. That having so ported she received one blast from the up-bound Smith, then three-quarters of a mile below, which she answered. At this time the Reis was under slow port wheel, and so continued until near about a half mile away from the Smith. The Smith, then well clear to port and showing her red light, again blew one blast. That the Reis answered one, and having swung under her slow port helm until she would be well clear of the Smith, she steadied. The Smith immediately blew an alarm, opening her green light and still showing red, about four points to port. The Reis answered the alarm signal and hard-port. At this time the Smith hit her amidships, between the first and second hatches. The Reis claims that the collision was about one-third out from the island side or American side; the contention being on the record that the Reis was proceeding in an ordinary course, attentive and careful, that the passage of the Reis and Sill was usual and orderly, and that in passing the Sill the Reis must have been in the middle of the river.

It is the contention on behalf of the Smith: That after coming up on the Russell Island lower ranges she ported and directed her course toward Walpole Island on the starboard side of the river. That at a short distance below Russell Island Lower Light, the first set of one blast passing signals was exchanged with the Reis, which then appeared to the Smith to be at the upper end of Russell Island. That the Reis continued down the river without apparently shifting her course, which course was on the Canadian shore. The result was that the Smith was obliged to hold her course, or was crowded over toward Walpole Island bank. Observing this, the Smith blew another one-blast signal, which was answered with one by the Reis. Notwithstanding this, the Reis still failed to give way and continued to head down on the Smith. As it was seen by those in charge of the Smith that

the Reis was forcing the Smith over onto the starboard channel bank, a danger signal was blown by the Smith and her helm was hard-ported in order to hold her bow onto the bank, and her engines were reversed. Notwithstanding these efforts to avoid the Reis, the starboard bilge of the Smith struck the Walpole channel bank, causing her bow to work out to port against her helm and against the natural tendency of her reversed engines, while her stern remained or stuck close to the bank, and she struck the Reis; the Reis being at that time over into the Smith's water.

Following the rule laid down in *Goslee v. Shute*, 18 How. 463, 15 L. Ed. 462, this being a collision at night, I will endeavor to ascertain the leading facts by the weight of the testimony, and so, if possible, arrive at the correct cause of this collision. There is a great conflict between the testimony of the officers and crew of the Reis and Smith. It is apparent that the Reis met the steamer Sill up-bound, and it appears from the testimony of the witnesses on the Sill that the Reis passed the Sill below the Indian Dock. This is disputed by the Reis' crew, which put the place of passing above the Indian Dock. I am inclined to think that the place of passing was a short distance below the Indian Dock. A consideration of the testimony of the Sill's crew does not develop that there was anything unusual in the manner of the passing of the Sill and the Reis.

William Hinnegan, collector of customs for the Canadian government at Walpole village for 12 years, testified to seeing the collision from his house on Walpole Island, which is on the river bank some 1,000 to 1,500 feet from the point of the collision, according to his testimony, and he placed the boats to be about between the Lower Range Light and the Middle Range Light on Russell Island, but on the Canadian shore, some 200 feet or 300 feet out from the Canadian channel bank. He describes the Smith as sheering about half the length of herself out of the river, from the Canadian channel bank.

Another disinterested witness was Captain Hagen, of the tug Hardin, who had had some 40 years' experience on the St. Clair river. According to his testimony, he was in the center of the navigable channel on his tug; that he saw the Reis straighten out and open her range lights, so that she was heading to port of the tug; that the Smith was on his starboard bow, apparently crowding the bank; that if the boats had continued the Hardin would have cleared the Reis without changing her course; and that the Smith shot right out in the river into the course of the Reis.

Much mathematical calculation and mapping of courses has been resorted to in the course of the arguments in this controversy. One thing is apparent to me, that the course adopted by the Smith was voluntary, and it was not changed by reason of the Reis. It is apparent that this course was a steady course up to the time of the sheering. The location of the point of collision is not positive. The Smith was proceeding near to the Canadian channel bank. This is shown by the fact, as testified to by the crew of the Smith, that shortly before the collision a rush of water was noticed, followed by the sheering of the Smith. It is apparent from the testimony of the wit-

nesses that the sheer of the Smith was a broad one. It is testified to by the captain of the Sill. There is nothing in the record to show that this collision would have occurred, had the Smith not sheered. The Smith's engines were running at full speed, and the water rushing against the channel bank would undoubtedly have had considerable effect upon the navigation of the Smith. It is important to recollect that this was not a head to head collision, but that the Reis was struck on the port side while proceeding down the river.

I attach great importance to the testimony of Captain Clark, who says that the sheer taken by the Smith was a broad sheer. This testimony of his, taken in connection with the testimony of all the witnesses, would account for this collision. Had the Smith not sheered, the Reis, in the usual course of navigation, would have passed down the river without collision. The sheering of the Smith was obviously caused by reason of the manner in which she was navigated, and not owing to the course taken by the Reis. The probabilities of the situation indicate such a state of facts.

I have not commented on the testimony at length, nor gone into it in detail. I have endeavored to arrive at the probabilities of the situation only. Two facts stand out prominently in the record: Firstly, that there was no change in the course of the Smith by reason of the course pursued by the Reis; and, secondly, that the collision would not have occurred, had it not been for the sheer of the Smith.

Taking this view, the fault of this collision must rest on the Smith.

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#### THE ISTHMIAN.

(District Court, D. Oregon. December 27, 1912.)

No. 5,600.

#### 1. SHIPPING (§ 84\*)—LIABILITY OF VESSEL—INJURY TO STEVEDORE—INSUFFICIENT LIGHT WITH WHICH TO WORK.

Libelant, a longshoreman engaged in unloading a ship, with others, was assisting to place the cover on a hatch at 10 o'clock at night, under direction of a mate. The night cover used was composed of planks fastened together in pairs, and when they had been raised by the winch, and lowered until they rested across the hatch coamings, libelant was directed to climb upon them and unloose the sling from the fall. When he did so, they fell apart and into the hold, carrying him with them, and resulting in his injury. *Held*, on the evidence, that the light furnished for the men to work by was insufficient to enable them to see that the planks rested securely on the coamings, which was the proximate cause of the injury, and rendered the ship liable therefor; also *held*, that libelant was not chargeable with contributory negligence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349-351; Dec. Dig. § 84.\*]

#### 2. DAMAGES (§ 131\*)—INJURY TO PERSON—AMOUNT OF AWARD.

A stevedore, who was severely and painfully, but not permanently, injured by falling into the hold of a ship through the negligence of the officers, and was laid up for four months, awarded \$1,000 damages, besides expenses of his cure and pay for loss of time.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370; Dec. Dig. § 131.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



In Admiralty. Suit by George Wolf against the steamship Isthmian; the American-Hawaiian Steamship Company, claimant. Decree for libelant.

Giltner & Sewall, of Portland, Or., for libelant.

Teal, Minor & Winfree, of Portland, Or., for claimant.

WOLVERTON, District Judge. George Wolf brings libel to recover for personal injuries sustained by reason of falling from the hatch on the main deck of the steamship Isthmian to and upon the shaft alley below, a distance of about 27 feet, which injuries are alleged to have been caused through the negligence of the ship. The American-Hawaiian Steamship Company is the owner and claimant of the Isthmian, and files an answer to the libel.

The accident happened at No. 4 hatch covering, No. 3 hold, on June 6, 1912. The alleged causes of the accident are: First, that the officers and agents of the steamship directed the night covering to be put on the hatch, instead of the regular covering commonly used when the ship is at sea; second, that in putting on the night covering the officers were negligent in not providing the libelant a safe place upon which to work; and, third, that they failed to provide sufficient light by which the work could be safely done. The claimant denies negligence, and alleges contributory negligence on the part of the libelant.

[1] The night covering, by which the hatch was protected in port when the ship was not engaged in loading or unloading, consisted of eight sets of planks, constructed with two in each set, held together by cleats, one cleat at each end of the planks and two in the center. A space of perhaps 2 inches was left between the two planks. These planks were 2 inches in thickness, a foot wide, and 15 feet 4 inches long; the hatch being 14 feet wide. These hatch coverings were raised from between-decks in the morning, when the work of unloading the vessel began, and were placed at the side of the hatch, and left there for use when wanted. The planks were put in one pile, one on top of the other, and hoisted by means of a winch and hoisting apparatus. The sling was wrapped twice around the planks thus piled, and then hooked onto the fall, and they were raised in that manner. When placed at the side of the hatch, the sling was left on the hatch coverings. About 10 o'clock on the night of the accident the long-shoremen who were engaged in unloading the boat were directed to put the hatch coverings on. In doing this the coverings were raised by the winch under the order of some person, either the third mate of the vessel or the hatch tender. They were then lowered onto the hatch coaming, but, not being satisfactory, were ordered to be raised again, which was done. They were again lowered, so that they rested upon the coaming athwart the hatch. At this time the libelant was directed to climb upon the boards and unloose the sling from the hook attached to the fall. In doing this, through some cause which is hardly explainable, the planks fell apart and into the hold of the ship, precipitating the libelant also into the hold. He fell upon his face, resulting

in his nose being broken and his face cut about the forehead, the nose, and the upper lip. He also suffered a fracture of the right wrist, a fracture of three of his toes, a dislocation of another, a fracture of one of his ribs, and was otherwise bruised by one set of planks falling upon him.

It appears that it was common for ships to use night coverings for the hatches when engaged in loading and unloading, and this covering was perhaps as well constructed and suitable for the purpose for which it was designed as any that has been in use in the port. The ship was therefore not negligent in directing this covering to be used instead of the regular covering. There is a dispute in the testimony as to who gave the orders for hoisting these hatch coverings in place and directing how they should be placed athwart the hatch before the libelant was ordered to go upon them for unloosing the sling. The longshoremen who were working about the hatch at the time all testify that the order was given by Bennett, the third mate of the ship, and that the work of putting on the night covering of the hatch was carried on under his supervision and direction. This has some corroboration in the testimony of Hardwick, a witness for the claimant, who was the quartermaster of the ship. He says in effect that Bennett had charge of the hold wherein the libelant fell, and that his duties there were to see that the cargo was taken out in good order and that the hatches were properly covered for the night. Upon the other hand, the claimant urges that it was not the duty of the ship to supervise the putting on of this covering, but that it was a matter of detail in the work of the longshoremen, and that, when ordered so to do, it was their duty to put on such covering, and at their own risk. There is some testimony to the effect that Oberg, who was the hatch tender, directed the placing of the hatch covering on this occasion, and that it was his duty to oversee the same.

After a very careful consideration of the testimony, I am strongly impressed with the view that it was the duty of the ship, through its proper officers, to direct and superintend the putting on of this night hatch covering when it became necessary, and that in fact Bennett, the third mate, was present at the time and did direct the manner in which the covering should be placed on the hatch. It being his duty to do this work, he was also charged with the duty of observing ordinary care and precaution in directing how the work should be done for the protection of the men employed in doing it. From the testimony, I cannot say, however, that the officer was negligent. It does not satisfactorily appear how the planks were placed across the hatch and by what reason they fell after the sling was unhooked and loosened from them.

As to the third alleged cause of negligence, namely, that the boat failed to sufficiently light the deck and the hatchway to enable the men to do their work safely, there is testimony both ways. All the longshoremen, seven in number, testify that the light on the deck was very dim; some of them going so far as to say that there was no light there at all. There was, in fact, however, an arc light located on the

mast some 20 or 25 feet aft of the hatch, and perhaps 25 feet in height. This light is described as being some 40 feet distant from the place of the accident. The longshoremen say, further, that the light was so dim that the workmen about the hatch could not be distinguished across the hatch; that an outline of their forms could be seen, but the individuals themselves could not be recognized. George Wolf, the libelant, testifies that, when he climbed upon the boards, he had to feel for the sling, and that he was unable to see it before getting upon the planks. The witnesses for the libelant all concur in the statement that the light was entirely insufficient to enable the workmen to proceed with their work without peril to themselves.

The officers of the ship dispute this testimony, and in general say that the light was bright, and entirely sufficient for the purpose. The captain of the ship, who was then the second officer, says that it was light enough to enable a person to read a newspaper without trouble. Bennett, who was third mate, and was within, according to his own testimony, 10 feet of the hatch at the time of the accident, says: "In my judgment it [the lamp] would give sufficient light." And then, when asked whether it was light enough on the deck near the hatch or not, he answered: "Well, I think it was light enough." Hardwick, the quartermaster, and also the captain, testify that there were two lights on the ship, one on the mainmast and one on the foremast. Hardwick says the light was in good condition, and was good to work under. He did not see the light, however, before the accident happened, but did see it a short time afterwards. He had some conversation with Bennett about the light, and he says that Bennett asked him if he (the witness) thought the lights were bright enough. This would seem to indicate that there was some doubt in Bennett's mind as to the sufficiency of the lights. John Garrigan, who was the engineer of the ship, testifies that the lights were bright and in good condition; but he did not see them at the time, nor until after the accident. And so of Captain McNeill, who was in bed when the accident happened, and knew nothing of it, but saw the lights some time afterwards. Mr. Dosch, who was clerk on the dock, and Mr. Schaublin, who was superintending the men in raising the cargo, both testify that the light was sufficient. Schaublin was on the boat at the time the accident happened, and it was he who gave orders to cover the hatches.

In this conflict of testimony, it is somewhat difficult to arrive at a solution of the question whether the light was sufficient or not. I am of the opinion, however, that the greater credit should be accorded the longshoremen. They were immediately at the place of the accident, engaged in doing the work, and their attention would more likely be called to the condition of the light at the immediate time than that of the witnesses upon the part of the ship, except Schaublin and Bennett, who were also directly present. Bennett, however, seems to be in doubt as to the sufficiency of the light, while Schaublin thought it was ample. I conclude, therefore, that the light on the mast, placed there for the purpose of lighting the hatch, was insufficient to give proper light for the workmen while engaged in putting on the night hatch. It is altogether probable that this was the proximate cause of

the accident. Undoubtedly the boards, being piled in one pile, one on top of the other, were not safely placed across the hatch, because when the sling was loosened they fell apart of their own accord, and precipitated the libelant into the hold of the ship, all of the boards going down with him. This would scarcely have happened if the boards had gained lodgment at both ends upon the coaming of the hatch; it being remembered that they were 15 feet 4 inches long, while the hatch was but 14 feet wide. If it had been lighter, it is altogether likely that either the person directing the manner of doing the work or some of the men themselves would have been able to see or discover the unsafe condition of the landing of the boards on the hatch. Therefore I think that the ship is liable on account of negligence in failing to provide proper lights for the work to be carried on in covering this hatch with the night covering.

[2] This leaves to be determined the amount of damages which the libelant sustained. Besides the injuries received, as heretofore stated, it is claimed that the libelant has suffered a curvature of the spine laterally. This curvature, however, was not discovered until shortly previous to the time of this trial, and the libelant has never at any time complained to any of his physicians of any injury to the back, although two of them examined him prior to this time. Two physicians who were called for the claimant testified that a slight lateral curvature in the spine is not unusual in healthy persons, which is accounted for by natural causes. The libelant has suffered some shock to his nervous system. From the testimony of the physicians for claimant, it would seem that none of these injuries are of a permanent nature; one of the physicians stating that the recovery was sufficiently complete, or should be at the end of three months, and the other at the end of four months, to allow the libelant to engage in his usual vocation with but slight inconvenience. There is some inconvenience, however, to the libelant in his breathing, caused by the crushing of the bridge of the nose, though this will probably not impair his health, and his face is left disfigured. Upon the whole, I am of the opinion that the libelant should be allowed \$1,000 for his personal injuries. To this should be added the loss of his labor for four months, at \$80 per month, \$320, his reasonable expenses for physicians' services, \$150, and \$51 at the hospital, aggregating \$1,521.

The claimant insists that, if the ship was negligent at all, the libelant was also negligent, and that the damages should be reduced on that account. I do not agree with the contention that the libelant was also negligent. He was directed to climb upon the boards; and it should be said, further, that the hatch coaming was about 3 feet in height, and the boards, when piled up, were about 32 inches, making nearly 6 feet in height from the deck of the ship for the libelant to climb upon. Libelant says he was not afraid to get upon the boards, but that he protested because it was dark. He was told, notwithstanding, to go on up and unloose the sling. He perhaps might have observed the unsafe condition of the planks, if there had been light enough for him to see them well and determine their adjustment for



himself. But the very fault we are speaking about is the one that contributed to the accident, namely, the lack of sufficient light.

The decree will be for the libellant in the sum of \$1,521, together with the costs of suit.

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IN re HOWARD.

(District Court, N. D. West Virginia. January 7, 1913.)

**1. BANKRUPTCY (§ 417\*)—DISCHARGE—APPLICATION TO VACATE—LIMITATIONS.**

Bankruptcy Act July 1, 1898, c. 541, § 15, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), provides that the judge may, on the application of the parties in interest who have not been guilty of undue laches, filed at any time within one year after the discharge shall have been granted, revoke it upon a trial if it shall appear that the discharge was obtained through the bankrupt's fraud, and that the knowledge of the fraud has come to the petitioner since the granting of the discharge, and that the actual facts did not warrant the same. *Held*, that the limitations prescribed by such section are directly on the court's power, as distinguished from the cause of action, and hence if they are not complied with the court has no power to annul a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867-871; Dec. Dig. § 417.\*]

**2. BANKRUPTCY (§ 417\*)—DISCHARGE—VACATION—LACHES.**

Bankruptcy Act July 1, 1898, c. 541, § 15, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), provides that parties in interest who have not been guilty of undue laches may, at any time within a year after a discharge, apply to revoke the same. Petitioners, applying to revoke a bankrupt's discharge, were both parties to the proceedings, and neither alleged that they did not receive the notice of the application for the discharge showing the date when the hearing would be asked thereon, nor did they assail the regular publication of notice of such date. The petition was not filed until two days before the expiration of the year, and the only excuse for delay given was that petitioners did not know of the discharge until long after it had been entered, and that a few days before the expiration of the year they were informed of the alleged fraudulent transfer because of which they sought to have the discharge set aside. Who gave such information or where, how, or under what circumstances it was received, however, was not disclosed. *Held*, that the application did not sufficiently show that petitioners were not guilty of laches, and was therefore insufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867-871; Dec. Dig. § 417.\*]

**3. BANKRUPTCY (§ 417\*)—DISCHARGE—REVOCATION—PETITION—AMENDMENT.**

Where a petition to revoke a bankrupt's discharge was not filed until two days prior to the expiration of the year limited therefor by Bankruptcy Act July 1, 1898, c. 541, § 15, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), and was insufficient for failure to relieve petitioners from the imputation of laches, they were not entitled to leave to amend after the expiration of the year to cure the defect.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867-871; Dec. Dig. § 417.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of John A. Howard. On demurrer to petitions filed by the Empire National Bank and W. C. Handlan to revoke the bankrupt's discharge. Demurrer sustained, and petitions dismissed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 201 F.—37

M. G. Sperry, of Clarksburg, W. Va., for petitioner Empire Nat. Bank.

J. B. Sommerville, of Wheeling, W. Va., for petitioner W. E. Handlan.

Arthur S. Dayton, of Philippi, W. Va., for bankrupt.

DAYTON, District Judge. John A. Howard was adjudicated bankrupt December 13, 1910. On July 27, 1911, discharge was granted him, and these petitions were filed July 25, 1912, seeking the revocation of the same. Demurrers have been entered to each of the petitions, arguments made thereon, briefs filed, and they are now to be determined.

The petitions are substantially alike in their charge based solely "upon information and belief" that said bankrupt, three days before his adjudication in bankruptcy, made a fraudulent agreement with one Landmesser, a broker, and one Bachman, whereby certain bonds were pretended to be sold to Bachman and paid for by him through Landmesser, when in fact they were not sold, but Bachman was paid back his money and the bonds were returned to Howard.

Both petitions allege that petitioners therein did not know of the order of discharge until long after it was granted; that they had no knowledge of the transaction set forth between Howard, Landmesser, and Bachman "until within a few days preceding the filing of this petition." Several grounds of demurrer are alleged, but I deem consideration of one, common to both petitions, to be sufficient. The fifteenth section of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]) provides:

The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

Construing this statute in *Re Mauzy* (D. C.) 163 Fed. 900, I said:

It is to be borne in mind that, under this section, the power of the judge to revoke a discharge is confined and limited. It must be exercised: (a) Upon application of parties in interest; (b) within one year after it has been granted; (c) upon a trial in which it must be shown by petitioners that they have (d) not been guilty of undue laches; (e) That the discharge was obtained through the fraud of the bankrupt; (f) that the knowledge of said fraud has come to the petitioners since the granting of the discharge; and (g) that the actual facts did not warrant the discharge. In each and every one of these particulars the burden of proof is upon the petitioners, and each requirement of the statute is absolutely essential to be proven.

It will be perceived that to revoke a discharge in bankruptcy involves an exercise of judicial discretion and power far more reaching in effect than the suspension for fraud of a statute of limitation barring the recovery of a debt or single demand of a single creditor; further, that it is in direct opposition to the whole spirit and intent of the bankruptcy act. That purpose and intent clearly is to give the bankrupt's creditors his property and to him complete relief from further claims upon him so that he may start over again. His failure may have

been solely because of collateral obligations; he may still have the confidence of those who, after his discharge, are willing to sell him property, extend to him credit, help to start him up again in business. To revoke his discharge not alone affects his interest but also all these new obligations that he has incurred to others upon the security and strength of such discharge. Under these conditions, I am inclined to think that this provision was incorporated in the bankruptcy act more as a check upon what might be the assumption of the courts under equity powers to revoke these discharges and the enforcement of equity's old rule that no limitation runs against fraud.

[1] The limitation here is directly upon the court's power, not upon "the cause of action," as most limitations are. It provides that the judge "may" act, not that he shall; that he may act only within the year, after the lapse of which his power to act at all ceases; that his action within this year must depend not alone upon the fraud of the discharged bankrupt, but also upon the conduct of the petitioning "party in interest"—that is to say, upon the latter's good faith and diligence in bringing the matter to the judge's attention.

[2] In other words, it becomes absolutely necessary for such petitioner, before he can be heard at all, to show that he has not been guilty of laches in bringing forward his complaint. Let us see if these petitions in any way conform to these requirements. They say the petitioners did not know the order of discharge was entered until long after it was entered. By the schedule filed, both were made parties to the proceedings, and neither allege that they did not receive the notice required to be sent by the clerk to all creditors of the application for such discharge and the date when hearing would be asked thereon. They do not assail the regular publication of notice of this date, also as the law requires. In fact, it looks very much as if this allegation means that they overlooked or paid no attention to the legal notice given them in both forms. Then they do not allege that they examined the bankrupt, as they had right to do, to ascertain whether he had made any unlawful transfers, or that they had made investigation of his affairs to see if any fraud had been committed by him. Part of the bonds alleged to have been fraudulently transferred by him to the broker were National Telephone Company bonds. Howard was president of this company; Handlan was manager. Its failure was the cause of Howard's financial downfall. His personal debts were substantially nothing. His indorsements for this company involved him to the extent of hundreds of thousands of dollars. It would seem to have been an easy matter for petitioners to ascertain who held these bonds and to have shown some effort to bring them into court for distribution.

But aside from all that, considered in the light most favorable to these petitioners, all that they say in effect is that, a few days before the expiration of the year, some one gave them information that the fraudulent transfer had been made. Who gave them this information? When, how, and under what circumstances? What reason has the court to know that such information came from a credible source, was not mere idle gossip? It would simply be imposition on all parties

concerned and a travesty upon both the law and justice to establish the rule that at any time within the year—in this case within two days of its expiration—a creditor could file a petition to upset the order of discharge on the ground that some one a few days before had told him that the bankrupt was not entitled to it because of a fraudulent transfer. But it is said such allegations can only be made “upon information and belief.” True, and therefore the greater necessity for additional allegations on the part of the petitioner showing how he got the information, from whom, under what circumstances, and that he in good faith has investigated such information to ascertain its verity.

Upon these propositions it seems to me that the three decisions of *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, *Hardt v. Heidweyer*, 152 U. S. 547, 14 Sup. Ct. 671, 38 L. Ed. 548, and *In re Oleson* (D. C.) 110 Fed. 796, 7 Am. Bankr. R. 22, are absolutely conclusive. The two first, by the Supreme Court, were based upon proceedings to suspend ordinary state statutes of limitations. In the first (*Wood v. Carpenter*) the court says:

The discovery of the cause of action, if such it may be termed, is thus set forth: “And the plaintiff further avers that he had no knowledge of the facts so concealed by the defendant until the year A. D. 1872, and a few weeks only before the bringing of this suit.” There is nothing further upon the subject.

In this class of cases the plaintiff is held to stringent rules of pleading and evidence, “and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence the discovery might not have been before made.” *Stearns v. Page*, 7 How. 819, 829, 12 L. Ed. 928. “This is necessary to enable the defendant to meet the fraud and the time of its discovery.” *Moore v. Greene et al.*, 19 How. 69, 72, 15 L. Ed. 533. The same rules were again laid down in *Beaubien v. Beaubien*, 23 How. 190, 16 L. Ed. 484, and in *Badger v. Badger*, 2 Wall. 95, 17 L. Ed. 836.

A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. *Carr v. Hilton*, 1 Curt. 230, Fed. Cas. No. 2,436.

And again:

There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.

The second case (*Hardt v. Heidweyer*) fully affirms this ruling of *Wood v. Carpenter*, and further holds a bill in equity so defective should be dismissed on demurrer, while *In re Oleson* directly applies the principles set forth in these two cases to petitions filed to revoke bankruptcy discharges.

[3] Finally, petitioners’ attorneys suggest that they should be permitted to amend their petitions. I do not think so. If such application to amend had been made before the expiration of the year, I think I could have allowed such amendment; but it was not. At the end of the year fixed by the statute, there was no sufficient petition filed upon which I could grant hearing to revoke this discharge. To allow these petitioners under guise of amendment to file new and possibly



sufficient, possibly insufficient, petitions would be exercising judicial power on my part after, by express enactment, my right to exercise such power had ceased.

It follows that the petitions must be dismissed.

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UNITED STATES v. EASTERN STATES RETAIL LUMBER DEALERS' ASS'N et al.

(District Court, S. D. New York. January 9, 1912.)

**1. MONOPOLIES (§ 12\*)—SHERMAN ANTI-TRUST ACT—COMBINATIONS IN RESTRAINT OF TRADE—LUMBER DEALERS' ASSOCIATIONS.**

Associations of retail lumber dealers, which issue and distribute among their members "official reports," containing lists of wholesale dealers doing an interstate business, who have made sales direct to consumers, and soliciting information as to other such sales, for the purpose and with the effect of influencing members receiving them to cease buying from such wholesale dealers, are combinations in restraint of interstate trade and commerce, and unlawful, under Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.\*]

**2. MONOPOLIES (§ 12\*)—SHERMAN ANTI-TRUST ACT—"RESTRAINT OF TRADE."**

The words "restraint of trade," as used in Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), are to be construed as including "restraint of competition."

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6185, 6186.]

In Equity. Suit by the United States against the Eastern States Retail Lumber Dealers' Association and others. Decree for complainant.

This is an action under the Anti-Trust Act, brought by the United States against various associations and corporations composed of retail lumber dealers, who are charged with being parties to a general conspiracy and combination, which it is alleged has limited competition and unlawfully obstructed the free flow of trade and commerce among the states in lumber and lumber products.

Clark McKercher, Special Asst. Atty. Gen., of Washington, D. C., for the United States.

Alfred B. Cruikshank, of New York City, for Eastern States Retail Lumber Co. and others.

Morgan, Lewis & Bockius, of Philadelphia Pa. (Howard Taylor, of St. Louis, Mo., of counsel), for Philadelphia Retail Lumber Dealers.

Before LACOMBE, COXE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. [1] Although the record is a long one, the concrete questions here presented lie within a narrow compass. Certain resolutions, which at one time or another were adopted at conferences between the defendants represented by delegates,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were abrogated some time before the suit was brought. Various lists were circulated in the trade, at one time or another, known in the record as the "Yes List," the "No List," "List No. 1," "List No. 2," and "List C"; but the circulation of such lists stopped before suit was brought, and there is nothing in the record to indicate that there is any intention to resume their circulation by defendants or by any one else. The extensive testimony as to these earlier resolutions and lists was properly introduced as illuminative of the intent with which the continuing circulation of other lists is carried on and of the object sought to be obtained thereby.

The lists which are still being circulated may be called, for lack of a better name, "Official Reports." Nothing else, so far as we understand it, is now or was being done at the time suit was brought by defendants as a combination, except the circulation of these lists, among the members of retail lumber dealers' associations and corporations. This seems to be the extent of their offending. Each of these Official Reports reads as follows:

"Official Report.

"[Name of the Particular Association Circulating It.]

"Statement to Members [with the Date].

"You are reminded that it is because you are members of our Association, and have an interest in common with your fellow members in the information contained in this statement, that they communicate it to you, and that they communicate it to you in strictest confidence and with the understanding that you are to receive and treat it in the same way.

"The following are reported as having solicited, quoted, or as having sold direct to the consumers: [Here follows a list of the names and addresses of various wholesale dealers.]

"Members, upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once report same, and in so doing should, if possible, supply the following information:

"The number and initials of car.

"The name of consumer to whom the car is consigned.

"The initials or name of shipper.

"The date of arrival of car.

"The place of delivery.

"The point of origin."

A brief statement of the conditions of the lumber business will make plain the bearing of this circular. The trade for a long time has been naturally divided into separate groups:

1. The manufacturer or millman usually turns the standing timber or the felled trees into one or more kinds of rough lumber. He sells either directly to the retail yard dealer, or to the wholesale dealer, or to large consumers using large quantities of one kind of lumber.

2. The wholesale dealers are usually located at or near the large markets, such as New York, Chicago, etc. In some cases the wholesale dealer maintains a yard; but usually he does not do so, acting as middleman to transmit orders from his customer to the millman, who fills the order direct to the customer. A very large part of the wholesaler's business is the selling of large lots (car load or schooner load shipments) to the retail dealer. There are some wholesalers who make it a rule to sell and ship only to retail yards; others sell only to large

consumers; others sell to both classes. The brief for the government contains this statement which seems to be supported by the record:

"It has been the custom for nearly all manufacturers, millmen, and wholesalers of good standing to protect the retail yard dealer in any city by refusing to sell to a consumer who is a customer of the retail yard dealer to whom such manufacturer or wholesaler sold lumber. But there is and always has been a large class of reputable manufacturers and wholesale dealers who sell lumber to large consumers in any city where such manufacturers and wholesalers have no customers among retail yard dealers, or where the large consumer is not a customer of any yard at retail prices."

3. The retail dealers are located in nearly every town and city in the New England and Middle states. They have yards in which they store lumber bought from the wholesaler or the millman. From his yard the retailer supplies the local demand for building or manufacturing purposes. In some places the retailer also delivers lumber to the consumer directly from schooners or cars, without first placing in his yard, where the order is for a large quantity.

4. The consumers are divided into several groups: (a) The contracting builder of houses, bridges, wharves, and who also does repair and construction work of all kinds. (b) The converter or manufacturer, who converts the sawed lumber into furniture and "trim," such as moldings, frames, sash, doors, and blinds, and in some cases into boxes and containers. (c) The United States government, and, in some localities, municipalities and railroads. (d) The small consumer of lumber for small building, repair, and construction work. (e) Large factories and manufacturing establishments using lumber in large quantities for special purposes.

The retail dealer has to carry many different kinds of lumber in stock in his yard to make prompt delivery of what may be called for. The natural customer of the retailer is the local contracting builder, who requires either a large number of items in small lots or particular items for immediate delivery. He also secures some of the trade of other consumers, such as large contracting builders of railroads, docks, etc., and factories of all sorts.

For a number of years there has been friction between the two groups, wholesalers and retailers. Wholesalers have complained because some retail dealer has not been content with selling in small lots for local delivery, but has negotiated sales of large lots from millmen to consumer. Retailers have complained because some wholesalers, having discovered a retail dealer's local customers, have themselves sold to such local customers in competition with the retailer. We need not go into the details of this controversy, which are spread out at great length in the record. Suffice it to say that the "Official Report" is a method adopted by the retailers to check this competition. Retail dealers, who are members of one or other of these associations defendant, are not required by their associations to refrain from dealing with any wholesaler whose names are on the list. There is no fine or penalty for dealing with them; nor is the retailer disciplined in any way if he does deal with them. But the record indicates that no such discipline is necessary. A retail dealer, who learns that some wholesaler has taken away customers from another retail dealer, will not be likely to buy from him, lest, learning the names of his own

customers, the wholesaler might compete with himself to get their trade. In the brief filed for one of the defendants there is a frank and concise summary of the situation:

"Ordinarily speaking, and other things being equal, a retailer would not buy his own source of supply from people on these lists, and wholesalers would object strongly to getting on these lists, because, if they were found out at the business of selling retailers' customers, they knew a retailer would be shy of buying from them."

To a greater or less extent, therefore, the circulation of these "Official Reports" operates to prevent some wholesalers, who otherwise would enter into competition with retailers in supplying consumers, from undertaking so to compete. That the reports are prepared and circulated to accomplish that very object is manifest.

No doubt every retail dealer has a right to choose from whom he will buy. He has a right to impart to any one else any information he may have about the business methods of any one, even though the natural result of thus telling what he knows may induce the person whom he tells to cease business relations with the other person. May the several retail dealers combine into an association, in order the better to acquire and distribute knowledge about the business methods of others, by means of the circulation among themselves of reports such as these?

[2] It seems to us that they cannot do so without violating the Sherman Act. It is now well settled that the words "restraint of trade" in that act are to be construed as including "restraint of competition." Full, free, and untrammelled competition in all branches of interstate commerce is the desideratum to be secured.

Much is said in argument of the evils which will result if the retail dealers are prevented from taking defensive measures to restrain the competition with them of the wholesaler, who, having no yard, and not seeking the smaller local trade of the retailer, is endeavoring to take away the profitable part of his trade. It is pointed out that it is expensive for a retailer to maintain a yard, with large quantities of a great variety of lumber in it, ready for prompt delivery at all times. If his business shrinks, through his losing the chance of making car and schooner load sales in his locality, the local yard, it is said, will become less and less well stocked, and will finally disappear entirely. But with such ultimate results the court is not concerned. Congress has considered the results, and chosen what seemed to it the wisest course.

"Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition, the stronger competitor may crush out the weaker; fluctuations in prices may be caused, that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition \* \* \* may be productive of evils does not militate against the fact that such is the law now governing the subject." *U. S. v. Freight Association*, 166 U. S. 337, 17 Sup. Ct. 557, 41 L. Ed. 1007.

The circulation of this circular certainly tends to restrain, directly, some wholesalers from entering into competition with retailers. This



seems to be contrary to the statute as the Supreme Court has construed it. That the defendants and their members are in a combination to prepare such circulars and to distribute them is manifest.

We conclude that the government is entitled to an injunction against the further circulation of these "Official Reports."

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THE EASBY.

(District Court, D. Maryland. December 31, 1912.)

**1. MARITIME LIENS (§ 38\*)—LIENS GIVEN BY STATE STATUTE—ENFORCEMENT BY ADMIRALTY COURTS.**

While a court of admiralty will recognize and enforce a lien given by a state statute which accrued prior to the enactment of Act June 23, 1910, c. 373, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1191), superseding such statutes, in determining questions of priority, it will give such lien the rank to which it is entitled by the principles of the maritime law.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 71-77; Dec. Dig. § 38.\*]

Jurisdiction of admiralty to enforce liens under state laws, see note to *The Electron*, 21 C. C. A. 21.]

**2. MARITIME LIENS (§ 38\*)—PRIORITIES—LIEN FOR REPAIRS AND MORTGAGE.**

Liens for repairs or supplies furnished to a vessel, properly secured under a state statute or given by Act June 23, 1910, c. 373, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1191), are entitled to precedence over a prior mortgage.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 71-77; Dec. Dig. § 38.\*]

Maritime liens created by state laws, see note to *The Electron*, 21 C. C. A. 21.]

In Admiralty. Suit to enforce liens for repairs and supplies against the steam tug *Easby*. Decree for libelants and intervening lien claimants, giving them priority over a mortgage.

W. Thomas Kemp, of Baltimore, Md., for mortgagee.

J. Walter Lord, Joseph N. Ulman, and Harry N. Abercrombie, all of Baltimore, Md., for intervening petitioners.

Gaylord Lee Clark, of Baltimore, Md., for steam tug *Easby*.

ROSE, District Judge. The libelants had made repairs to the steam tug *Easby*. Their bill was not paid. They libeled the tug. It was sold by order of the court. Its net proceeds amount to \$1,773.97. They are in the registry of the court. Other persons have filed intervening libels for repairs, materials, or supplies made or furnished by them to the tug. The aggregate amount of the claim of the original libelants, and the claims of all intervening libelants having bills of a like character, is \$929.89. There is no question made that these supplies, repairs, and materials were needed for the tug; that they were furnished in her home port upon the order of the owners or of their duly authorized agents. The amount due for them is not in dispute. The controversy is as to whether they are entitled to priority in distribution of the fund in the registry over a mortgage

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

claim of the Maryland National Bank, which has also intervened. The mortgage was made April 3, 1906. It was intended to secure the payment four months after date of a promissory note for \$5,000. The mortgage was duly recorded at the Baltimore customhouse. Some payments have been made upon it, but there is still a balance of \$3,371.11 due upon it.

The contentions of the mortgagee may be briefly summarized as follows:

First. The mortgage was made and recorded more than four years before the passage of Act June 23, 1910, c. 373, 36 Statutes at Large, 604 (U. S. Comp. St. Supp. 1911, p. 1191).

Second. Before that enactment, the supply, material, and repair claimants could not have maintained libels in rem against the tug had it not been for the provisions of the state statutes. Maryland Code Public General Laws, art. 63, §§ 43-52.

Third. By the express terms of that statute (Code, art. 63, § 47) the lien given by it did not entitle the claimant to preference over creditors or claimants secured by mortgage or bill of sale properly executed and recorded before the claim to be secured by such lien had accrued.

Fourth. That all the claims for supplies, etc., against the Easby accrued long subsequently to the recording of the mortgage. In this connection it is important to notice that the earliest item in the bills of any of the supply claimants bears date nearly or quite eighteen months after the passage of Act June 23, 1910.

Fifth. That before the passage of that act the lien claimants would have been postponed to the mortgagee. *The Marcelia Ann* (C. C.) 34 Fed. 142; *The D. B. Steelman* (D. C.) 48 Fed. 580.

Sixth. That act is not retroactive (*The Edna* [D. C.] 185 Fed. 206; *The Princess* [D. C.] 185 Fed. 218), and in consequence these lien claims cannot be preferred to that of the mortgagee.

That the first four of the above-stated propositions are sound need not be questioned.

[1] To the fifth I cannot assent. It is true that the authorities cited for it by the mortgagee are both directly in point and fully sustain it. Both of them, however, were decided before the Supreme Court handed down its opinion in *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345. In neither of them was reference made to the earlier case of *The Guiding Star* (C. C.) 18 Fed. 263, in which a very similar question, if not precisely the same, was considered by Mr. Justice Stanley Matthews on circuit. In that case the home port of the vessel was Cincinnati. Supplies had been there furnished it. Without the state statute the materialmen had no lien upon the vessel. The Supreme Court of Ohio had construed the state statute, giving the lien as if it had contained the language found in that of Maryland, and upon which the mortgagee here relies. Such construction was, of course, binding on the federal court. Nevertheless Justice Matthews, with the concurrence of Judge Baxter, held that:

"Admitting this construction to be the one adopted by the state courts in determining priorities between liens given by the statutes to secure liabilities

other than those arising upon maritime contracts, it would not on that account be applicable in admiralty courts in enforcing liens given by it to secure maritime liabilities."

He pointed out that:

"In enforcing the statutory lien in maritime causes, admiralty courts do not adopt the statute itself, or the construction placed upon it by courts of common law or of equity, when they apply it. Everything required by the statute as a condition on which the lien arises and vests must, of course, be regarded by courts of admiralty, for they can only act in enforcing a lien when the statute has, according to its terms, conferred it; but beyond that the statute, as such, does not furnish the rule for governing the decision of the cause in admiralty as between conflicting claims and liens. The maritime law treats the lien, because conferred upon a maritime contract by the statute, as if it had been conferred by itself, and consequently upon the same footing as all maritime liens; the order of payment between them being determinable upon its own principles. \* \* \* It follows that the claims for materials and supplies, and for insurance, which have arisen at the home port, for which a lien is given by the local law, must be placed upon the same footing in the distribution with similar claims arising in foreign ports."

Consequently the lien claimants were held entitled to priority over the mortgagee.

This case was cited with approval by the Supreme Court in *The J. E. Rumbell*, supra. The Supreme Court itself expressly said:

"It would seem to follow that any priority given by the statutes of a state or by decisions at common law or in equity is immaterial, and that the admiralty courts of the United States enforcing the lien because it is maritime in its nature arising upon a maritime contract must give it the rank to which it is entitled by the principles of the maritime and admiralty law."

[2] Since the decision in the *Rumbell Case*, and prior to the passage of Act June 23, 1910, it has been the practice of this court to award Maryland materialmen who have under the state law properly secured liens against Maryland vessels priority over the claims of persons holding mortgages upon such vessels. But if prior to June, 1910, the law had been otherwise, is the sixth proposition of the mortgagee sustainable? In *The Edna* and in *The Princess*, supra, the question before the court was whether persons who had furnished supplies before the passage of the act could avail themselves of its privileges. It was held that they could not. It is not easy to see how any other conclusion could have been reached. It is not necessary to express any opinion as to whether the construction placed by Judge Toulmin in *The Edna* upon the language of the fourth section of the act is correct. It is at least possible that when Congress said that "this act shall not be construed to affect the rules of law now existing either in regard to the right to proceed against a vessel for advances or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed in personam," it had not in mind anything with reference to the retroactive or prospective operation of the act. Apparently it intended to make plain that it had not changed the law either for the past or for the future in the respects mentioned in the language above quoted.

In this case we are not concerned with lien claims which accrued

prior to the passage of the act. When it became law, the mortgage had been in default for nearly four years. The mortgagee was entitled to take immediate possession of the tug. The owner retained the management of the vessel at the port of supply by the leave and license of the mortgagee. To hold that under such circumstances the supply claimants are entitled to the benefit of the statute, and that it confers upon them rights superior to that of the mortgagee, is not to give a retroactive effect to that enactment.

A decree may be drawn directing that after costs are paid the claims of the libelants, original or intervening, who have made repairs or furnished materials or supplies shall be paid in full, and that the balance remaining shall go to the mortgagee.

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THE A. G. BROWER.

(District Court, N. D. Ohio, E. D. January 1, 1913.)

No. 2,454.

**COLLISION (§ 91\*)—STEAM VESSELS MEETING—FAULT.**

A collision between the steamship Ellwood, down bound, when turning eastward into Lake Erie at the south end of the Detroit River channel, and the steamship Brower, up bound from Toledo, *held* due solely to the fault of the Brower in keeping too far to the eastward in the part of the channel which belonged to the Ellwood, instead of turning up the channel in the usual and proper course, and as required by the passing agreement of two whistles made when the two vessels were a mile apart.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 187-192; Dec. Dig. § 91.\*]

In Admiralty. Suit by the Pittsburgh Steamship Company, owner of the steamship Isaac L. Ellwood, against the steamship A. G. Brower. Decree for libellant.

Hoyt, Dustin & Kelley, of Cleveland, Ohio, for libellant.

Goulder, Holding & Masten, of Cleveland, Ohio, for respondent.

DAY, District Judge. This case arises out of a collision which occurred in Lake Erie a short distance below the Detroit River light, on the evening of August 27, 1907, between the steamship Isaac L. Ellwood and the steamship A. G. Brower. The Ellwood was bound down the lakes, laden with a cargo of iron ore. The Brower was bound up the lakes, laden with coal. Shortly before 8 o'clock in the evening, in the neighborhood of the first gas-buoy above Bar Point lightship, the vessels collided. It is the claim of the Ellwood that, while she was bound down, and in the neighborhood of the first gas-buoy above Bar Point lightship, and was proceeding down about the center of the channel above the Detroit River lighthouse, at her usual speed, and when at the usual and proper place for beginning to make the necessary turn, at a point below the gas-buoy, she started to swing to port, and at the same time she sounded a two-blast signal to a down-bound steamer in the neighborhood of a mile away apparently upon a course up bound from Toledo. This up-bound steamer, which

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



proved to be the Brower, responded with two blasts; but about this time, or shortly afterwards, as the Ellwood was swinging to port, and the Brower still a considerable distance off to starboard, the Brower again sounded a two-blast signal, which the Ellwood answered with two, still continuing on a swing, under a hardastarboard wheel. As the vessels approached each other, it was discovered by the watch on the Ellwood that the Brower was not making her turn properly, but was heading on to the Ellwood amidships. When this was discovered, the Ellwood's wheel was put hard to port, and, notwithstanding this effort, the Brower's stem and starboard anchor struck the Ellwood on the latter's starboard side, causing the damages complained of.

It is contended on behalf of the Brower that there were several dredges extending out to the southeastward from the Detroit River light; that the Brower saw the lights of the Ellwood as she was making the turn into Lake Erie, and heard the two-blast signal. It was then observed from the Brower that the Ellwood was not swinging in accordance with her signal, and with her own helm hardastarboard, the Brower repeated the two blasts. The Ellwood answered with two, and then, as the Ellwood was not being swung sufficiently, the Brower's engines were reversed, but the Ellwood came on, and there was a collision at a small angle, and a glancing blow, causing injury to both boats.

It will be noticed from these claims there was no insufficiency of lights and no misunderstanding of signals. The principal complaint of each vessel against the other is that she did not make the turn properly; in other words, that she was occupying the waters of the other vessel.

I think that the location of the point of collision has been definitely ascertained, both from the testimony of all the witnesses, and from the point fixed in the survey which was introduced in testimony. There were five dredges at work to the southward and eastward of the Detroit River light. These dredges were nearly in a straight line, and close to the westerly edge of a new 800-foot channel or cut; these dredges being on the average of 1,000 to 1,200 feet apart. The point of collision was about 1,200 feet east of the line of the dredges.

From the entire record it appears that, if the Brower had taken the ordinary and proper course of a vessel bound from Toledo, she would have been several hundred feet further to the westward than the point of collision. For the boat to go into the waters east of the dredged channel was entirely unnecessary. In making her turn to port, the Brower failed to direct her course to port, according to the signals. She went over into the waters of the Ellwood apparently depending upon the Ellwood to partly anticipate meeting her, and this caused the disaster. The Ellwood in making the turn went several hundred feet further to the eastward than vessels ordinarily went, and, had the Brower made the turn properly, there would have been several hundred feet between the boats in passing under the starboard signal.

It is evident that the Ellwood might have increased the space sev-

eral hundred feet more, but she was not required to do so, for each vessel was entitled to presume that the other would act lawfully in reference to its navigation. *The Victory & The Plymothian*, 168 U. S. 426, 18 Sup. Ct. 149, 42 L. Ed. 519.

Mate Bryce, of the *Brower*, an experienced navigator, holding master's papers, said:

"Q. He would in the ordinary course of navigation, going down there, and getting a two-blast signal from an up-bound vessel, would expect, would he not, the up-bound vessel would pass at least within 600 feet of the Detroit River lightship, would he not? A. Yes, somewhere along about 600 or 500 or 300 feet."

It is not contradicted that the course taken by the *Ellwood* was northward further from the dredges than is usually taken by vessels at this point in the lake. From Bryce's testimony, it appears that the *Brower*, near the time of the collision, was far over from the middle line of the dredged channel, into the water of the *Ellwood*.

The testimony of the witnesses on the dredges does not materially dispute the point of collision. Had the *Brower* starboarded at the proper time, and swung to port in obedience to the passing signals, it is plain this collision would not have occurred. In any event, she failed to make her turn up the channel, in the usual and proper way. She was not following the proper course, and this caused the collision.

The question is raised as to the sufficiency of the lookout on the *Ellwood*. I think it appears in the record with clearness that any insufficiency of the lookout could have had nothing to do with the disaster that followed. The captain was navigating the *Ellwood*, and appears to have understood what was going on at the time of the disaster. There was nothing in the nature of the locality that would give those in charge of the navigation of the *Brower* to expect that the *Ellwood* would proceed in any other than the direction in which she did. The *Ellwood* was navigated in the customary manner. Compliance with the customary usages of navigators at this place was required, and each navigator had to expect that the turn would be made in such a manner as not to interfere with the navigation of the other vessel. *Lake Erie Transportation Company v. Gilchrist Transportation Company*, 142 Fed. 89, 73 C. C. A. 313; *The Victory & The Plymothian*, 168 U. S. 410, 426, 18 Sup. Ct. 149, 42 L. Ed. 519.

The navigators of these two vessels knew that each intended to make a turn as part of the usual and customary course attributable to each, and that such navigation would keep them clear of each other if the maneuvers were properly made. The risk of collision was not involved if each vessel did what it was bound to do under the agreement and usages of navigation. The *Ellwood* was not bound to anticipate that the *Brower* would not be navigated in the usual manner and comply with the passing agreement. Each steamship was bound to conform to her own customary course and maneuvers and take notice of the customary course and observe the movements of the other, and each had the right to assume that the other would do so. *The Servia*, 149 U. S. 144, 153, 13 Sup. Ct. 877, 37 L. Ed. 681.

The Ellwood was entitled to hold her course and manage her own navigation on the supposition that the Brower would make her turn without encroaching upon the Ellwood's side of the channel, and, until it was apparent that the Brower was not going to do this, there was in a legal sense no risk of collision which called upon the Ellwood to slack her speed or to change her course over to the other side of the channel. The collision which occurred was a consequence of the negligence or fault of the Brower, in disobedience of the rules of navigation at this point and of her expressed passing agreement. The Ellwood took the most reasonable course to avert the collision, and I cannot see how the Ellwood was in any way at fault.

The record is not entirely clear with reference to the lookout maintained by the Ellwood; but, in any event, the master of the Ellwood saw all that was necessary to be seen, and heard all that was necessary to be heard, in order to properly navigate his boat at this time.

I am therefore of the opinion that the Brower alone was wholly at fault in causing this collision.

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DE ATLEY v. CHESAPEAKE & O. RY. CO.

(District Court, E. D. Kentucky. November 6, 1912.)

**1. MASTER AND SERVANT (§ 256\*)—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT.**

Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), imposes liability on a common carrier engaged in interstate commerce for injuries to a servant while so engaged resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or from any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track roadbed, works, boats, wharves, or other equipment. Plaintiff, a brakeman on an interstate train, by direction of the engineer, left the train at a tower to get orders, and on his return with the order, in attempting to board the train while in motion in accordance with custom, he fell under the wheels, and was injured. The complaint alleged negligence in the engineer's failure to stop the train for plaintiff to get aboard and in defendant's failure to adopt and promulgate rules forbidding the practice of brakemen mounting trains while in motion, and requiring them to be stopped under such circumstances. *Held* that, though the duty to promulgate rules was a nondelegable one, it was one which could nevertheless be performed only by defendant's officers, agents, and employes, and hence both allegations of negligence were allegations that plaintiff's injury resulted from the negligence of defendant's officers, agents, or employes, and were within the act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. § 256.\*]

**2. MASTER AND SERVANT (§ 87\*)—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT.**

Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), making every common carrier engaged in interstate commerce liable for injury to or death of an employe engaged in such commerce, resulting in whole or in part from negligence of any of its officers, agents, or employes, or by reason of any defect or insufficiency due to its negligence in any of its cars, engines, etc., was intended to

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cover every act of negligence for which a common carrier engaged in interstate commerce might be liable to its employes in such commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 138; Dec. Dig. § 87.\*]

**3. COMMERCE (§ 8\*)—EMPLOYER'S LIABILITY ACT—EFFECT.**

Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1911, p. 1322), making common carriers engaged in interstate commerce liable for injuries to employes, supersedes all other common-law and statutory liabilities on the part of such carriers to such employes.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.\*]

**4. REMOVAL OF CAUSES (§ 25\*)—EMPLOYER'S LIABILITY ACT—INJURIES TO PERSON ENGAGED IN INTERSTATE COMMERCE—ACTS OF NEGLIGENCE.**

Where, in an action for injuries to a brakeman engaged in interstate commerce against the carrier, plaintiff claimed a liability under Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), the suit would be regarded for purposes of removal as one arising under the act, though the negligence charged be not covered by the act, or the facts alleged do not make out that there had been negligence as charged.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.\*]

**5. REMOVAL OF CAUSES (§ 3\*)—EMPLOYER'S LIABILITY ACT—DIVERSITY OF CITIZENSHIP.**

Under Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), as amended by Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324), providing that an action brought under the act shall not be removable, such an action is not removable, though it involves diversity of citizenship.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.\*]

At Law. Action by John J. De Atley against the Chesapeake & Ohio Railway Company. On motion to remand. Granted.

Holmes & Ross, of Carlisle, Ky., and A. D. Cole, of Maysville, Ky., for plaintiff.

Worthington, Cochran & Browning, of Maysville, Ky., for defendant.

COCHRAN, District Judge. This cause is before me on motion to remand. It is a suit to recover damages for a personal injury. The plaintiff was a brakeman in defendant's employ, and at work, as such, on one of its freight trains at the time of his injury. The injury was occasioned by his falling in an attempt to mount the train whilst in motion, and consisted in having his right foot cut off by one of its wheels. As it approached a tower from which written orders as to the operation of trains are issued, the plaintiff, by direction of the engineer, left the train to get an order, and it was on his return with the order that he was making the attempt to mount. At no time did the train stop to let him off or get on. It had been the practice for a year or more for brakemen to get written orders from the tower in this way; i. e., getting off and remounting whilst the train was in motion as it passed the tower.

The negligence complained of was the failure on the part of the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



engineer to stop the train for plaintiff to mount it, and the failure to adopt and promulgate a rule forbidding such a practice and requiring the trains to be stopped under such circumstances. It is alleged in the petition that the defendant is a common carrier engaged in interstate commerce, and that the plaintiff was employed by it in such commerce, and the right to recover is expressly based on the Employer's Liability Act April 22, 1908.

The ground upon which removal was sought was diversity of citizenship. In determining whether the cause was removable, I will limit myself to the question whether its removal was forbidden by the amendment of 1910 to that act. It is claimed that it is not so forbidden for two reasons. One is that the case did not arise under the act. The other is that the removal was obtained, not on the ground that the case arose thereunder, but on the ground of diversity of citizenship. The claim that the case did not arise under that act is made in the face of the fact that it is alleged that the defendant is a common carrier engaged in interstate commerce, and that plaintiff was employed by it in such commerce, and the right to recover is expressly based on that act.

[1] The act authorizes a recovery of damages for an "injury or death resulting in whole or in part from negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." It thus authorizes a recovery, apparently at least, in two classes of cases. The contention is that this case does not come within either class. Clearly it does not come within the second, for there was no defect or insufficiency as is called for by it. It does not come within the first, as to the negligence in not adopting or promulgating the rule referred to, for it is limited to cases where the injury is caused by the negligence of a "coemployé or fellow servant," and the failure to adopt such rule was not the "violation of any duty owed by any coemployé or fellow servant" to plaintiff. It was a violation of duty by the defendant, the carrier, if by any one. And, as to the negligence of engineer, it does not come within the first class because it does not appear from the allegations of the petition that the engineer was negligent in not stopping the train. It is not alleged that there was any duty on the part of the engineer to stop the train to enable the plaintiff to get aboard, or that he knew that plaintiff had gotten off the train, or that he wanted to get back on. Such, in substance, is the defendant's position on the question whether the case is one arising under that act. The plaintiff took an appeal from the order of the lower court removing the case to the Court of Appeals of Kentucky, and that court reversed that order, holding the case nonremovable. *De Atley v. Chesapeake & Ohio Ry. Co.*, 147 Ky. 315, 144 S. W. 95. It is held that the case arose under the act because of the clause as to the negligence of the engineer. Judge Nun said:

"Appellee's counsel concede that the act and its amendment imposed a liability on the carrier for any injury caused by the negligence of a coemployé or fellow servant, and for other causes, not necessary to mention here. Ap-

pellant was clearly a coemployé of the engineer in charge of the train, and the act referred to makes the company liable for the negligence of the engineer that caused or produced the injury to appellant."

Concerning the allegations of the petition and the effect thereof, he said this:

"It was also clearly charged that the engineer in charge upon the occasion of the injury directed De Atley to leave the train while it was running, and negligently failed to stop the train to allow him to get aboard in safety. If these acts were actually committed, and they must be so considered for the purpose of this action, they were certainly negligent acts of a coemployé of De Atley within the meaning of the act of Congress, and he was entitled to maintain his action in the state court."

The petition alleges that the engineer failed to stop the train, and that he was negligent in so doing. It seems to me, also, that the allegations thereof should be construed to mean that he knew that plaintiff had gotten off the train and wanted to get back, and that whilst the train was in motion. It is alleged that the practice had been for a year or more for the servants superior in authority to the brakemen to require them to get on and off the trains for orders whilst it was in motion and without stopping, and that on this occasion the plaintiff was directed by the engineer when the train was approaching the tower to go forward to it and get orders, and that, whilst he was on the way from the tower pursuant to such direction with orders and was endeavoring to get on the train while in motion, he fell. It is not distinctly alleged that he got off the train pursuant to the direction, but that is necessarily to be inferred from the allegation as to the direction and the return pursuant thereto with the order. I think, also, that it follows from this allegation that he got off and on while the train was in motion pursuant to the engineer's direction, and that he knew he did so. It was not essential to allege that the engineer owed a duty to the plaintiff to stop the train. The law imposed on him the duty of operating the train with due regard to the safety of the brakeman, and the allegation that he negligently failed to stop is an allegation that he failed to exercise such care. It seems to me, therefore, that the opinion of the Court of Appeals is sound. But, assuming that the petition failed to state a good cause of action on account of the engineer's negligence, is it to be said that, because of this, the case did not arise under the act? Such is the effect of defendant's contention.

Then, how is it as to the negligence charged in failing to adopt and promulgate the rule referred to. The duty so to do was one of the nondelegable duties of the defendant as master. But it was a duty, as is the case with all its nondelegable duties, which it could not perform except through its officers, agents, and employés. Being a duty having relation to the operation of its trains, it is one that would be delegated to such of its officers, agents, and employés as had to do with their operation, and hence were in position to determine what were proper rules to be adopted and promulgated. The failure to perform such duty according to the allegation of the petition was negligence on the part of such officers, agents, and employés. As to such

duty such officers, agents, and employés were not fellow servants of the plaintiff. Their negligence was negligence on its part, as distinguished from the negligence of fellow servants. Yet notwithstanding this, such failure, if it was negligence not to adopt and promulgate such rule, was negligence on the part also of such officers, agents, and employés, and hence I think within the first class of cases covered by the statute. I do not think that this class is limited to fellow servants which seems to be the contention of the defendant. It is not so limited by the language used. The language used is, "any officers, agents, or employés," and this is broad enough to cover any negligence for which a common carrier engaged in interstate commerce can be responsible to its employés therein. It is true that in the second class the language used is "its negligence." But its negligence must be negligence also of those officers, agents, and employés to whom it has intrusted the duty of looking after the condition of its cars, etc. It can only act through officers, agents, and employés, and the failure to look after such condition properly is necessarily negligence on the part of officers, agents, and employés to whom it has intrusted the duty of looking thereafter. The two classes seem, therefore, to overlap, but I do not think that one is justified in limiting the language of the first class to prevent overlapping, which would be done by limiting the first class to the negligence of servants for which the common carrier is not liable at common law, leaving the second class to cover the negligence of servants for whom it is in such cases as it covers. By so doing there would be eliminated from the act liability thereunder for certain negligence on the part of servants for whom the carrier is liable at common law, to wit, negligence on the part of servants who are not fellow servants, but which does not relate to its "cars, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment," as in the case here, where, according to the allegation of the petition, there was negligence on the part of such servants of defendant to whom it had intrusted its non-delegable duty of adopting and promulgating the proper rules as to the operation of its trains.

[2] It seems to me that it was the intent and purpose of the act to cover every negligence for which a common carrier engaged in interstate commerce might be liable to its employés in such commerce.

[3] It is settled that it supersedes all other common-law and statutory liability on the part of such common carriers to such employés. If, then, the act does not cover every negligence for which such common carrier may be liable to such employés, there are cases of negligence, and this, as to the negligence in not adopting and promulgating the rule in question, is one of them, in which there is no liability at all. But this cannot have been the intention of Congress. It is difficult, however, to explain why it separated the cases of liability into two classes, where the first class is broad enough in terms to include the second class; and, indeed, to cover every case of negligence for which the common carrier might be made liable, and no explanation thereof occurs to me. But the inability to find such explanation does not justify one in limiting the first class to fellow

servants so as to get two distinct classes, which do not overlap each other, thereby eliminating from the act certain cases of negligence for which there is liability at common law. It is sufficient to say that the act in express terms covers the negligence of any of the officers, agents, or employes of the common carrier, and the failure to adopt and promulgate a proper rule for the operation of its trains is negligence on the part of its officers, agents, and employes to whom it has intrusted the performance of such duty. But, assuming that such negligence is not covered by the act, is it to be said that because of this the case did not arise under the act? Such is the effect of the defendant's contention here. I am inclined to the opinion that it cannot be so said, any more than it can be said that the case did not arise thereunder as to the engineer's negligence, assuming the petition not to state facts showing negligence on his part. As heretofore stated, the act supersedes all other basis of liability for negligence on the part of a common carrier engaged in interstate commerce to its employes therein, and is now the only basis of liability therefor.

[4] A suit, therefore, against such a carrier by such a one of its employes, seeking to recover damages for an injury caused by the negligence of one of its officers, agents, and employes, particularly if expressly based on the act, would seem to arise thereunder, even though the negligence charged was not one covered by the act, or the facts alleged did not make out that there had been negligence as charged. The plaintiff claims in each instance that there is liability under the act, and that would seem to be sufficient to make the case one arising under the act.

[5] The other ground upon which it was claimed that the removal was not forbidden by the amendment of 1910 is that the removal was obtained, not on the ground that the case arose under the act, but on the ground that there was a diversity of citizenship. The position is taken that the only cases, the removal of which Congress intended to prohibit, were those where there was no diversity of citizenship, and the only ground of removal is that the case arose under the act. The intention, in other words, was to prohibit only a removal on the ground that the case arose under the act, and this in order to prevent the removal of all such cases. This view was adopted in the case of *Van Brimmer v. T. & P. Ry. Co.* (C. C.) 190 Fed. 394, but I think the position is unsound. Congress said that "no case arising under this act" should be removed, and it should be taken to have meant what it said. All the other decisions are the other way. They are as follows: *Symonds v. St. Louis & S. E. Ry. Co.* (C. C.) 192 Fed. 353; *Strauser v. Chicago, B. & Q. Ry.* (D. C.) 193 Fed. 295; *Lee v. Toledo, St. L. & W. Ry. Co.* (D. C.) 193 Fed. 685; *Ulrich v. N. Y., N. H. & H. Ry. Co.* (D. C.) 193 Fed. 768; *Hulac v. Chicago & N. W. Ry. Co.* (D. C.) 194 Fed. 747; *McChesney v. Ill. Cent. Ry. Co.* (D. C.) 197 Fed. 85. Some of these cases arose after the new judicial Code went into force, and the case against removability is stronger under that Code than before. This case arose before the Code, but I think the case was no different then than now.

The motion to remand is sustained.



## THE FRANK T. HEFFELFINGER.

(District Court, W. D. New York. January 2, 1913.)

**1. TOWAGE (§ 4\*)—INJURY TO OTHER VESSELS—LIABILITY OF TUG.**

One of two tugs, hired to tow or maneuver a steamship, but which had not yet made fast to the ship, nor been signaled to do so, cannot be held liable for a collision occurring while the vessel was being moved by the other tug, although both belong to the same owner.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 4; Dec. Dig. § 4.\*]

**2. TOWAGE (§ 11\*)—COLLISION BETWEEN TOW AND ANOTHER VESSEL—LIABILITY OF TUG.**

A tug, towing a steamship out of a slip, is responsible for her movements, and liable for a collision between the ship and another vessel, which could have been avoided by care, provided the ship promptly obeyed her signals.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.\*]

**3. TOWAGE (§ 11\*)—COLLISION BETWEEN TOW AND ANOTHER VESSEL—LIABILITY OF TUG.**

A tug, towing a steamship from a slip on a river, held solely in fault for a collision between the ship and another vessel lying in a slip on the opposite side of the river, for want of proper care in the towing.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.\*]

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

In Admiralty. Suit by the United States, as owner of the lighthouse tender *Crocus*, against the steamer *Frank T. Heffelfinger*, the *Peavey Steamship Company*, claimant; the tugs *Conneaut* and *W. G. Mason* being impleaded. Decree against the *Conneaut*.

James C. Moore, Asst. U. S. Atty., of Buffalo, N. Y.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for claimant.

Brown, Ely & Richards, of Buffalo, N. Y., for claimant of tugs.

HAZEL, District Judge. The freight steamship *Frank T. Heffelfinger*, 450 feet over all, by 50 feet beam, struck the lighthouse tender *Crocus* at midnight on May 11, 1909, while the former was being assisted out of Evans slip across Buffalo river to the Philadelphia & Reading coal dock by the steam tug *Conneaut*. The Evans slip is 70 feet wide and adjoins the river. There was an approximate distance of 390 feet from the entrance thereto to the opposite bank of Buffalo river, where the *Crocus* was moored in the government slip with her stern projecting out about 5 feet into the river, and a distance of approximately 400 feet from the entrance to the bend in the dock on the City Ship Canal, while the distance to a point on the southwesterly side of the City Ship Canal 100 feet from the said bend, measured from a point on a line bisecting the entrance to Evans slip, is approximately 450 feet. From an examination of such distances it is evident that a steamer of the dimensions of the *Heffelfinger*, leaving the Evans slip to turn down the river, must be ma-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

neuvered slowly and with considerable care and diligence. To properly make the turn, skill and sound judgment on the part of the tugs assisting her would be required; for it will be noticed that, if the steamship proceeded ahead in a straight line, her bow would reach one bank of the river while her stern still remained in Evans slip. Notwithstanding the difficulties of such navigation, steamships of the class to which the Heffelfinger belongs are daily maneuvered from Evans slip into the river in such a way as to avoid colliding with other craft or interfering with their navigation.

The evidence shows that after taking the line of the tug Conneaut, which went ahead, and after blowing an "all right" signal, the steamship did not immediately work her engines; but soon afterwards, when her pilot house was abreast the entrance to the slip, without notifying the tug, or without receiving directions to that effect, she worked her engines slowly backward, in order, as the master testified, not to increase the speed at which the Heffelfinger was being steadily pulled across the river by the tug Conneaut. When the steamship's pilot house was abreast the Watson elevator, which is located on a plot of ground dividing the river from the City Ship Canal, she backed strong; her master supposing that her stem was near the south bank. Captain Lawson, of the tug Conneaut, testified that, when the bow of the Heffelfinger was about 100 feet from the south bank, a signal to back was blown from the Conneaut, and both the master and the engineer of the steamship testified that the signal was promptly obeyed by backing full astern with the full power of her engine by putting on the pass over; but the collision nevertheless occurred. The Conneaut, after having signaled the steamship to back, ported her wheel and, heading downstream, pulled off to starboard with the intention of stopping the steamship's headway, but her efforts were unavailing; and while the tug was engaged in her endeavor to pull her around the steamship lightly struck the Crocus and damaged her.

[1] The United States, the owner of the Crocus, libeled the Heffelfinger alone; but subsequently the owner of the latter, The Peavey Steamship Company, under admiralty rule 59 (29 Sup. Ct. xlv), brought in the tugs Conneaut and W. G. Mason. The latter was at anchor at the Anchor Line dock at the end of the slip when the collision occurred, waiting to take the astern line of the steamship to assist in making the turn. As the accident happened before the astern line was heaved, and before the customary signal to assist in making the swing was received, it is difficult to see any sound reason for attributing fault to her. She is not liable for the negligence of the ahead tug, even though both tugs belonged to the same owner. The W. G. Mason and The W. I. Babcock, 142 Fed. 913, 74 C. C. A. 83.

[2] The Heffelfinger claims that the entire fault for the collision was due to the Conneaut's negligence in pulling her too close to the opposite bank and permitting her bow to sag down, and in passing around to the starboard side of the steamship when there was danger of striking the after end of the Crocus. On the other hand, the tug Conneaut claims that, in view of the situation, it was essential that the steamship should be in control of her ahead movements when her bow

approached the middle of the river, and alleges negligence for her failure to stop her headway directly after signaled to do so.

There was testimony to the effect that prior to taking the line the master of the *Conneaut* notified the master of the *Heffelfinger* to look out for the *Crocus* and not to let the steamship go across into the dock. Six witnesses have sworn that such admonition was shouted to Captain Lawson, while an equal number of witnesses aboard the *Heffelfinger* have sworn that it was not heard or understood. In the view I take of this controversy, however, it makes no difference whether or not the attention of the *Heffelfinger* was called to the berth of the *Crocus*. An obligation rested upon the *Conneaut* to exercise proper skill and diligence in towing the steamship. *Winslow v. Thompson*, 134 Fed. 546, 67 C. C. A. 470; *Rebstock et al. v. Gilchrist Transp. Co. et al.* (D. C.) 132 Fed. 174.

Even with the stern of the *Crocus* projecting into the river, the condition of the channel, except for its narrowness, was not hazardous. The situation no doubt required the steamship to proceed with carefulness and to obey with promptness the signals of the ahead tug; but it did not require her to proceed out of Evans slip to the opposite bank, or close thereto, under her own power, or to use her rudder in any way. The pilot tug dominated her movements, and was responsible for her navigation, upon condition of her prompt obedience to the directions of the master of the tug. Even had the *Heffelfinger* heard the admonition shouted to her by the master of the pilot tug regarding the berth of the *Crocus* across the river, it is difficult to see how she could have acted more cautiously than she did by continuing to work her engines slowly backward as the tug pulled her forward. The contention that she was in fault for so doing, without receiving a signal from the pilot tug and without giving notice thereof, is without merit, and seems to ignore the uncontroverted evidence that the steamship stopped as quickly as possible upon receiving the tug's signal to do so.

[3] I am disinclined to hold the steamship in fault, and think it is fairly shown that the fault is in the *Conneaut* for misjudging the momentum of the *Heffelfinger* and failing to seasonably signal her to reverse strong or stop. She certainly lost valuable time in crossing the steamship's bow and pulling to starboard, when quick action was imperative to stop the latter's headway. She alone was in fault, and she alone must bear the damage sustained by the *Crocus*.

A decree may be entered accordingly, with costs.

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THE E. M. PECK.

(District Court, N. D. Ohio, E. D. January 3, 1913.)

No. 2,393.

**COLLISION (§ 71\*)—VESSEL BREAKING FROM MOORINGS—FAULT.**

Evidence considered, and *held* not to sustain the burden of proof resting on the owner of a steamer, which, on a rise in the river where she was tied up for the winter, broke from her moorings and drifted against

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a dredge below, to show that such breaking away was due to inevitable accident or a vis major, but rather to show that she was insufficiently secured or that her caretaker was negligent, and also to show that the collision was the proximate cause of the sinking of the dredge by breaking its lines and driving it against some piles.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.\*]

In Admiralty. Suit by the L. P. & J. A. Smith Company, owner of Dredge No. 8, against the steamer E. M. Peck; the Calumet Transit Company, claimant. Decree for libelant.

Goulder, Holding & Masten, of Cleveland, Ohio, for libelant.

Warren, Cady & Ladd, of Detroit, Mich., for claimant and respondent.

DAY, District Judge. This is a libel in rem, by the L. P. & J. A. Smith Company, owners of Dredge No. 8, against the steamer E. M. Peck, to recover damages for the sinking of the dredge on January 22, 1904, at Lorain, Ohio, due to the alleged negligence of the Peck in striking the dredge after the former had broken from her moorings.

Some time prior to January, 1904, the Peck was moored on the west bank of Black river, at Lorain, Ohio, in a proper place. Other vessels lay both ahead and astern of the Peck. The Peck's moorings consisted of a heavy anchor chain, 75 to 100 feet long, leading forward from the starboard side to a white oak bank pile, planted in solid ground, some 15 feet back from the edge of the water. Dredge No. 8 was moored in a proper place some 75 to 100 feet to the stern of the Peck. She was about 90 feet long and 30 feet wide. Her forward end was square, the after end being something of a fantail. Upon the forward end was a large derrick or crane projected ahead, and fastened to the sides of the dredge by a wire rope. The river was frozen, and the water was beginning to rise at the time of the breaking away of the Peck. From a concurrence of the testimony, it appears that the water had not risen more than one or two feet at the time the Peck broke away. Between 8 and 9 o'clock in the morning, the gorge began to move down the river towards the Peck. The compressor holding the chain slipped once or twice, permitting the Peck to surge astern. This caused the pile to which the Peck was moored to pull out, and the Peck was carried down the stream. As she passed the dredge, the after end of the cabin scraped along the edge of the dredge's crane, breaking the cabin stanchions and throwing the yawlboat, resting on a cradle, to the deck.

I do not think it is established by the libelant that the Peck hit the dredge, except in so far as the crane of the dredge was hit.

It is claimed by the libelant that the contact between the Peck and the crane of the dredge broke the dredge's lines, and drove her astern through the ice some 75 feet, and forced her starboard quarter upon some old piling along the water's edge, and stove a hole in the bottom about 20 feet forward of the point where the fantail began, in consequence of which the dredge began to leak and finally sank.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



From the evidence it appears that the Peck passed the dredge between 8 and 9 o'clock in the morning. At the time the Peck hit the dredge's crane, the water in the river was not more than one or two feet above its normal height, but later on the water rose rapidly, until in the early part of the afternoon it was at least six feet above the normal height.

It is contended by counsel for the Peck that there is no liability in this cause of action, for the reasons: First, that the respondent had exercised every precaution to secure the Peck against the breaking of the gorge, which reasonably prudent men of experience would have exercised under like circumstances; second, that the gorge which broke the Peck loose amounted to an act of God; third, that the contact between the Peck and the dredge was not the proximate cause of the injury to the dredge; but that the sinking of the dredge was due directly to a subsequent intervening cause, namely, the rise in the water which floated the dredge over the piling, and the failure on the part of those in charge of the dredge to slack the lines seasonably and permit it to float out as the water receded.

From the record I think it is apparent that the Peck broke loose by reason of the compressor slipping and permitting the chain to become slack and then tighten, thus breaking or loosening the pile to which the Peck was moored. This was the fault either in the construction of the compressor or more probably in the conduct of the caretaker of the Peck. The law is well established in cases of this sort in *The Louisiana*, 3 Wall. 164, 18 L. Ed. 85, wherein the Supreme Court says:

"The collision being caused by the *Louisiana* drifting from her moorings, she must be liable for the damages consequent thereon, unless she can show affirmatively that the drifting was the result of inevitable accident, or a *vis major* which human skill or precaution and a proper display of nautical skill could not have prevented."

This same principle has been applied by the Court of Appeals of this circuit to a case of a boat breaking away during a flood, where the original mooring was proper, but it did not appear that the shipkeeper properly adjusted the moorings as the water rose. *The Wm. E. Reis*, 152 Fed. 673, 82 C. C. A. 21.

Granting that the Peck broke loose by reason of the improper conduct of the shipkeeper, the inquiry naturally is, under this record, whether or not the breaking of the Peck from her moorings was the proximate cause of any injury sustained by the dredge. The question of proximate cause often arises. As was said by the Court of Appeals of this jurisdiction, in the case of *Slyfield v. Penfold*, 66 Fed. 364, 13 C. C. A. 514:

"This is generally a question of fact to be determined in each case by the circumstances attending the injury, and the conditions in which it happened. In *Railway Company v. Kellogg*, 94 U. S. 469 [24 L. Ed. 256], it is said: 'The primary cause may be the proximate cause of a disaster, though it may operate through successive instrumentalities. \* \* \* The question always is: Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? \* \* \* The inquiry therefore must always be whether

there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

The dredge was moored with a new seven-inch line forward and a number of other breastlines. The contact of the boom or crane of the dredge with the Peck broke several stanchions and scraped the top of the cabin of the Peck.

There is a great variance in the testimony of witnesses as to whether or not the contact of the Peck with the crane of the dredge broke the fastenings of the dredge, or whether it did not. Much of the testimony in this case on behalf of the Peck was taken some six years after the occurrence. Making due allowance for this, and weighing the testimony, I think that from all of the probabilities the contact of the Peck and the dredge was sufficient to break the lines on the dredge and force the dredge back onto the pilings and break a hole into the hull of the dredge which subsequently caused the sinking of the dredge.

To say that the dredge would have sank had there been no contact would be to deal in speculation.

The law being so well established in cases of this kind, and it having been shown that the Peck was in fault in reference to her moorings, and that the contact took place between the Peck and the dredge, I reach the conclusion that the Peck was at fault.

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#### KELLY'S ADM'X v. CHESAPEAKE & O. RY. CO. et al.

(District Court, E. D. Kentucky. November 6, 1912.)

##### 1. MASTER AND SERVANT (§ 87\*)—INTERSTATE CARRIERS—EMPLOYER'S LIABILITY ACT.

A master mechanic employed by an interstate railroad company cannot be made liable for the death of an engineer, under the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]); liability under such act being limited to common carriers engaged in interstate commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 138; Dec. Dig. § 87.\*]

##### 2. COMMERCE (§ 8\*)—DEATH OF SERVANT—INTERSTATE CARRIERS—EMPLOYER'S LIABILITY ACT—EXCLUSIVE APPLICATION.

Where an interstate carrier was liable for the death of a servant, under the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), it could not also be made liable under a state statute creating a cause of action for wrongful death; the federal act, where it applies, being exclusive.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.\*]

##### 3. MASTER AND SERVANT (§ 256\*)—DEATH OF SERVANT—INTERSTATE COMMERCE—EMPLOYER'S LIABILITY ACT.

Where a petition for wrongful death of a railroad engineer alleged that he was killed while employed by defendant in interstate commerce, that defendant was engaged in such commerce, and that the decedent's death resulted from the negligence of defendant's officers, agents, and employes, and the defective condition of defendant's roadbed and the engine decedent was required to use, it sufficiently stated a cause of action within

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. § 256.\*]

**4. REMOVAL OF CAUSES (§ 36\*)—CAUSES OF ACTION—JOINDER—EMPLOYER'S LIABILITY ACT.**

Plaintiff administrator brought suit against defendant interstate railroad company for the death of plaintiff's intestate, alleging a cause of action under the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), in that intestate, an engineer, was killed while in the employ of defendant company as a result of the negligence of defendant company's officers, agents, and employes. Plaintiff also joined a cause of action against an individual defendant alleged to have been defendant's master mechanic, alleging that he negligently directed intestate to operate the engine at the time knowing that it was defective, and that the track over which he was to operate it was also defective. In a petition to remand the corporate defendant denied that the individual defendant had ever been its master mechanic, alleged that he had nothing to do with directing plaintiff's intestate to operate the locomotive the derailment of which killed him, and that such allegations in the petition were untrue and known to be so when made, and were made solely to prevent a removal to the federal court, which allegations were not denied. *Held*, that such allegations in the petition for removal required a finding that the individual defendant was fraudulently joined; and hence the action, if brought against the corporate defendant alone under the federal Employer's Liability Act, not being removable, though diversity of citizenship existed between plaintiff and such corporate defendant, the cause was subject to remand.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.\*]

Fraudulent joinder of parties to prevent removal of cause to federal court, see note to *Offner v. Chicago & E. R. Co.*, 78 O. O. A. 362.]

**5. CONSTITUTIONAL LAW (§ 249\*)—REMOVAL OF CAUSES (§ 3\*)—EMPLOYER'S LIABILITY ACT—DIVERSITY OF CITIZENSHIP.**

Federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), providing that no case arising therein should be removed, construed to prevent a removal in cases under the act involving diversity of citizenship, was not unconstitutional as making an unjust discrimination between such cases and cases of a like character not arising under such act which might be removed in case they involved diversity of citizenship or other removable cause.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 710; Dec. Dig. § 249; \* Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.\*]

**At Law.** Action by Mat Kelly's administratrix against the Chesapeake & Ohio Railroad Company and another. On motion to remand Sustained.

O'Rear & Williams, of Frankfort, Ky., for plaintiff.

Lewis Apperson, of Mt. Sterling, Ky., and John T. Shelby, of Lexington, Ky., for defendant.

COCHRAN, District Judge. This cause is pending before me on a motion to remand. It is a suit to recover damages for the death of plaintiff's intestate. He was, at the time of his death, an engineer in the employ of the defendant company, and his death was caused by the derailment of his locomotive. The defendant George Robinson is alleged to have been defendant's master mechanic at the time.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The petition alleges that the defendant company was a common carrier engaged in interstate commerce; that the decedent was employed therein; that his death was caused by the negligence of the officers, agents, and employes of the defendant and by reason of defects and insufficiencies of the road, rails, and track, and of the engine, appliances, and machinery. Such are the allegations as to the defendant company. As to the defendant Robinson, the allegation, in substance, is that he negligently directed the decedent to operate the engine knowing that it was defective, and that the track over which he was to operate it was also defective.

[1-3] The petition states a cause of action against the defendant company under the Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), and, under the decisions of the Kentucky Court of Appeals, one against the defendant Robinson under the wrongful death statute of Kentucky. The individual defendant is not liable under the Employer's Liability Act, for it is limited to common carriers engaged in interstate commerce, and he is not such; and under the allegations of the petition there can be no liability of the corporate defendant under the Kentucky wrongful death statute, for the Employer's Liability Act, as to cases coming within its terms, supersedes that statute; and it is expressly alleged that the corporate defendant is a common carrier engaged in interstate commerce, the decedent was employed in such commerce, and he was killed by the negligence of the officers and agents and employes of the corporate defendant, and the defective condition of its roadbed and engine, thus bringing the case within the terms of the act.

Defendant's counsel speculates as to why plaintiff sued both defendants in the same action. Several hypotheses are put forward to account for this. But it does not seem to me that the determination of her actual thoughts on this matter is of consequence. The motion is to be disposed of on the case made by the facts alleged in the petition. It makes a case against the corporate defendant under the national statute and against the individual under the Kentucky statute. Under the allegations of the petition it would not be possible for plaintiff to recover as against the corporate defendant on the Kentucky statute, in case it should turn out in proof that her intestate was not employed in interstate commerce. She has alleged that he was so engaged, and under this petition she must prove this fact. To recover on the Kentucky statute, it must not only appear that her intestate was not engaged in interstate commerce, she must also allege it.

To sue the corporate defendant under the national statute, it was not necessary for the plaintiff to claim that she was so suing in her petition. It was sufficient for her to allege facts which brought her case within that statute, which she did. Judge Warrington, in the case of *Garrett v. L. & N. R. R. Co.* (C. C. A.) 197 Fed. 715, said:

"True it is not distinctly alleged in the declaration that the action is based upon the second Employer's Liability Act, but we think this effect must be given to the averments of the declaration that the deceased met his death while in the employ of the company, and while it was engaged in



interstate commerce. Such averments rendered the federal act alone applicable."

[4] It is certain, therefore, that the suit as to the corporate defendant is on the national statute. It is equally certain that the suit as to the individual defendant is on the state statute, whatever plaintiff may have thought about it. It could not as to him be otherwise than on it. If I were to hazard a guess why it was the individual defendant was sued, I would say it was to make it cocksure that the case could not be removed. There was a feeling of uncertainty as to whether the suit was removable if against the corporate defendant alone, even though it was based on the national statute, and it was thought that whatever uncertainty there was would be done away with by suing the individual defendant also. It is likely that it was not thought out just how so doing would accomplish this end. As a matter of fact, so doing has brought about the only complication in the case.

[5] Had the suit been brought against the corporate defendant alone, there could have been no doubt that it was not removable; and this though diversity of citizenship exists between it and plaintiff, and the cause was removed on this ground. In the case of *Van Brimer v. T. & P. R. R. Co.* (C. C.) 190 Fed. 394, which arose before the new Judicial Code went into effect, it was held that a case arising under the Employer's Liability Act was removable where diversity of citizenship existed. In a number of cases arising both before and after that Code went into effect, it has been held otherwise. Those cases are the following, to wit: *Symonds v. St. Louis & S. E. R. R. Co.* (C. C.) 192 Fed. 353; *Strauser v. Chicago, B. & Q. R. R. Co.* (D. C.) 193 Fed. 295; *Lee v. Toledo & L. W. R. R. Co.* (D. C.) 193 Fed. 685; *Ulrich v. N. Y., N. H. & H. R. R. Co.* (D. C.) 193 Fed. 768; *Hulac v. Chicago & N. W. R. R. Co.* (D. C.) 194 Fed. 747; *McChesney v. Ill. Cent. R. R. Co.* (D. C.) 197 Fed. 85. This case arose since the Code went into effect. The law is stronger against removability since then than before. But I think such a case was not removable before. Congress said that "no case arising under this act" should be removed, and it should be taken to have meant what it said.

It is urged that to so construe the act renders it unconstitutional, in that it makes an unjust discrimination between such cases—i. e., cases arising under the Employer's Liability Act, where diversity of citizenship exists—and cases of like character not arising thereunder in such contingency; i. e., that there is no reasonable basis for not making the same rule as to removability applicable to both classes of cases. This point was not made in any of the above cases, except the last one, and in that case Judge Evans held that the point was not well taken. In this opinion I concur. The creation of the liability by Congress was in the exercise of its power under the interstate commerce clause of the federal Constitution. The prohibition of the removal of cases arising under the statute was in the exercise of the power granted to it by the third article of that Constitution, by which Congress is empowered to legislate as to the judicial power of such inferior courts as it may establish. I understand that within the limit of the second section of that article Congress may do as it

pleases in the exercise of the power thereby conferred. In the case of *Home Life Ins. Co. v. Dunn*, 19 Wall. (86 U. S.) 214, 22 L. Ed. 68, Mr. Justice Swayne said:

"The third article of the Constitution declares that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Congress may from time to time establish, and that it shall extend, among other things, to controversies between the citizens of different states. As regards the inferior courts authorized to be established, Congress may give them such jurisdiction, both original and appellate, within the limits of the Constitution, as it may see fit to confer. How their appellate jurisdiction shall be exercised is not declared. The whole subject is remitted to the unfettered discretion of Congress."

What we have here, then, is two causes of action joined together in the same suit, one against the corporate defendant under the national statute, and one against the individual defendant under the state statute, and it may be accepted that they are improperly joined. Had the suit been against the corporate defendant alone, it would not have been removable. Does, then, the fact of the improper joinder of the cause of action against the corporate defendant with the cause of action against the individual defendant render it removable? The effect of such joinder is to make in the suit what is called a separable controversy; i. e., a controversy between the plaintiff and the corporate defendant, which is wholly between them, and can be fully determined between them. If it were not for the prohibition against removal in the Employer's Liability Act, this circumstance would render the cause removable, notwithstanding the joinder of the individual defendant. The question here, then, comes to this: Does that prohibition apply to a controversy arising under the Employer's Liability Act, which is a separable controversy, in a suit, or is it limited to one that is the sole controversy therein? The answer to this question depends on whether, because of the joinder therewith of another controversy, the case can be said to arise under the act. It does not wholly arise thereunder; i. e., it does not arise thereunder so far as such other controversy is concerned. But it does arise thereunder so far as the controversy as to the liability on that act is concerned. The case of *Ulrich v. N. Y., N. H. & H. R. R. Co.*, *supra*, was decided on the assumption that three causes of action were stated against the common carrier, who was the sole defendant therein, one of which was the Employer's Liability Act, one on a statute of New York, and the other at common law; and yet it was held that the case was one arising under the national act, and hence not removable. That was a stronger case for removability than here, where but a single cause of action is stated against the removing defendant.

This cause, however, has a feature in it which renders it unnecessary for me to decide how the matter would be if it had to be disposed of on the basis that the plaintiff had a genuine cause of action against the individual defendant. The corporate defendant, in its petition for removal, alleged that the individual defendant was not and never had been the corporate defendant's master mechanic; that he had nothing whatever to do with directing the plaintiff's intestate to operate the locomotive whose derailment killed him; and that these

allegations and all other allegations as to Robinson were untrue, and known to be untrue when made, and were made solely for the purpose of preventing the cause from being removed to this court. These allegations of the petition for removal are not denied, and must be accepted as true. What we have here, then, is not a genuine cause of action against the individual defendant, but a fraudulent one. The case is the same, therefore, as if no cause of action had been asserted against him, and were solely against the corporate defendant. On that basis I have already reached the conclusion that the case is not removable.

The motion to remand is sustained.

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CALAHAN et al. v. HOLLAND-COOK MFG. CO.

(District Court, W. D. Washington, S. D. December 26, 1912.)

No. 1,117.

1. **DISCOVERY (§ 19\*)—SUFFICIENCY OF BILL—WAIVER OF ANSWER UNDER OATH.**

A complainant is not entitled to discovery from the defendant on a general prayer therefor in the bill, where the bill expressly waives answer under oath and propounds no interrogatories.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 20-26; Dec. Dig. § 19.\*]

2. **DISCOVERY (§ 17\*)—IN EQUITY—CORPORATIONS—JOINDER OF OFFICERS.**

When discovery on the part of a corporation is asked, the better practice is to join as defendants the corporate officers having particular knowledge of the matter sought to be discovered.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 18; Dec. Dig. § 17.\*]

In Equity. Suit by D. L. Calahan and C. A. Scales against the Holland-Cook Manufacturing Company. On exceptions to answer for insufficiency in not making discovery prayed for. Exceptions overruled.

G. Ward Kemp, of Seattle, Wash., for complainants.

Walter M. Harvey, of Tacoma, Wash., for defendant.

CUSHMAN, District Judge. The bill herein is one complaining of the infringement of a certain patent for a turning tool, praying for injunctive relief against the infringement, an accounting of profits which have been made out of its use by the defendant, and triple damages. The complaint also prays for discovery as follows:

"That the defendant make full disclosure and discovery of all the matters aforesaid, and full, true, and direct and perfect answer make to the several matters hereinbefore stated and charged (but not upon oath, an answer under oath being hereby expressly waived), as fully as if same were herein repeated and the defendant fully interrogated in reference thereto, and especially that it may set forth."

Complainant therein asks discovery concerning the manufacturing and sale by defendant of—

"devices of any kind containing or employing the inventions aforesaid, or any of them and how many thereof it has made."

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Defendants have answered under oath, denying any infringement, alleging that this turning tool had been in public use and on sale in the United States for more than two years before the application of the complainants for the alleged patent, and that claimants unjustly and surreptitiously obtained a patent for an invention made by others. Particulars of its invention, use, and sale are set forth in the answer. No discovery is made, as prayed in the complaint. The cause is now before the court upon complainants' exceptions to the answer for insufficiency in not making the discovery prayed for.

[1] The right to discovery is not all one of advantage. If sworn discovery is made, it is evidence in the case, and requires two witnesses, or one witness with strong corroboration, to overcome. It cannot be considered evidence, unless sworn to, and, if sworn to, where an oath has been waived in the bill of discovery, it would not be considered evidence against the party so waiving it. It has, therefore, been considered that a waiver in the bill of an oath to the answer waives discovery.

"It is not a bill of discovery, because the answer under oath of the defendant is expressly waived. No interrogatories are propounded to either of the defendants; no effort made to obtain from them, or either of them, by way of sworn answer, anything which could be used as evidence in the case." *Huntington v. Saunders*, 120 U. S. 78, at page 80, 7 Sup. Ct. 356, at page 357 (30 L. Ed. 580).

"The discovery feature of the bill may be disregarded—First, because an answer under oath is expressly waived in the bill; and, secondly, because the bill propounds no interrogatories." *Excelsior Wooden Pipe Co. v. City of Seattle*, 117 Fed. 140, at page 144, 55 C. C. A. 156, at page 160 (Ninth Cir. cult); *Tillinghast v. Chace* (C. C.) 121 Fed. 435; *Victor G. Bloede Co. v. Carter* (C. C.) 148 Fed. 127; *McFarland v. State Savings Bank* (C. C.) 132 Fed. 399; 6 Enc. Pl. & Pr. 732.

Complainants, in support of their exceptions for want of discovery, rely upon *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* (C. C.) 83 Fed. 26, and *Continental National Bank v. Heilman* (C. C.) 66 Fed. 184. There are other cases that might have been cited; but, as has been said:

"The complainant contends that the waiver of the oath does not deprive complainant of his right to a full answer and a full discovery from the defendants. This contention finds some slight support. \* \* \* But there is presented no decision of the Supreme Court, or of any Circuit Court of Appeals, for this position, and it seems contrary to principle. The cases cited by Bates cannot be accepted as sufficient authority to overthrow so well established a principle as that a complainant who waives an oath cannot have discovery. The waiver of the oath, which reduces the answer to a mere pleading must also require that 'every fact essential to plaintiff's title to maintain the bill, and obtain his relief, must be stated in the bill, or the defect will be fatal.'" *Tillinghast v. Chace* (C. C.) 121 Fed. 435, at pages 436 and 437.

[2] When discovery on the part of a corporation is asked, the better practice appears to be to join as defendants the corporate officers having particular knowledge of the matter sought to be discovered. 14 Cyc. 311; *Foster's Federal Practice* (3d Ed.) § 148, p. 346.

The exceptions to the answer are overruled.



## BRENNAN v. TILLINGHAST.

## TILLINGHAST v. BRENNAN.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1913.)

Nos. 2,253, 2,254.

**1. BANKS AND BANKING (§ 80\*)—INSOLVENCY—CLAIMS—TRUST FUNDS—CONVERSION OF SECURITIES.**

A bank of which complainant was a customer while insolvent wrongfully sold certain of complainant's stock deposited with it as collateral, receiving \$3,558.75, which it deposited in another bank to its credit in a pre-existing open account May 1, 1909. From May 1st to 8th, inclusive, the bank drew drafts on this account in favor of an express company for amounts aggregating \$2,807.32, receiving from the express company over its counter the amount of the drafts in cash, and at all times from May 1st to 10th, inclusive, the open account, after crediting all deposits and deducting drafts, showed a balance in favor of the insolvent bank always in excess of the proceeds of the stock so sold. On May 11th the account was overdrawn, however, but at all times from February 1st until the bank closed there was more than \$3,500 of cash on hand in the bank's vaults, and \$15,652.23 in cash came into the hands of a receiver. *Held*, that the proceeds of the stock constituted a trust fund which did not lose its character when mingled with the other moneys of the bank, and, when the deposit was drawn down by the express company drafts, the trust attached to the amount paid by the express company for the drafts pro tanto, and hence there was a sufficient following of the fund to entitle complainant to a preferred claim therefor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184-196; Dec. Dig. § 80.\*]

**2. TRUSTS (§ 352\*)—TRUST FUNDS—LOSS OF TRUST CHARACTER—MINGLING WITH OTHER FUNDS.**

Where the proceeds of stocks wrongfully sold by an insolvent bank constituted a trust fund for the benefit of the owner, they did not lose their trust character by being mingled with other moneys of the bank, provided the owner could trace the money either in its original shape or in substituted form into assets which came into the hands of the bank's receiver.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 520-525; Dec. Dig. § 352.\*]

**3. TRUSTS (§ 358\*)—TRUST FUNDS—MINGLING WITH OTHER MONEYS.**

Proof that a tort-feasor has mingled trust funds with his own and made payments thereafter out of the common fund, in the absence of anything else appearing, is a sufficient identification of the remainder of that fund coming into the hands of the receiver not exceeding the smallest amount the fund contained subsequent to the commingling as trust property, under the presumption that the trust moneys had not been paid out.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 523, 553; Dec. Dig. § 358.\*]

**4. TRUSTS (§ 372\*)—TRUST FUNDS—BLENDING WITH OTHER FUNDS—PRESUMPTIONS.**

Where trust funds are blended with other moneys in a bank account from which there had been drawings from time to time, the presumption that the sums first drawn out were from the moneys which the tort-feasor had a right to expend in his own business, and that the balance which remained included the trust fund, will not stand against evidence to the contrary.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 600-603; Dec. Dig. § 372.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**5. TRUSTS (§ 372\*)—TRUST FUNDS—MINGLING—TRANSFERS.**

The presumption that a tort-feasor, having mingled trust funds with his own, paid out his own funds, and that the remaining balance included those of the trust, has no application where the evidence shows that the first moneys drawn from the mingled fund by the tort-feasor were not in fact dissipated by him, but merely transferred in a substituted form to another fund retained in his own possession.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 600-603; Dec. Dig. § 372.\*]

**6. BANKS AND BANKING (§ 75\*)—DEPOSITS—RECLAMATION—INSOLVENCY.**

Where a bank, being hopelessly insolvent, receives a deposit with knowledge that it cannot pay its debts and must fail in business, the depositor may rescind for fraud and reclaim the deposit or its proceeds, if traced into the assets of the bank coming into the hands of the receiver.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 157; Dec. Dig. § 75.\*]

Deposits in bank after insolvency, see note to *Richardson v. New Orleans Coffee Co.*, 43 C. C. A. 588.]

**7. BANKS AND BANKING (§ 75\*)—INSOLVENCY—DEPOSITS—RECEIPT.**

Where the officers of a bank at the time they received a deposit from complainant had known for 10 years that the bank was insolvent, but it did not appear but that the officers had reason to believe that by a continuing business the bank might retrieve its fortunes, and that it would be necessary to close, the receipt of the deposit did not constitute such fraud as would entitle the depositor to rescind and recover the deposit from the bank's receiver for fraud.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 157; Dec. Dig. § 75.\*]

**8. BANKS AND BANKING (§ 75\*)—RECEIPT OF DEPOSITS—FRAUD.**

Complainant, being indebted to a bank which was insolvent for money borrowed, deposited \$1,000 with the bank, with the understanding that it would be used in payment of defendant's note at maturity. *Held*, that such deposit was taken by the bank as quasi security for the payment of its debt, and hence a receipt of the deposit, notwithstanding the bank's insolvency, was not fraudulent.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 157; Dec. Dig. § 75.\*]

**9. APPEAL AND ERROR (§ 719\*)—ASSIGNMENTS OF ERROR—SCOPE—REVIEW.**

Where, in a proceeding to recover certain claims against the receiver of an insolvent bank, complainant's \$1,000 note in favor of the bank was allowed as an offset against his preferred claim arising out of the bank's wrongful sale of his collateral consistently with the prayer of the bill, and complainant assigned no error on appeal because the offset was not allowed against his claim as a general creditor under a certificate of deposit, error, if any, in that regard, will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.\*]

Appeals from the Circuit Court of the United States for the Northern Division of the Western District of Michigan; Arthur C. Denison, Judge.

Bill by John Brennan against Philip Tillinghast, as receiver of the First National Bank of Ironwood, Mich. From a decree awarding complainant a part of the relief demanded, both parties appeal. Affirmed.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Charles M. Humphrey, of Ironwood, Mich., for John Brennan.

I. A. Fish and Quarles, Spence & Quarles, all of Milwaukee, Wis., for the receiver.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

SANFORD, District Judge. John Brennan, the complainant below, filed a bill in the Circuit Court, sitting in equity, against the First National Bank of Ironwood, Mich., an insolvent banking association, and Philip Tillinghast, receiver of said bank, the defendants below, seeking to recover as preferred claims against the bank the value of certain stock deposited by Brennan with the bank as collateral and sold by the bank, and the sum of \$1,000 deposited by Brennan with the bank a short time before it was placed in the hands of the receiver. The court, on final hearing, allowed the first of these items as a preferred claim, and disallowed the second. Brennan and the receiver have each appealed from this decree; and the two appeals have been heard together.

The material facts are these:

The First National Bank of Ironwood, Mich., hereinafter called the Ironwood Bank, was organized as a national banking association in 1888, and conducted a banking business in Ironwood until June 21, 1909, when it closed its doors, and Tillinghast was appointed as its receiver by the Comptroller of the Currency.

On February 1, 1909, Brennan borrowed from the Ironwood Bank the sum of \$1,000, for which he executed his promissory note, due in four months, with interest, and deposited with the bank as collateral security certificates for certain shares of mining stock, including 200 shares of the capital stock of the Shattuck-Arizona Copper Company.

On April 8th Brennan deposited with the Ironwood Bank the sum of \$1,000, for which he received a certificate of deposit. This deposit was received by the cashier of the bank, with the understanding at the time that it was to be used in paying Brennan's note at its maturity.

The receiver admitted in his answer that the bank was insolvent from February 1st, when the note was given, to June 21st, when the receiver was appointed, including the date, April 8th, on which the deposit was received; and the cashier who received the deposit testified that he had known for about ten years before that the bank was insolvent.

On May 1st the Ironwood Bank, through its cashier, without the knowledge or consent of Brennan, sold 195 of the shares of the stock of the Shattuck-Arizona Copper Company which it held as collateral to his note, the proceeds of which, \$3,558.75, were on that day deposited in the City National Bank of Duluth, Minn., hereinafter called the Duluth Bank, to the credit of the Ironwood Bank, in a pre-existing open account.

Against this open account in the Duluth Bank, in which other deposits were made from time to time, the Ironwood Bank drew from day to day various drafts to meet its daily clearing house balances.

And from May 1st to May 8th, inclusive, the Ironwood Bank also drew four drafts on the Duluth Bank against this open account, in favor of the American Express Company, for amounts aggregating \$2,807.32. These drafts were purchased by the express company from the Ironwood Bank on the dates on which they were drawn, and the express company on such dates paid the Ironwood Bank the amounts of such drafts, in cash, over its counter. At all times from May 1st to May 10th, inclusive, the open account of the Ironwood Bank at the Duluth Bank, after crediting all deposits made and deducting all drafts drawn, showed a balance in favor of the Ironwood Bank, varying in amount from day to day, but always in excess of \$3,558.75. On May 10th this balance amounted to \$4,273.39. On May 11th, however, this account of the Ironwood Bank at the Duluth Bank was overdrawn in the sum of \$1,068.75.

On June 14th, after Brennan's note had fallen due and when he did not know that any part of his stock had been sold by the Ironwood Bank, he, after a conversation with its cashier, who advised him to let the note run, gave up his original intention of paying his note with his certificate of deposit, and, instead, paid the Ironwood Bank the interest due on his note, and gave the bank a renewal note for the principal.

In addition to these transactions, Brennan also had a checking account with the Ironwood Bank, and, when its doors closed, owed it for an overdraft on this account the sum of \$216.07.

The books of the Ironwood Bank furthermore show that at all times from February 1st until it closed on June 21st there was \$8,000 or more of cash on hand in its vaults, and \$15,652.23 in cash came into the hands of the receiver. And, while it appears that the bank books contained many false cash entries, the evidence fully sustains the finding of the court below that from and after April 8th until the closing of the bank it had continually on hand in cash in its own vaults more than \$3,500.

The remainder of the stock held by the bank as collateral on Brennan's note has been returned by the receiver to Brennan.

The evidence further showed that claims had been filed against the Ironwood Bank aggregating \$603,000; that the Comptroller of the Currency had levied an assessment of 100 per cent. on its stockholders; that 30 per cent. dividends had already been paid to creditors; that not exceeding 10 per cent. more could be paid; and that the other claims for preferences which had been filed and which were still pending aggregated between \$3,500 and \$4,000.

On this state of facts we have reached the following conclusions:

[1] 1. The court below correctly held that Brennan was entitled to recover as a preferential claim, to be paid in full, the sum of \$3,558.75 received by the Ironwood Bank from the sale of his stock, less the amount of his note, \$1,000, and of the overdraft, \$216.07, leaving a balance of \$2,342.68, for which sum he was granted a decree against the receiver.

[2] It is undisputed that the proceeds of the sale of Brennan's stock, wrongfully converted by the Ironwood Bank to its own use, consti-



tuted a trust fund, which did not lose this character when mingled with other moneys of the bank, and that Brennan was entitled to recover the amount thereof as a preferred claim, if, and to the extent that, he sustained the burden of proof of tracing this money, either in its original shape or in a substituted form, into the moneys which came into the hands of the receiver as part of the assets of the bank. *Peters v. Bain*, 133 U. S. 670, 693, 10 Sup. Ct. 354, 33 L. Ed. 696; *Board of Commissioners v. Strawn* (C. C. A. 6) 157 Fed. 49, 54, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100; *In re Brown* (C. C. A. 2) 193 Fed. 24, 29, 113 C. C. A. 343, affirmed sub nom. *First National Bank of Princeton v. Littlefield*, 226 U. S. 110, 33 Sup. Ct. 78, 57 L. Ed. —; *Empire State Surety Co. v. Carroll County* (C. C. A. 8) 194 Fed. 593, 604, 114 C. C. A. 435, and cases cited.

[3] And proof that the tort-feasor has mingled the trust funds with his own and made payments thereafter out of the common fund, is, nothing else appearing, a sufficient identification of the remainder of that fund coming into the hands of the receiver, not exceeding the smallest amount the fund contained subsequent to the commingling, as trust property, under the legal presumption that he regarded the law and neither paid out the trust fund nor invested it in other property, but kept it sacred. *Board of Commissioners v. Strawn*, supra, at page 51; *Empire State Surety Co. v. Carroll County*, supra, at page 605, and cases cited.

Applying these general principles, we are of opinion that the court below correctly held that the proceeds of the sale of Brennan's stock constituted a trust fund held by the Ironwood Bank for his benefit; that the transactions in connection with the four cash drafts drawn in favor of the express company constituted, in effect, a transfer of \$2,807.32 of this trust fund in cash to the vaults of the Ironwood Bank; that this portion of the trust fund must be deemed to have remained in the vaults of the Ironwood Bank as part of the trust fund, in cash, until it came into the possession of the receiver; and that as the amount thus remaining in the trust fund was more than sufficient to cover the balance to which Brennan was entitled from the proceeds of the sale of his stock, after deducting the amount due from him to the bank on his note and overdrafts, he had successfully traced the balance of the trust fund thus due to him into the cash assets that came into the hands of the receiver, and was hence entitled to be paid the same as a preferential claim.

It is urged, however, in behalf of the receiver that the cash draft transactions should not be regarded as a transfer of \$2,807.32 of this trust fund to the vaults of the Ironwood Bank, for the reason that, after the last of these cash drafts was drawn on May 8th, there remained to the credit of the Ironwood Bank at the Duluth Bank until May 10th a balance of \$4,273.39, or more than the amount of the trust fund, which was not dissipated until this balance was changed into an overdraft of \$1,068.75 on May 11th; the argument being that under this state of facts it should be presumed that the Ironwood Bank first drew on its open account in the Duluth Bank for its own purposes, intending to leave the trust fund unimpaired; that the \$4,-

273.39 remaining in the Duluth Bank on May 10th hence included the trust fund; and that, as this balance was subsequently dissipated by drafts drawn by the Ironwood Bank for its own purposes, it cannot, for that reason, be traced into the cash which came into the hands of the receiver from the vaults of the bank.

[4] It is true that in the case of blended moneys in a bank account, consisting in part of trust funds, from which there have been drawings from time to time, it has been held, in favor of the cestui que trust, as a presumption of law, that the sums first drawn out were from the moneys which the tort-feasor had a right to expend in his own business, and that the balance which remained included the trust fund, which he had no right to use. In *re Hallett's Estate*, 13 Ch. D. 696, 727; *Board of Commissioners v. Strawn*, supra, at page 51. It is clear, however, in the first place, that this is a mere presumption, which will not stand against evidence to the contrary. *Board of Commissioners v. Strawn*, supra, at page 51.

[5] And it is furthermore clear that this rule of presumption has no application where the evidence shows that the first moneys drawn out of the mingled fund by the tort-feasor were not in fact dissipated by him at all, but were merely transferred, in a substituted form, to another fund retained in his own possession. In such case, it must be held that the trust attaches to the substituted form in which the property is retained by the tort-feasor, and that the right to follow the trust in such form is not lost by reason of the fact that the tort-feasor thereafter draws out and spends for his own purposes the balance of the fund in which the trust money was originally mingled. The English case of *In re Oatway*, L. R. 2 Ch. 356, 359, directly sustains this view. In that case Oatway, a joint trustee under a will, had sold a portion of the trust property and deposited the proceeds to his own credit in bank with other funds belonging to himself. Out of this deposit, consisting in part of the proceeds of the converted trust fund and in part of his own moneys, Oatway purchased certain shares of stock in the Oceana Company, which he took and retained in his own name. Thereafter he drew out and paid away irrevocably for his own individual purposes the entire remainder of the bank deposit. It was held that, under this state of facts, the cestui que trust was entitled to follow the shares of stock thus purchased by Oatway. Joyce, J., said:

"If money held by any person in a fiduciary capacity be paid into his own banking account, it may be followed by the equitable owner, who, as against the trustee, will have a charge for what belongs to him upon the balance to the credit of the account. If, then, the trustee pays in further sums, and from time to time draws out moneys by checks, but leaves a balance to the credit of the account, it is settled that he is not entitled to \* \* \* maintain that the sums which have been drawn out and paid away so as to be incapable of being recovered represented pro tanto the trust money, and that the balance remaining is not trust money, but represents only his own money paid into the account. \* \* \* It is, in my opinion, equally clear that when any of the money drawn out has been invested, and the investment remains in the name or under the control of the trustee, the rest of the balance having been afterwards dissipated by him, he cannot maintain that the investment which remains represents his own money alone, and that what has been spent and can no longer be traced and recovered was the money belonging to the trust.

• • • The order of priority in which the various withdrawals and investments may have been respectively made is wholly immaterial. • • • In the present case there is no balance left. The only investment or property remaining which represents any part of the mixed money paid into the banking account is the Oceana shares purchased for £2,137. Upon these, therefore, the trust had a charge for the £3,000 trust money paid into the account. That is to say, those shares and the proceeds thereof belong to the trust. The investment by Oatway, in his own name, of the £2,137 in Oceana shares no more got rid of the claim or charge of the trust upon the money so invested than would have been the case if he had drawn a check for £2,137 and simply placed and retained the amount in a drawer without further disposing of the money in any way. The proceeds of the Oceana shares must be held to belong to the trust funds under the will of which Oatway and Maxwell Skipper were the trustees."

In like manner we are of opinion that in the present case it must be held that the transfer by the Ironwood Bank to its own vaults, through the cash draft transactions, of \$2,807.32, of the balance standing to its credit in the Duluth Bank in which the trust fund had been mingled, did not divest the money thus transferred of its character as a trust fund, but as this money remained thereafter in its own vaults and in its own custody, and subsequently passed into the hands of the receiver as part of the cash assets of the bank, it remained subject in all respects to the trust originally impressed upon the proceeds of the sale of Brennan's stock.

2. The court below correctly held that the amount of the \$1,000 deposit was not a preferred claim, but that as to this sum Brennan was a general creditor of the Ironwood Bank, to be paid by the receiver the same percentage of dividends that had been and should be paid to other general creditors.

[6] It is true that where a bank, being hopelessly insolvent, receives a deposit, with the knowledge that it cannot pay its debts and must fail in business, this is such a fraud upon the depositor that he may rescind the contract of deposit and reclaim the amount so deposited or its proceeds, if traced into the assets of the bank coming into the hands of the receiver, in like manner as other trust funds. *St. Louis Ry. Co. v. Johnston*, 133 U. S. 566, 576, 10 Sup. Ct. 390, 33 L. Ed. 683; *Standard Oil Co. v. Hawkins* (C. C. A. 7) 74 Fed. 395, 398, 20 C. C. A. 468, 33 L. R. A. 739; *City Bank v. Blackmore* (C. C. A. 6) 75 Fed. 771, 773, 21 C. C. A. 514; *Richardson v. Coffee Co.* (C. C. A. 5) 102 Fed. 785, 789, 43 C. C. A. 583; *Hutchinson v. Le Roy* (C. C. A. 1) 113 Fed. 202, 209, 51 C. C. A. 159.

[7] However, the mere fact that the bank is known to be insolvent at the time the deposit is received is not in our opinion sufficient of itself, without more, to confer this right of rescission upon the depositor, and such right of rescission would not arise when the bank at the time of receiving the deposit, although embarrassed and insolvent, yet had reason to believe that by continuing in business it might retrieve its fortunes; the necessary condition upon which the right of rescission is predicated being that the deposit was received when the bank was hopelessly embarrassed and so circumstanced as to constitute its receipt of the deposit a fraud upon the depositor. See *St. Louis Ry. Co. v. Johnston*, *supra*, at pages 576, 577.

In the present case it merely appears that the bank was insolvent at the time this deposit was received, and had been known to be insolvent for ten years previously by the cashier who received the deposit. The extent of its insolvency at that time is not shown, nor is there any evidence as to what subsequent events precipitated the condition which caused its doors to close, or whether or not at the time the deposit was received the bank, although embarrassed and insolvent, yet had reasonable hopes that by continuing in business it might retrieve its fortunes, just as it had previously continued in business for the ten preceding years during which it had been insolvent. In the light of this meager evidence, we agree in the view expressed by Judge Denison, then district judge, who heard this case below, who said:

"There is no reason to think in this case that the suspension of the bank was any more imminent on April 8th than it had been for a long time, or that the cashier or bank officers anticipated the closing of the bank or had any expectation that complainant would not receive his money when he should ask for it—except their general and vague fear that they might fail to tide over their difficulties. This does not seem to me to raise the necessary trust. Complainant's own showing is that for more than 60 days the deposit would have been repaid on demand, and that it was practically offered to complainant when the note was renewed. For these reasons, I think complainant is not entitled to any preference upon his certificate of deposit, but should prove the same as a general creditor."

[8] And, whatever would have been the result otherwise, we think it cannot properly be held that the receipt of this particular deposit constituted a fraud upon Brennan within the rule entitling him to follow it as a trust fund, in the light of the undisputed facts, shown by his own testimony that at the time the deposit was made the bank held his \$1,000 note for borrowed money, and the deposit was made with the "understanding" that it would be used in payment of this note at maturity. As this deposit was hence, under this evidence, in effect taken by the bank as quasi security for the payment of a just debt due to itself, this circumstance alone, in our opinion, relieves the bank from the imputation of fraud in receiving the deposit, which might otherwise have existed if the deposit had been merely received in the ordinary course of dealings between the bank and a customer not indebted to it.

[9] 3. It is furthermore suggested in behalf of Brennan that the court below should have allowed his \$1,000 note as an offset against his claim as a general creditor under his certificate of deposit, instead of allowing it, in effect, as an offset against his preferred claim arising out of the sale of his collateral. It is frankly conceded, however, in the brief filed in his behalf that the opposite view was taken by his counsel in the court below, and it appears, from an examination of the pleadings, that the decree of the court below in allowing this offset against Brennan's preferred claim for the proceeds of his stock was entirely consistent with the prayer of the complainant's bill. Furthermore, Brennan, under his appeal, has assigned no error in reference to the action of the court in this respect. In this state of the record there is obviously nothing in the decree of the court below in this respect of which Brennan is entitled to now complain.



4. Finding no error in the decree below, it must be in all things affirmed. A decree will be entered accordingly, dismissing both appeals, and taxing each appellant with one-half of the costs of the appeals.

**HARTFORD STEAM BOILER INSPECTION & INS. CO. v.  
PABST BREWING CO.**

(Circuit Court of Appeals, Seventh Circuit. October 15, 1912.)

No. 1,850.

**1. ACTION (§ 48\*)—JOINDER OF CAUSES OF ACTION—TORT AND CONTRACT—WISCONSIN STATUTE—"TRANSACTION."**

A cause of action on a policy of insurance to recover for the loss of steam boilers through explosion and one in tort for negligence of the insurance company in making inspection of the boilers, which it agreed to do periodically as an inducement to the insurance contract, arose out of "transactions connected with the same subject of action," the joinder of which is authorized by Rev. St. Wis. 1898, § 2647.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 450, 471, 490-510; Dec. Dig. § 48.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7060-7062.]

**2. INSURANCE (§ 422\*)—INSURANCE OF BOILERS AGAINST EXPLOSION—PROXIMATE CAUSE OF LOSS—LIMITATION IN POLICY—"SINGLE EXPLOSION."**

Defendant insured six new steam boilers in a building of plaintiff's plant in the sum of \$150,000 against loss or damage from explosion; liability "resulting from any one explosion" being limited to \$50,000. The boilers were connected in battery with a common header for distribution of steam. Three of the boilers exploded. The explosions were not simultaneous, but the first was followed in rapid succession by the second and third. The direct cause of the initial explosion was not shown further than that there was evidence of defects in each of the boilers. *Held*, it appearing that the several explosions were of different boilers, that the second and third were plainly incidental and attributable to the first, and while contributing to the damage could not be considered as intermediate and efficient causes of any part of the loss, but that the first was the proximate cause, and there was as matter of law but one explosion within the meaning of the limitation in the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1128, 1134, 1139, 1141; Dec. Dig. § 422.\*]

**3. INSURANCE (§ 427\*)—LIABILITY—"PROXIMATE CAUSE" OF LOSS.**

In determining the cause of a loss for the purpose of fixing insurance liability, when concurring causes of the damage appear, the proximate cause to which the loss is to be attributed is the dominant, the efficient one that sets the other causes in operation; and causes which are incidental are not proximate, though they may be nearer in time and place to the loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1139-1143; Dec. Dig. § 427.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

**4. CUSTOMS AND USAGES (§ 15\*)—EVIDENCE—MEANING OF TERMS USED IN POLICY.**

Where the question whether the explosion of several boilers in immediate succession constituted a single explosion or a number within the meaning of a provision of an insurance policy was submitted to the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

jury, evidence of the usage with respect to the meaning of the term "explosion," where a number of boilers are referred to, was competent.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 30-33; Dec. Dig. § 15.\*]

5. INSURANCE (§ 422\*)—BOILER INSURANCE POLICY—CONSTRUCTION.

Rev. St. Wis. 1898, § 1966—41, provides that no corporation doing business in the state "issuing a policy of boiler insurance shall expose itself to any loss under any one accident to an amount exceeding fifty thousand dollars." *Held*, that a proviso in a policy issued on boilers in the state while such statute was in effect limiting the liability of the company to \$50,000 for loss or damage "resulting from any one explosion" must be construed as intended by the parties to make the policy conform to such requirement, and as limiting liability for any one disaster occurring during the term.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1128, 1134, 1139, 1141; Dec. Dig. § 422.\*]

6. STEAM (§ 6\*)—INJURIES FROM EXPLOSION—LIABILITY—COLLATERAL UNDERTAKING TO MAKE INSPECTIONS.

Although a provision in a policy insuring steam boilers giving the insurer the right to inspect the boilers at any time was solely for its own protection and created no duty to the insured to make such inspections, such duty may arise from representations made as an inducement to the insurance, that it made such inspections periodically by skilled men and reported the conditions found to the insured, and by a long course of dealing in making the inspections and reports, which are relied on by the insured with its knowledge, and it may become liable for negligence in the performance of such duty outside of the contract made by its policy.

[Ed. Note.—For other cases, see Steam, Cent. Dig. §§ 4-11; Dec. Dig. § 6.\*]

7. STEAM (§ 6\*)—INJURIES—NEGLIGENT INSPECTION OF BOILERS—EVIDENCE.

Defendant insurance company assumed the duty of inspecting a battery of large boilers in plaintiff's plant. A month after the last inspection had been made, three of the boilers exploded, wrecking the building. *Held*, that on trial of an action to charge defendant with liability on the ground of negligent inspection, where there was no direct evidence of any defects in the boilers at the time of the last inspection which were discoverable by the exercise of reasonable care and skill, it was error to admit evidence of cracks which were found in two of the remaining boilers after the explosion, there being no evidence on which it could be assumed that they were not caused by the explosion, and especially where there was evidence tending to show that the cracks were such that it would be impossible to use the boilers at the usual steam pressure.

[Ed. Note.—For other cases, see Steam, Cent. Dig. §§ 4-11; Dec. Dig. § 6.\*]

8. STEAM (§ 6\*)—INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence considered in such action, and *held* to require the submission to the jury of the issue of contributory negligence of plaintiff.

[Ed. Note.—For other cases, see Steam, Cent. Dig. §§ 4-11; Dec. Dig. § 6.\*]

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin; Arthur L. Sanborn, Judge.

Action at law by the Pabst Brewing Company against the Hartford Steam Boiler Inspection & Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

The defendant in error, Pabst Brewing Company, was the plaintiff below in a suit against the plaintiff in error, Hartford Steam Boiler Inspection &

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Insurance Company (as defendant), to recover damages caused by explosions (averred to be several) of steam boilers in plaintiff's great plant in Milwaukee. On trial of the issues to a jury, verdict was rendered in favor of the plaintiff, assessing the damages at \$104,178.75—namely, for \$97,500 as damages, together with interest thereon—and reversal of the judgment entered thereupon is sought by the defendant below, under this writ of error.

The amount of actual damages suffered by the plaintiff in the disaster was not only uncontroverted, but stipulated between the parties at \$97,500, and the numerous assignments of error are directed to questions of law, raised in the course of the trial, in reference (a) to the plaintiff's pleadings, (b) alleged contracts in suit and construction thereof, (c) rulings upon admission and rejection of evidence, and (d) instructions denied or given by the trial court.

The plaintiff's complaint embraces two alleged causes of action: One in tort, charging negligence on the part of the defendant in inspection of the boilers prior to the explosion, and the other for indemnity under a policy of insurance written by the defendant.

For the first cause of action the complaint (as amended), aside from formal matters, avers, as follows, in substance: The defendant for many years has been engaged in the business of insurance on steam boilers and of inspecting such boilers, and promptly reporting the results of such inspection to the insured. It represented and held itself out to the party as skilled in such examinations, for which special knowledge, experience, and skill were required. Prior to July 28, 1908, the date of the insurance policy involved herein, the defendant represented and held out to the plaintiff that it was skilled and expert in such examinations of water tube steam boilers, and solicited and requested plaintiff to enter into a contract of insurance with it on six certain water tube boilers, resulting in the issuance of such policy. The policy so issued contained a provision whereby the plaintiff covenanted and agreed with the defendant to allow the latter to enter upon its premises at all reasonable times and inspect and examine said boilers to determine their condition and safety. The defendant then and there represented that, if the plaintiff entered into the insurance contract, such inspections would be made skillfully, carefully, and at such intervals as might be necessary to determine the safety and condition of the boilers; that upwards of 40 per cent. of the premium to be paid on the policy would be expended in making such inspection; that the results of such inspections would be promptly and truly reported, and the plaintiff kept continuously and accurately informed as to the condition and safety of the boilers. It further avers that the defendant knew that the plaintiff was not skilled, experienced, or expert in making such examinations, and would and did rely on the representations, agreements, and reports of the defendant; that thereupon the plaintiff, relying on such representations, entered into the contract before mentioned, and paid to the defendant the consideration named by it for the making of such inspection and reports, and for the said policy of insurance. Thereupon and thereafter the defendant entered upon the performance of the promises and representations referred to, and visited the premises of plaintiff from time to time for making such inspections up to October 9, 1909, inspecting and examining the boilers and reporting to the plaintiff the results of examinations, pretending and undertaking to keep the plaintiff continuously informed as to their condition and safety. Relying upon the representations, reports, and inspections of the defendant, the plaintiff refrained from making or having made any other expert examinations or inspections, and depended wholly upon the defendant therefor. It further avers that it thereby became the duty of the defendant at all times between July 28, 1908, and October 26, 1909, truly, carefully, and accurately to report and keep the plaintiff informed as to the condition of the boilers, and report to and advise it of any and all defects or conditions which might cause them to be dangerous or unsafe for the use to which they were applied; that on and prior to September 4, 1909, dangerous defects and conditions existed in the boilers rendering them unsafe and dangerous for such use, which defects and dangerous conditions were so obvious to any one having special knowledge, skill, and experience that the defendant ought, in the exercise of ordinary care, prudence, and skill, to have discovered them prior to October 25, 1909; that on and between September 4 and October

9, 1909, the defendant, pursuant to its agreement, examined and inspected each and all of the six boilers, and reported to the plaintiff that each and all were free from any and all dangerous defects, and were in good condition, and failed and neglected to inform the plaintiff of the dangerous and defective conditions above mentioned; that the defendant was careless, reckless, and negligent in making inspections, in that, among other things, it failed and neglected to discover and observe the dangerous defects referred to, and failed and neglected to make reasonable and careful and thorough examinations of the drums of the boilers; that it made merely hasty, imperfect, and superficial examinations thereof; that it wrongfully and negligently failed to inform the plaintiff of the true condition of the boilers on and prior to October 25, 1909, and wrongfully and negligently informed and advised the plaintiff that the same were safe, in good condition, and free from dangerous defects. It further avers that the plaintiff, relying upon such undertakings of the defendant, continued to use the boilers in ignorance of their true condition, by reason whereof on October 25, 1909, three of them burst and exploded. The averments as to damages do not require mention.

For the second cause of action, the complaint alleges the making and entering into the contract of insurance on July 28, 1908, under its policy of insurance numbered 57996, as described therein, and that the defendant thereby agreed to pay the plaintiff any loss which might be occasioned to said property by any bursting, explosion, or rupture of the said boilers, or either of them, not to exceed the sum of \$150,000 for and during the term mentioned therein. It further avers that on October 25, 1909, during the term thereof, three of the water tube steam boilers thereby insured "burst by three separate and distinct explosions, by the force of which explosions the said boilers and the buildings adjacent thereto, belonging to this plaintiff, were destroyed." The damages are described alike with the first cause of action, and the complaint concludes with a prayer for recovery of such damages.

The defendant interposed demurrer, alleging as ground thereof that several causes of action were improperly united, and the demurrer was overruled, under an opinion filed, stating that "each cause of action arises out of a separate contract and the two contracts arose from a single negotiation or transaction between" the parties, and that they were thus properly united under the Wisconsin practice. Answers were thereupon filed, raising the various issues of law and fact submitted at the trial; and the defendant further served an offer (pursuant to sec. 2789, Wis. R. S.) "to allow judgment to be taken against it" for \$50,000 with interest (as specified) and costs. The insurance policy, in so far as material, reads as follows:

"No. 65978.

\$150,000.00.

"The Hartford Steam Boiler Inspection and Insurance Company in consideration of the receipt of surrender of policy #57996 and three hundred and seventy-five and 25/100 dollars hereby insures Pabst Brewing Company and its legal representatives one hundred and fifty thousand dollars against all

(Rider.)

\$150,000.00 on the six (6) Munoz W. T. steam boilers contained in the premises occupied by assured, as brewery, "New House," situate Milwaukee, Milwaukee Co., Wis., and described in the application of the assured, No. 57996; and on the property of the assured, and the property of others for which the assured may be liable, wherever located, against loss or damage, except by fire, caused by the explosion, collapse or rupture of the said steam boiler or boilers, or any of them; also against loss or damage to the assured resulting from the loss of life or personal injury of any person or persons caused by the explosion, collapse, or rupture of said steam boiler, or boilers, or any of them, and not contingent upon a judgment of liability against the assured; but the liability of the company for loss of life or injury to any one person shall not exceed the sum of five thousand dollars.

It is further provided, that in case of loss under this policy, the loss or damage to property as described herein shall be the first claim for settlement, and that the portion of the policy then remaining shall be the only amount applicable to loss of life or injury to persons; also, that the total liability of the company for loss or damage resulting from any one explosion shall not exceed the sum of fifty thousand dollars; and in case of more than one explosion the entire liability of the company shall not exceed the sum insured by this policy, viz., \$150,000.00.

(Rider xxA for Policy 99B. Attached to and forms part of Policy No. 65978.)

Hartford Steam Boiler Inspection & Insurance Co.,

H. M. Lemon, Manager.



immediate loss or damage, except by fire, to the property specified, or resulting from loss of life or injury to persons caused by the explosion, collapse, or rupture of any or all steam boilers described in the application of the assured, except as hereinafter provided, and not exceeding in amount the sum insured—from the 23rd day of July nineteen hundred eight at 12 o'clock, noon, unto the 23rd day of July nineteen hundred and eleven at 12 o'clock, noon; to be paid after notice and proof of loss by the assured, according to the requirements and in conformity to the provisions of this policy, it being expressly covenanted and agreed, as conditions of this contract, that this company is not to be liable for any loss or damage resulting from any explosion caused by the burning of the building or steamer containing the boiler or boilers; nor for any loss or damage in case the load on the safety valve approved by the company's inspector, viz.: One hundred and sixty (160) pounds per square inch on each of said six (6) Munoz water tube boilers, shall be exceeded; and if the title or possession of said property is transferred or changed, or if this policy is assigned without the written consent of this company endorsed thereon, this policy shall be void; and any change in the boilers, within the control of the assured, material to the risk, without the consent of this company, shall make void this policy.

• • • • •  
 "Prevention of steam boiler explosions being one of the objects of this company, it is hereby agreed that the inspectors of this company shall at all reasonable times have access to said boiler or boilers, and the machinery connected therewith, on which safety depends; and ample facilities shall be afforded to such inspectors, whenever this company shall desire it, for a thorough examination of said boiler or boilers; and should any inspector at any time discover any defect affecting the safety of said boiler or boilers or the apparatus connected therewith, the assured shall be notified and insurance by this policy shall thereupon, in respect to the defective boiler or boilers, become void, unless the use of the said boiler or boilers shall cease until the defect is thoroughly repaired by the assured; notice of defect and suspension of insurance, also the reinstatement of insurance after repairs are made, to be in writing, delivered or mailed to the assured to the address given in this policy; and the company reserves the right at any time to cancel this policy, in which case, after deducting the charges for inspection, the company will return to the assured a pro rata part of the remaining premium for the unexpired term of this policy. This policy may also be canceled at the request of the assured, but only in case of the sale, lease, transfer, or destruction of the boiler or boilers insured, or if the assured cease to use them for a period of more than three months; in which case the company, after deducting the charges for inspection and the customary short rates for the time the policy has been in force, will return to the assured the remaining portion of the premium."

The general verdict of the jury reads:

"We, the jury sworn in this action, do find for the plaintiff, and assess its damages at the sum of \$104,178.75." (Signed by the foreman.)

It is supplemented as follows:

"Special Questions.

"(1) Do you find generally in favor of the plaintiff or defendant on the first cause of action? Answer: In favor of the plaintiff.

"(2) Do you find that there was more than one explosion? Answer: Yes.

"(3) If you answer the last question 'Yes,' then answer this: How many explosions were there? Answer: Three.

"(4) What was the total amount of damages to plaintiff caused by the explosion or explosions in question, over and above the direct damages? Answer: \$901.21." (Signed by the foreman.)

Other facts in evidence and rulings upon the trial are mentioned in the opinion.

George P. Miller, Edwin S. Mack, Arthur W. Fairchild, and J. G. Hardgrove, all of Milwaukee, Wis. (E. Sidney Berry, of Hartford, Conn., of counsel), for plaintiff in error.

Irving A. Fish, William C. Quarles, and Charles S. Thompson, all of Milwaukee, Wis., for defendant in error.

Before SEAMAN and KOHLSAAT, Circuit Judges, and LANDIS, District Judge.

SEAMAN, Circuit Judge (after stating the facts as above). The interesting questions presented under this writ of error arise in the suit brought by the plaintiff below, Pabst Brewing Company (hereinafter referred to as the Brewing Company), to recover damages caused by explosion of three steam boilers, forming part of a six-boiler battery in its extensive brewery plant at Milwaukee. Recovery is sought therein and verdict and judgment obtained against the plaintiff in error, Hartford Steam Boiler Inspection & Insurance Company (hereinafter referred to as the Insurance Company), under a complaint averring two causes of action—one stated in tort, for negligence in its inspection of the boilers, and the other in contract, under its policy of insurance against loss caused by explosion of the boilers. The amount of actual damages thus caused is stipulated at \$97,500, and the entire amount thereof was assessed by the verdict against the Insurance Company, together with interest, making \$104,178.75. It is unquestionable under the contract (and conceded as well) that such loss is recoverable against the Insurance Company, as insurer, to the extent of \$50,000, and all controversy between the parties arises out of the claim and award of damages beyond that sum, named in the insurance policy as the limit of liability for loss "resulting from any one explosion." The issues of law and fact thereupon are clearly raised by the pleadings and well presented in the arguments of counsel; and, whatever may be the difficulty of solution as to the law applicable to either charge of liability, the facts are free from material conflict in the testimony upon two of the leading issues in controversy, namely: (a) The facts of periodical inspections of the boilers and reports of their condition on the part of the Insurance Company, relied upon for the assumption of duty charged in the first cause of action; and (b) the immediate circumstances of the explosion, relied upon as proving more than one explosion within the above-mentioned contract terms.

[1] For definition of the two alleged causes of action joined in the plaintiff's complaint, it is not needful to state the extended averments in the charge of tort beyond the following outline: They aver inspection of steam boilers as part of the business carried on by the Insurance Company; that its representations of skill therein, to be exercised in periodic inspections of the boilers for the information and benefit of the insured, were made to and relied upon by the plaintiff as an inducement to enter into the insurance contract referred to; that the defendant entered upon such undertaking and made inspections and reports thereof continuously, which were exclusively relied upon by the plaintiff, as defendant well knew, for prompt information of discoverable defects endangering the safety of the boilers; that prior to the last inspection by the defendant the several boilers became unsafe for further service, through cracks and defects which were readily discoverable on reasonably careful inspection; that defendant was careless and negligent in the performance of the duty

to inspect and report the condition of the boilers, and failed to inform the plaintiff of such discoverable defects; that the plaintiff, relying upon the skill and undertaking of the defendant in the premises, continued the boilers in service, in ignorance of such defects; and that three of the boilers exploded by reason thereof and caused the damage in suit. For the second cause of action, the contract of insurance on the six steam boilers is set up, insuring for \$150,000 for a term of three years, and expressly providing that the liability "for loss or damage resulting from any one explosion shall not exceed the sum of fifty thousand dollars." It is then averred that three of the boilers mentioned "burst by three separate and distinct explosions," and caused the damage specified. Thus the cause *ex delicto* is plainly averred to arise out of the "transactions connected with the same subject of action" as the insurance contract, for which joinder appears to be authorized by section 2647, Wis. Stat. 1898, as comprehensively interpreted in *Emerson v. Nash*, 124 Wis. 369, 389, 102 N. W. 921, 70 L. R. A. 326, 109 Am. St. Rep. 944; and we believe error is not well assigned for the ruling of the trial court against the defendant's demurrer alleging misjoinder. Whether the testimony brought the case within the statutory meaning for joinder and submission of both issues to the jury presents a question not free from difficulty, under the defendant's several motions to require an election between the two alleged causes, but we are not satisfied that submission of both was open to denial, under the Wisconsin rule governing the right of joinder, however such course may have tended to confuse the issues. Moreover, the interpretation we adopt of insurance liability will obviate such confusion in the event of another trial.

The insured battery of boilers, described as 6 Munoz water tube boilers, were recently installed by the Brewing Company (under contract with Platt Iron Works) as a new boiler plant in a new boiler house, to take the place of 33 boilers variously located throughout the brewing plant. These Munoz boilers were not of the ordinary type. Each was composed of two horizontal steam drums above and two water drums, called "mud drums," below, with 32 vertical 4-inch tubes, extending downward from the bottom of the steam drum (about 14 feet) to the mud drum for connection between them. Horizontal steam tubes connected the two steam drums, and a bank of numerous tubes was suspended between the two rows of vertical tubes, connected at the rear of the mud drum. Outside the vertical tubing was a covering of asbestos or fire brick, extending up to cover a portion of the steam drum, called a "jacket"; and the boilers were inclosed at the front and back and across the top between the steam drums. The steam drums were 3 feet in diameter and 20 feet long, made of  $\frac{3}{8}$ -inch sheet steel. As 32 4-inch openings were required at the bottom of each to receive the upright tubes, a re-enforcement strip of  $\frac{5}{8}$ -inch steel, 9 inches wide, was riveted along the line to be punched to compensate for the weakness caused by such openings—a special feature of the construction which becomes prominent in the controversy over the charge of negligent inspection. The boilers were of

200 horse power each, placed in a row and connected by means of a 16-inch overhead pipe, called a "header," through which steam passed for distribution as required; and in this header was placed a "non-return valve" to prevent return of steam to the boilers. The building inclosing this battery was of brick, measuring 50 by 150 feet, and centrally located in the great brewing plant, and the boilers are referred to in the testimony as Nos. 1, 2, 3, 4, 5, and 6; Nos. 5 and 6 being separated from the others by the base of a large stack, 18 feet square.

In 1907 this boiler plant was completed, and a boiler insurance policy theretofore issued by the defendant Insurance Company was then outstanding on the pre-existing boilers, which was temporarily made applicable to the new plant; and on July 28, 1908, the policy in suit was entered into between the parties. On October 25, 1909, shortly after 4 a. m., three of the boilers, Nos. 1, 2, and 3, exploded, wrecking the boiler building, moving "a large elevator building immediately adjacent \* \* \* bodily four feet off its foundation," and hurling wreckage over the premises and streets. Two engineers or firemen were in the boiler room, and one was killed, but the other was behind the above-mentioned stack, and fortuitously escaped alive in the midst of wreckage. According to the testimony of this survivor, boilers 1, 2, 3, and 4 were under full steam and connected up with the header, No. 5 was also under steam, and No. 6 was in course of firing to be connected up. No. 4 was crushed, but Nos. 5 and 6 were protected by the stack in some measure, and remained in place. The cause of explosion is unexplained, beyond the fact in evidence that the wreckage of the six steam drums of boilers 1, 2, and 3 shows the shells to be ruptured, respectively, along the line of rivets in the above-mentioned re-enforcement strips. Other circumstances bearing on particular questions discussed will be mentioned in reference thereto.

[2] 1. The complaint arranges the charge under the insurance policy as the second cause of action, but we believe it may best be treated as the primary ground of liability, to be considered before taking up the claim in tort. It is unquestionable that the judgment can be upheld, irrespective of other assignments of error, if the plaintiff's contention is tenable that the evidence and finding of the jury establishes more than one explosion, as the proximate cause of the loss, within the meaning of the contract limitation, which reads:

"That the total liability of the company for loss or damage resulting from any one explosion shall not exceed the sum of fifty thousand dollars; and in case of more than one explosion, the entire liability of the company shall not exceed the sum insured by this policy, viz. \$150,000."

The issue of contract liability, therefore, involves alone interpretation of this provision in the light of the facts in evidence and a special finding of the jury that there were three explosions. Three boilers of the battery were exploded, and the occurrence is described by the witnesses as several explosions, detonations or reports (some naming three and others four), in distinct but rapid succession, with the first report mentioned by the chief witnesses as much heavier than those which followed. It does not appear how the pressure of steam



was increased (if it was increased at the instant) beyond the tensile strength of the boiler which was exploded at the start. The special finding of the jury referred to is consistent with this testimony, and can have no broader scope for the purpose of the present inquiry, so it must be accepted as settled that the three boilers exploded in distinct succession, and not concurrently. Indeed, we do not understand, either from common knowledge of steam pressure as an explosive force, or from the expert testimony in the record, that it could otherwise reasonably be assumed in reference to an explosion of three individual boilers so operating in a battery that any probable cause or causes would concur to explode them simultaneously in the strict sense of that term. Upon the premise of facts, however, that the explosion of one boiler was followed in rapid succession by the other two explosions, we believe the conclusion to be inevitable that one was primary and the others secondary or incidental occurrences.

Is this not one explosion, as the cause of loss, within the terms and purpose of the insurance contract? The policy reads for insurance of \$150,000 for a term of three years, "on the six (6) Munoz W. T. steam boilers contained in the premises occupied by assured, as brewery 'New House' \* \* \* and on the property of the assured, and the property of others for which the assured may be liable, wherever located, against loss or damage, except by fire caused by the explosion, collapse or rupture of the said steam boiler or boilers, or any of them; also against loss or damage to the assured resulting from the loss of life or personal injury of any person or persons caused by the explosion," not exceeding \$5,000 "for loss of life or injury of any one person"—with the total liability, for loss "resulting from any one explosion," limited to \$50,000 as above stated. Thus explosion is the danger insured against—steam generated in a boiler being the explosive force in contemplation—and the liability is absolute for all damage caused thereby up to the limit stated, however the explosion may originate, except "in case the load on the safety valve approved by the company's inspector \* \* \* shall be exceeded." It is neither contingent on the actual efficiency of the boilers for their purpose, nor does any covenant enter into the contract, on either part, that the boilers are in safe condition, although it does provide for their inspection by and at the option of the insurer, and that on discovery of defects affecting the safety of the boilers and notice thereof to the assured the insurance becomes void unless use thereof "shall cease until the defect is thoroughly repaired by the assured." The six boilers mentioned in the policy were not separable entities for the purpose of insurance, but were in the well-known battery form, coupled to a common header, for joinder of several or all in steam service.

The contention in support of liability for the total loss is this, in substance: That the above-mentioned limitation for loss "resulting from any one explosion" must be construed as "made with respect to the boilers as individuals"; that it "meant to the minds of these contracting parties that, if one boiler burst, the indemnity \* \* \* was to be limited to \$50,000," and that, "when more than one boiler burst, the indemnity" was limited only to the face amount of insur-

ance, \$150,000. For such interpretation of the terms, a definition contained in one of the printed provisions of the policy is greatly relied upon, reading as follows:

"That by the terms 'explosion, collapse or rupture,' as used in this policy, is to be understood a sudden substantial tearing asunder of the boiler or any portion thereof, or the sudden crushing or forcing inward of the furnace or the flues or other parts of the boiler, caused by the pressure of steam; and 'boiler' is understood to include also the steam pipe, feed pipe and blow-off pipe up to and including the stop valve nearest the boiler in each of the same, the pipes of the water column, steam and water gauges, and the safety valve."

It is argued thereupon that the term "explosion" thus used and applied only to "a boiler as an individual" thing—not using "the plural number"—amounts to a definition of like restriction of the term as used in the limitation clause. We do not understand, however, that the definition cited tends in any degree to aid the contention that an explosion of one boiler which involves as well the explosion of others does not come within the meaning of this limitation of damages resulting from an explosion. It appears as one of the general provisions of the standard form of policy, and its obvious purpose is, as we believe, to prevent restricted application of the terms referred to, and so extend the meaning as to include all attachments of the boiler which were subject to pressure. Thus explosion of any of the numerous tubes and connections of the boiler in controversy is brought within the intendment of liability, including, as of course, resulting explosions and damages. Throughout the policy the term "explosion" is used in the singular form, and we believe the limitation of liability for loss "resulting from any one explosion" accurately and entirely names the cause or event insured against, both within the settled rule of efficient or proximate cause and in accord with common usage in reference to an occurrence which involves the explosion of more than one boiler. Whatever the extent of damages resulting from an explosion, the indemnity recoverable under the contract is alike, whether one or several of the boilers explode, either concurrently or in succession, and no mention of successive (incidental) explosions is needful or desirable in the limitation clause.

The fact being established that the primary explosion in question occurred in one boiler, followed by explosion of two others plainly attributable to the first, we are satisfied that the above-mentioned doctrine of proximate cause becomes applicable to fix the one explosion as the cause of contract liability, and therefore strictly within the terms of the limitation.

[3] Various refinements which appear in the authorities in definitions of proximate cause do not require consideration for this inquiry, as the rule we refer to is well recognized as elementary and of undoubted force for definition of insurance liability, namely: When concurring causes of the damage appear, the proximate cause to which the loss is to be attributed is the dominant, the efficient one, that sets the other causes in operation, and causes which are incidental are not proximate, though they may be nearer in time and place to the loss. *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65; *Insurance Co. v.*

Transportation Co., 12 Wall. 194, 20 L. Ed. 378; Insurance Co. v. Boon, 95 U. S. 117, 130, 24 L. Ed. 395; The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234. This rule is both well founded and of special force in reference to a battery of boilers, whereof the amount of damage cannot be distinguished between the contributing causes. Vide Insurance Co. v. Transportation Co., supra; The G. R. Booth, supra. Although the jury were advised by the trial court, in accord with such rule, that if the several explosions were "in the chain of causation, as it is called, from the first break," it would constitute one explosion, they were also instructed, in substance, that the explosions would be separable, if it appeared that the effect of the first explosion would not have exploded the others without intervention of another cause, the alleged defective condition of the second and third boilers; and it was thereupon submitted to the jury to determine for both issues (contract and tort) whether there was one explosion or several. As the condition of the boilers referred to relates only to their strength to resist the strain produced by the first explosion, in no wise relieving the insurer from liability, we do not understand that it affects the question of proximate cause. However it may have contributed to the damage, it was not an "intermediate cause, disconnected from the primary fault [cause] and self-operating, which produced the injury." Mil. & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256. We believe the above-mentioned instruction was erroneous, and that the contention of like import in the argument on behalf of the defendant in error must be overruled. The question of proximate cause became one of law under the settled facts, and was not open for submission to the jury.

[4] Furthermore, if the meaning of the term "explosion" as used in the policy were not thus settled, the proof tendered of common usage in the singular form, as applicable to explosion of several boilers in immediate succession, was clearly admissible by way of ascertaining the sense in which the term must have been understood between the parties. This evidence embraced numerous reports in scientific and technical journals (American and English), official reports of disasters, and local publications—all showing like usage of the term "explosion" where multiple boilers were exploded—and its rejection was erroneous under the view adopted by the trial court for its interpretation.

[5] In the light of the above-mentioned rule of proximate cause and of the well-known purpose of insurance for a term of years against losses caused by fire or other specified disaster, we are impressed with no doubt that the provision in controversy was intended and must be interpreted to limit liability to \$50,000 for a single disaster arising during the three years. This meaning conforms to the requirement of the Wisconsin statute, in force when the policy was issued, which provides that no corporation doing business in the state "issuing a policy of boiler insurance shall expose itself to any loss under any one accident to an amount exceeding fifty thousand dollars"—Wis. R. S. 1898, § 1966-41—through which it may well be presumed that the assured so understood the purpose. Moreover, the Insurance Company informed the assured thereof, in its written proposal, stat-

ing the rates of insurance for \$150,000 and for \$100,000, "with a \$50,000 limit for any one loss in both cases," which was accepted by the assured with direction to write the policy in suit. Both letters were introduced in evidence on behalf of the defendant, but were ultimately excluded by the trial court; and we believe error was well assigned for their rejection.

Under the foregoing view, the defendant was entitled to direction of a verdict for \$50,000 and interest, as requested, on the contract cause of action, and the judgment must be reversed, unless the other cause of action furnishes ample ground for its support on the present record.

2. The propositions of law on which the alleged cause of action in tort rests are far wider in significance, if not more difficult of solution, than those raised under the insurance contract, and their settlement as tenable merely establishes the relation between the parties under which the issues of fact may arise which are of chief importance to the parties in the present controversy. These issues of fact are: (a) Of negligence on the part of the Insurance Company in inspection of the boilers, relied upon by the Brewing Company in their use and resulting in their explosion; (b) of contributory negligence therein on the part of the Brewing Company; and various assignments of error are involved under each in reference to rulings upon the evidence and instructions given or refused, for later consideration.

In the insurance contract provision is made for right of inspection on the part of the Insurance Company at its option, and for its own protection and benefit; but it is conceded that no contract obligation is thereby created to inspect for the benefit of the assured, nor to advise the assured from time to time as to the condition of the boilers. The law casts upon the owner of the boilers when in use, as instrumentalities of danger, the duty to inspect and care for their safety, for protection of the public; and, of course, the owner may delegate the inspection and care to competent employes or other agency (or both) remaining answerable for their negligent performance. As foundation for the present charge of liability, however, it is contended that the duty of inspection was assumed by the Insurance Company, as an undertaking outside the insurance contract and its purposes, to relieve the Brewing Company of performance thereof, and all inspections were so made and relied upon for safety in use of the boiler up to the time of the explosion. Thus the question arises: Can liability be so predicated, at the side of the insurance contract, and without other consideration, for alleged negligent inspection?

[6] Laying aside for the moment the objections raised to the evidence, as tending to vary the written contract which was made and into which previous understandings must be treated as merged, the undisputed facts (received in evidence over the objections) may be briefly summarized: The Brewing Company had long held explosion insurance policies, written by the Insurance Company, which had always been attended by periodical inspection by the insurer, with reports made in each instance to the assured as to conditions found; and the inspector representing the Insurance Company inspected the new battery of boilers in the course of installation, preparatory to



their insurance. After the policy in suit was issued, the boilers were continuously inspected and reported upon by the Insurance Company; the last inspection being made in the month previous to the explosion. Advertisements of the Insurance Company accompanied its above-mentioned reports to the assured, calling attention to the benefits which were given with the insurance, through its competent experts engaged in the inspections, as a means "for immunity from an explosion," a service "superior even to providing indemnity for a loss," and stating that about one-half of the premium received was expended for such inspections, making their insurance desirable "to provide for regular and thorough inspection" and maintain "safe operating condition." The numerous reports of its inspections made by the Insurance Company during the term of the instant policy, mention various matters for attention, but report no cracks or other unsafe conditions. Testimony was also received of oral representations made by a solicitor in negotiations for earlier insurance, but it is not included in the recital, as we believe special objection raised thereto for want of proof of agency should have been sustained, even if it were otherwise admissible.

We are of opinion that these facts of continuous conduct on the part of the Insurance Company in reference to the inspections and their purpose—if relied upon by the Brewing Company and so understood by the Insurance Company, as alleged—are of probative force to show both the undertaking of duty and relation of the parties upon which the action for negligence in performance thereof may be predicated. Neither the evidence nor the duty affects the terms, purpose, or performance of the insurance contract, or liability thereunder; and the assumed duty arising ab extra such contract, the objection above referred to, for inconsistency therewith, was rightly overruled. Inspection of the boilers necessarily requires care and skill in its performance for safety in their use, and, when thus undertaken by the Insurance Company to serve as a benefit to the assured, the duty arises, with or without contract obligation to inspect, to exercise reasonable care and skill in each inspection so made, although no such rule of duty obtains in favor of the assured where the inspections are attributable alone to the policy provision for the sole benefit of the insurer, which would leave no ground for a finding of fact that they were understood between the parties to be made and accepted as inspection service for direct benefit to the Brewing Company. But, if so made and accepted as beneficial service, we understand the above-mentioned rule to be applicable as well with or without contract obligation for the service; that it is such making of the inspections, and not obligation on the part of the Insurance Company to make them, upon which the duty of care arises. In this view, we are not impressed with force in the contention on behalf of the Brewing Company that the service was in no sense contractual, nor the contentions on the part of the Insurance Company that the duty, as averred, "was imposed by contract" and ineffectual within the rule, either as purely voluntary, or as a mandatum, within Wharton's definition (Wharton on Neg. § 482), as a "consensual contract in which one party commissions another to undertake a particular business for him,

which commission the party so invited agrees to undertake." The service and duty are not derived from the insurance contract, and it is not essential to define their origin as contractual or otherwise.

This doctrine of duty incurred and of liability for injurious negligence in its performance is of common-law origin, as a rule of public policy not dependent upon contract obligation for the performance, and well supported, as we believe, by the general trend of authorities. For its scope and pertinent examples of its application in various phases of the inquiry, we are content to refer to leading citations from the mass of cases called to our attention and examined for their bearings upon the issue.

The English authorities most frequently cited for the rule are *Coggs v. Barnard*, 2 Lord Raymond's Rep. 909 (2 Annæ Regiæ B. R. 1703); *Heaven v. Pander*, 11 Queen's Bench Div. 503; *George v. Skivington*, 5 Law Rep. Exch. 3; *Boorman v. Brown*, 3 Queen's Bench, 843, 850, affirmed House of Lords, 11 Clark & F. 1. The early case of *Coggs v. Barnard* is of first importance, as the opinion is by a great expositor of the common law, Lord Chief Justice Holt, in reference to gratuitous service extremely petty in character. The opinion thus states the matter in controversy:

"The case is shortly this: The defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guild Hall, there has been a motion in arrest of judgment that the declaration is insufficient, because the defendant is neither laid down to be a common porter, nor that he is to have any reward for his labor, so that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward."

These objections are overruled upon consideration of the various sorts of bailments, in which the sixth sort is defined as arising "when there is a delivery of goods or chattels to somebody who is to carry them or do something about them gratis, without any reward for such his work or carriage, which is the present case." On reference to various authorities, the opinion states that this undertaking obliges the undertaker to a diligent management, and it then proceeds to answer the contention that for want of consideration the undertaking is but *nudum pactum*, as follows:

"That the owners trusted him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory to carry these brandies from one place to the other such a day, the defendant had not been bound to carry them, but this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this he signifies an actual entry of the thing and taking the trust upon himself, and, if a man will do that and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing."

*Heaven v. Pander* appears to be most frequently cited for the rule of duty, as stated by Brett, Master of the Rolls (afterwards Lord Esher), in the leading opinion, although the report shows that his associates (Cotton, L. J., and Bowen, L. J.) concurred only in the

decision upon other grounds. The defendant was owner of a dry dock used for painting and repairing vessels, and as an incident to such use supplied and put up the necessary staging for the work, but, when delivered over to the shipowner, the staging was no longer under control of the defendant. The plaintiff was a painter, in the employ of a contractor with the shipowner, engaged in painting the vessel in the dry dock; and during the work of painting, while the plaintiff was using the staging, one of the ropes supplied by the defendant for its support gave way, causing the plaintiff's fall and injury. Evidence appeared tending to show that the rope was scorched and unfit for support of the staging, and that reasonable care was not exercised by the defendant as to its "state and condition at the time." The plaintiff recovered in the trial court, but the judgment was reversed on appeal to the Queen's Bench Division; and on appeal therefrom the case was decided in favor of the plaintiff by the Master of the Rolls and law judges above mentioned. In the opinion handed down by the Master of the Rolls, after discussion of the case from various standpoints, both as to facts and law, the following doctrine was pronounced as applicable thereto, under authorities cited:

"The proposition which these recognized cases suggests, and which is therefore to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his conduct with regard to these circumstances, he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill and avoid such danger."

The opinion is supplemented, however, by the opinion of Cotton, L. J., speaking for himself and for Bowen, L. J., in effect, that all who were engaged in the painting "were there for business in which the dock owner was interested," and "must be considered as invited by the dock owner to use the dock and all appliances" provided by him, so that in favor of all such persons he "was under obligation to take reasonable care that at the time the appliances \* \* \* were in a fit state to be used"; that this decides the appeal in favor of the plaintiff, "and I am unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived" (citing cases). The above-quoted broad statement of the rule, although entitled to consideration as the deliberate expression of a great jurist, cannot have the force of a precedent therefor. Nor is its adoption needful for any requirement of the instant case, but it remains of interest for the favorable notice received in numerous American authorities.

In *George v. Skivington*, the opinion is by Kelly, C. B., Barons Pigott and Cleasby concurring. The facts are thus stated:

"The plaintiff purchased a chemical compound as a hair wash for the use of his wife, which was made up of ingredients known only to the defendant, and by him represented to be fit and proper to be used for washing the hair, with an express statement that the defendant knew the purpose for which the article was bought. The declaration further alleges that the defendant so unskillfully and negligently and improperly conducted himself in and about

selling and making the said compound as to cause the damage complained of to the wife, and the question is whether an action will lie at the suit of the plaintiff Emma George, her husband being joined for conformity."

The opinion states that it is unnecessary to enter into the question whether there was a warranty, express or implied, towards the purchaser, "because the contract of sale is only alleged by way of inducement, the cause of action being not upon that contract, but for an injury caused to the wife of the purchaser by reason of an article being sold to him for the use of his wife, and so sold to the defendant's knowledge, turning out to be unfit for the purpose for which it was bought." It rules thereupon that there was "a duty on the defendant, the vendor, to use ordinary care in compounding this 'wash for the hair'"; that there was unquestionably such duty toward the purchaser, and "it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased." Cleasby, B., remarks:

"I think there was a duty imposed upon him to use due and ordinary care, and of the breach of that duty I am of opinion the female plaintiff, who was injured, can take advantage. The two things concur here, negligence and injury flowing therefrom."

The case of *Boorman v. Brown* is a leading citation and instructive for the exposition of the duty arising in various forms, either under contract or as a general duty implied by law, with cause of action founded thereon, whether for nonfeasance or misfeasance—discussed chiefly in the Court of Errors, opinion by Tindall, C. J., but further discussed by Lords Campbell, Brougham, and Cottonham on writ of error to the House of Lords. It was a suit in tort against a broker for alleged neglect of duty in parting with goods of his client without securing payment, and recovery of damages was affirmed. Quotations from the opinions—all founding the duty on contract—are not deemed needful.

In reference to professional services (of physicians and surgeons, attorneys, chemists and the like), requiring skill in their performance, the common-law rule of duty to exercise skill and care in the performance is uniformly recognized in favor of the party served, whether contractual or voluntary (chapter 34, Bishop on Noncontract Law; *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621); and we believe it to be applicable alike to the undertaking for inspection services alleged in the case at bar.

The early lines of American authorities exemplifying and enforcing the rule of duty implied by law are too numerous for any attempt to review them within reasonable limits for this opinion, and reference is therefore made to a few of the more recent cases which impress us to be apt and well considered.

In *Van Winkle v. American Steam Boiler Co.*, 52 N. J. Law, 240, 19 Atl. 472, the unanimous opinion of the Supreme Court by Chief Justice Beasley meets the principal objections urged in opposition to the charge of duty in the instant case upon demurrer to averments of fact which are singularly pertinent. The suit was for recovery against the defendant Insurance Company of damages to adjacent property



caused by explosion of a steam boiler, alleged to be due to negligent inspection of the boiler by such insurer thereof, the plaintiff being owner of the property so damaged, but no party to the alleged undertaking of the insurer with the owner of the boiler to inspect and report its condition. Thus the averments of the declaration necessarily involved the question of duty arising thereunder between the owner of the boiler and the Insurance Company, together with the further question whether the alleged duty was operative in favor of the plaintiff. The deductions stated in the opinion may be summarized as follows:

The policy of insurance written by the defendant in favor of the Ivanhoe Paper Company (owner of the plant containing the boiler) against explosion damages (which was similar in terms to the policy in evidence here) provided only for "the right to make inspection if it pleased so to do," and, if the insurer had refrained from making inspection, "it would have incurred no responsibility, either to the assured or to the plaintiff." But it did make "repeated inspections of the boiler in question," and furnished certificates thereof for guidance of the assured; and by such course of action "a duty in favor of the assured was imposed on the defendant, by operation of the contract itself, to act with ordinary skill and care, both with respect to its inspection and its certificate," thus becoming "answerable to the assured" for damages "occasioned by the absence of such care and skill." As the boiler "was a dangerous thing" if not properly handled, it was the duty of the owner to have it properly inspected, and for neglect of such duty he could be held liable for resultant damages to a neighbor's property through explosion of the boiler. When the Insurance Company entered upon the performance of that duty, it became the substitute for the owner therein, and incurred the above-mentioned responsibility, which "belonged not to the ownership of the machine, but to the function of operating it," with the duty to exercise care and skill arising in favor of the owner "by virtue of its contract" and in favor of the plaintiff "by virtue of the law." The liability of the Insurance Company may be defined as well upon the broader ground that when "any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives" of others "the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill," and for non-performance of such duty resulting in damage to the person or property of another as its obvious product an action will lie.

The common-law rule of duty voluntarily assumed, outside the contract obligations between the parties, and the liability for want of reasonable care and skill in its performance, has frequently arisen and been applied to authorize recovery by a tenant against his landlord for damages caused by negligence of the landlord in making repairs to the leased premises, although the lease imposed no requirement to make them; the cause of action resting "upon the tortfeasance of the landlord in undertaking to make repairs and in doing the work negligently." *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Gregor v. Cady*, 82 Me. 131, 19 Atl. 108, 17 Am. St. Rep. 466; *Wertheimer*

v. Saunders, 95 Wis. 573, 70 N. W. 824, 37 L. R. A. 146; La Brasca v. Hinchman, 81 N. J. Law, 367, 79 Atl. 885.

For other references in various pertinent applications of the rule and discussion thereof, we cite Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; Torgesen v. Schultz, 192 N. Y. 156, 84 N. E. 956, 18 L. R. A. (N. S.) 726, 127 Am. St. Rep. 894; Flint & Walling Mfg. Co. v. Beckett, 167 Ind. 491, 79 N. E. 503, 12 L. R. A. (N. S.) 924; Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478.

In conformity with the foregoing view of the doctrine of duty applicable to this case, the various assignments of error directed to that branch of the issue must be overruled, and we come to the issues of fact upon the merits of the controversy—the charge of negligence on the part of the defendant, and counter charge of plaintiff's contributory negligence—under various complaints of error as to evidence received and instructions given and refused. The questions of reliance upon and inspections and mutual understanding in respect thereof are alike issues of fact, but do not require special discussion.

[7] *Issue as to negligence of defendant.* These premises are unquestionable for the issue of negligence under which the several assignments arise to be first considered: The burden rests on the plaintiff to prove want of care and skill in the defendant's inspections of the boilers as cause of the explosion; and the fact of the explosion, which occurred more than a month after the last inspection and when the plaintiff was in the exclusive operation of the boilers, cannot serve to relieve the plaintiff in any measure of such burden of proof. The presumption of fact remains, in the nature of evidence, that the inspections on the part of the defendant were conducted with reasonable care and skill. In no degree is the defendant answerable for defective construction or material—if defects there were in respect of the so-called "re-enforcement strips" or otherwise—unless it is proven that cracks or other defects endangering use of the boilers had developed in one or more of the three boilers which were exploded at the time of their inspection, and were then discoverable upon reasonably careful inspection of the boiler. So, without proof that the alleged cracks in the shell of such boilers were thus discoverable when either of the inspections occurred, the charge of liability must fail.

In this undoubted aspect of the issue, no direct proof appears in the record, either that ruptures of any boiler were then discoverable, or that ruptures existed therein at or prior to their last inspection by the defendant, and the finding of liability rests on circumstances offered and received as tending to prove such preëxisting condition of the exploded boilers. The force of such evidence, when probative circumstances appear, is well recognized, and from its nature special care is required, both to exclude facts not entitled to consideration, from which unjust inferences may be adopted, and to instruct the jury upon their bearing. We are of opinion therefore that prejudicial error is well assigned in this vital branch of the case in the following particulars:

(1) Testimony was received from several witnesses describing cracks in the unexploded boilers, Nos. 5 and 6, upon the examination after the explosion, when the wreckage was cleared away from them; and later portions cut out of the boilers showing these cracks as penetrating the shell along the line of the re-enforcement strips were introduced in evidence. The trial court instructed the jury in reference thereto that "it is no proof because you find cracks in one boiler that there are cracks in another boiler," but that the "evidence was put in merely for the purpose of putting the defendant's inspector upon inquiry, upon notice that, if he found cracks in one boiler, he would be liable, perhaps, to find them in some other boiler, and to thus increase his vigilance." We believe this proof to be inadmissible for any legitimate purpose. Neither the engineer nor other employes of the plaintiff engaged constantly in work about and within the boilers, nor any witness, testifies that such cracks had developed before the explosion; and the assumption is unauthorized, without proof, that the force of the explosion, which moved an adjacent elevator building "bodily four feet off its foundations," or other causes described by witnesses, would not injure these boilers. Furthermore, testimony appears tending to prove, not only the probability of such injury under the conditions shown, but that it would have been impossible to use the boilers, at the usual steam pressure, with such cracks as subsequently appeared. The evidence, however, was submitted to the jury, in effect, as establishing the fact of such rupture of boilers 5 and 6 prior to the explosion, to be considered as notice to put the inspector on inquiry for like cracks in other boilers, and the several assignments of error thereupon—numbered 20, 21, 26, 32, and 65—are sustained.

(2) Experts called on behalf of the plaintiff were interrogated by its counsel upon like assumption of facts that boilers 5 and 6 were "uninjured by the explosion," and were theretofore cracked as shown in the exhibits, and their testimony so predicated may well have influenced the finding of the jury. For the reason above stated, the assignments of error in reference thereto—numbered 19, 28, 30, and 31—are sustained.

(3) Embraced in the above-mentioned questions and answers were further assumptions of fact that excessive and continuous leakage had occurred in the boilers, as specified in the question in conformity with testimony introduced. The questions directed to proving this from the existence of cracks in the boilers are unobjectionable; but assignment 31 reaches a question thus predicated to prove notice to the inspector, through such leakage, that ruptures of the boiler shell were indicated thereby. Objection is raised for two reasons: That the question ignores another cause of leakage which appears from the testimony, and that it includes persistent leaks of which the inspector was not advised. We believe the objections to be well founded under the testimony, and that the ruling thereupon must be deemed prejudicial, in view of denial of the instruction requested in reference thereto, as below mentioned.

(4) On behalf of the defendant an instruction was requested, in substance, that if the jury "find from the evidence that defendant's

inspector was not informed and did not know of the existence of persistent and recurring leaks along the re-enforcement plate of said boilers, but only knew that leaks existed at the time shown in his reports in evidence," and that the leaks which were discovered by him "were stopped by calking," or that he was so informed, and if the "inspector might, in the exercise of reasonable care and prudence under the circumstances, have considered that said leaks were caused by defective tube and rivet conditions, and not by cracks in the boiler shell, then you must find for the defendant upon the first cause of action." We believe the defendant was entitled to have the jury so instructed under the testimony, for the reason above stated; that no instruction was given of like import; and that denial thereof was erroneous, as pointed out in the forty-eighth assignment.

[8] *Issue of contributory negligence.* The question of fact was distinctly raised whether negligence appeared on the part of the plaintiff, particularly in reference to developments during the five weeks which intervened after the last inspection of boilers Nos. 1, 2, and 3. Plaintiff's employes had entire charge of the boilers and their use (aside from defendant's inspection service), and it was their practice to lay off two boilers each week for cleaning and internal inspection. Such inspection was usually made by assistant engineer Felber, and the cleaning and other work by the boiler washer Risner, both of whom gave testimony at the trial which furnishes the evidence (undisputed) referred to in two instructions, requested on behalf of the defendant and refused by the court, as follows:

"There is evidence in this case tending to show that boilers 1, 2, and 3 were leaking continuously during the week before the explosion, and particularly on the Friday before the explosion, and if you find that these leaks were of such a character that a reasonably prudent engineer in charge of said boilers ought in the exercise of ordinary care to have known that the said boilers were not in the condition in which the same were when inspected by Mr. Bowie on September 19th, September 4th, and September 11th, respectively, then you are instructed that such boilers were not being operated at the time that the explosion occurred in reliance upon any inspections thereof made by the defendant, and you must find for the defendant on the first cause of action." (Assignment 45.)

"It appears in evidence that Bowie last inspected boiler No. 1 on September 19th, boiler No. 2 on September 4th, and boiler No. 3 on September 11th, and boiler No. 4 on October 9th. It also appears that Felber made an interior inspection of two of these boilers, 1, 2, 3, and 4 on October 9th and of two on October 16th, prior to the explosion, and if you find that there were then cracks in the drums of either boilers 1, 2, or 3, and that said cracks were discoverable by the exercise of ordinary care and by a reasonably prudent man, occupying the same position occupied by Felber and engaged in the same line of business under similar circumstances, and that the cracks so found contributed to produce the explosion, then you will find for the defendant on the first cause of action." (Assignment 46.)

We are of opinion that these or equivalent instructions were needful and proper, one or both, to enable the jury to understand this important feature of the case; that the instructions which were given, in general terms (assignments 55, 56), were insufficient for such purpose under the complications presented; and that error is well assigned thereupon.

Upon the further issue of understanding between the parties that



the plaintiff relied solely on the defendant's inspection and reports for safety in use of the boilers, testimony was received from two witnesses—Mr. Pabst, president, and Mr. Clasmann, chief engineer of the Brewing Company—in effect, that it was agreed between the witnesses when Clasmann was engaged as engineer that the steam boilers of the Brewing Company were to be insured for the purpose of having inspection thereof, and that this inspection was not within the duties of such engineers. We believe the twenty-third assignment of error, based on reception thereof over the defendant's objection for want of participation in or notice of such arrangement, must be sustained. In reference to the forty-ninth assignment of error for denial of an instruction requested by the defendant—in substance, that there was evidence in the case to be considered "that plaintiff relied as to the condition of said boilers upon its engineer, Clasmann, or its consulting engineer, Chapman, or Munoz," and if the jury found therefrom "that the plaintiff relied upon them, or any of them, as the basis for its judgment as to the condition of said boilers," they were to "find for the defendant on the first cause of action"—we are not satisfied that error was committed. The evidence relating to Chapman and Munoz does not impress us to have the bearing assumed thereby, whatever may be fairly inferred from the testimony as to the position and long service of Clasmann with the plaintiff and his experience of many years in steam engineering.

The contention on behalf of the defendant that any recovery under the first cause of action is subject to the limitation of \$50,000 fixed by the insurance contract, so that it must be dismissed when that sum is allowed under the contract, we believe to be untenable. It is true that the trial court instructed the jury that both causes of action were subject alike to the insurance limitation, but we do not understand the theory upon which such ruling was based. Under our opinion (above stated) of the duty and liability charged as the first cause of action, both must arise outside the insurance contract, and neither affect its provisions nor can be affected thereby. While there can be no double recovery for the same damages under either charge, recovery of insurance indemnity up to the limit of the contract satisfies the other claim to the extent only of such recovery, leaving any liability in tort applicable for damages suffered beyond the amount so recovered.

The judgment accordingly is reversed, and the cause remanded for a new trial.

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CANADIAN NORTHERN RY. CO. v. SENSKE.

(Circuit Court of Appeals, Eighth Circuit. December 24, 1912.)

No. 3,746.

(Syllabus by the Court.)

**1. NEGLIGENCE (§ 4\*)—ELEMENTS—ORDINARY CARE.**

An act or omission may be so clearly negligent, or so clearly free from negligence, that the customary use of the same degree of care by others in like circumstances becomes immaterial.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

But, where the character of the act or omission is doubtful, the true test of actionable negligence is the degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercise in like circumstances. If the care exercised in such a case rises to or above that standard, there is no actionable negligence. If it falls below that standard, there is.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 6; Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

**2. NEGLIGENCE (§ 4\*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.**

In cases of this character, where the question of negligence is at issue, evidence of the ordinary practice and of the uniform custom, if any, of other persons of ordinary intelligence and prudence, engaged in the same kind of business under similar circumstances in the performance of acts like those which are alleged to have been done negligently, is competent, and it is error to reject or disregard it because such evidence presents to the jury the correct standard for the determination of the issue.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 6; Dec. Dig. § 4.\*]

**3. TRIAL (§ 141\*)—TAKING QUESTION FROM JURY—DIRECTION OF VERDICT.**

It is the duty of the trial court to direct a verdict at the close of a trial when the evidence is undisputed, and when, upon a question of fact, it is so clearly preponderant, or of such a conclusive character, that the court would be bound, in the exercise of a sound judicial discretion, to set aside a verdict in opposition to it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.\*]

**4. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—ACTIONS—RES IPSA LOQUITUR.**

The doctrine *res ipsa loquitur* is inapplicable to negligence cases arising between master and servant. The fact that an accident occurred is not sufficient to overcome the mere legal presumption that the defendant exercised ordinary or reasonable care in the conduct of its business, in the absence of any evidence whatever to support that presumption. Much less may that fact be permitted to overcome this presumption and the undisputed testimony of an unimpeached witness.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

Application of doctrine of *res ipsa loquitur* in actions for injuries to servants, see note to *Carnegie Steel Co. v. Byers*, 82 C. C. A. 121.]

**5. MASTER AND SERVANT (§ 124\*)—APPLIANCES—LATENT DEFECTS.**

The failure of an employer to find and remove latent and hidden defects, which the exercise of ordinary care would not discover, is not negligence on his part because the discovery and removal of such defects falls beyond the limits of his duty to exercise reasonable care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

**6. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—ACTIONS—DIRECTION OF VERDICT.**

While the plaintiff, an employé of the railroad company, was climbing upon a freight car, a handhold on the roof pulled off, he fell, and was injured. The handhold was fastened with two screws which pulled out. After the accident one of the holes was found to be rusty and enlarged at its opening, so that one of the screws could be inserted in it and withdrawn by hand. This rusty and enlarged condition of the hole was not visible before the accident when the handhold was in place,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and there were no marks on the roof where the sides of the handhold rested, such as there would naturally have been if the handhold had been loose, and had theretofore wobbled. The boards on the roof were sound, and there was no visible crack or decay in the roof or handhold indicating any defect or weakening in its fastening before the accident. The car was a foreign car. It was inspected by one of the defendant's inspectors when it came upon the road of the defendant in the manner in which other railroad companies and their employes commonly inspected such cars in transit, and the inspector discovered no defect. In addition to the inspection commonly used by other companies and their employes, which was a visual inspection, the defendant's inspector tested this handhold by pulling upon it with the hook of a hammer attached to a handle 20 inches long, and found no looseness or defect therein.

*Held*, the railroad company was entitled to a peremptory instruction to the jury to render a verdict in its favor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010–1050; Dec. Dig. § 286.\*]

Hook, Circuit Judge, dissenting in part.

In Error to the Circuit Court of the United States for the District of Minnesota; Charles F. Amidon, Judge.

Action by Benjamin Senske against the Canadian Northern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

Hector Baxter, of Minneapolis, Minn. (Clark & Sweatman, of Winnipeg, Canada, on the brief), for plaintiff in error.

P. V. Coppernoll, of Park Rapids, Minn. (Coppernoll & Woolley, of Park Rapids, Minn., on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and McPHERSON, District Judge.

SANBORN, Circuit Judge. [6] The plaintiff below was a switchman in the employment of the defendant, the Canadian Northern Railway Company, when the screws which fastened a handhold on the roof of a car of the "Soo" Railroad Company pulled out as he was ascending the car in the discharge of his duty, and he fell and sustained personal injuries. He sued the defendant for negligence in the inspection of its car and recovered a judgment. These facts were established by the evidence without contradiction at the close of the trial. The screws which held the handhold extended through two boards and into another. After they were pulled out, at the time of the accident, one of the holes was found to be rusty and enlarged at its opening, so that one of the screws could be inserted in it and withdrawn by hand. This rusty and enlarged condition of the hole was not visible, however, when the handhold was in place and there were no marks on the roof where the sides of the handhold rested, such as there would have been if the handhold had been loose and had wobbled before the accident. The boards on the roof of the car were sound, so that, if larger screws had been driven into the same holes after the accident, the boards would have held them. There was no visible crack or decay, or other evidence in the roof or in the handhold, of any

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defect or weakness in the fastening of the handhold before the accident. The car came upon the railroad of the defendant at Emerson Junction in Minnesota, and it was there inspected by Mr. Brown, one of the defendant's inspectors. He started to make the inspection at the rear end of the train in which this car was found, examined the draft gear, the brakes, and the wheels of each car, went forward and examined in this way the side of each car to see if there was any defect in the irons and sheathing boards, until he reached the front of the train. He then returned on the other side of the train and there made the same inspection of each car, and, when he arrived at his starting point, he climbed up on the top of the train and examined the handholds, running boards, and brakes on all the cars in the train to see if he could find any defects. Whenever he found a defect or anything indicating weakness, or arousing suspicion thereof, he refused to pass the car without a closer inspection and a repair, if repair was needed. He found no defect or weakness, or indication thereof, in the roof of this car or in the fastening of the handhold which gave way. The method of inspection which has now been described, and which he pursued, is called visual inspection, and it is the only method customarily and generally used in the inspection of foreign cars coming upon their railroads by the railroad companies of the United States and their inspectors. Mr. Brown, however, went farther, and made a more thorough inspection. He had a hammer on a handle 20 inches long with a hook or claw on the side opposite the face of the hammer, made for the purpose of this inspection, which he had been directed by the defendant to use when he commenced to work for that company. He tested the security of the handholds on the roofs of the cars by placing the hook under their handles and pulling them up. In that way he tested the handhold which gave way with this hook and found in it neither defect, nor weakness, nor sign of it. There was no evidence tending to show any other or different facts relating to the character of the inspection of the car made by the defendant. At the close of the trial, the company made a motion for a peremptory instruction in its favor, and its denial is assigned as error.

The defendant requested the court to charge the jury that they were not permitted to erect in their own minds any particular standard or grade, or decide any particular methods of doing business, to be negligent, unless the evidence in the case convinced their minds that the method adopted by the defendant was such a method as a railway company exercising ordinary care and prudence in that respect would not have adopted and practiced under the circumstances, and that all the defendant was required to do in the inspection of the car was to use ordinary and usual care, such as is used by railway companies in the general transaction of their business in that respect. The court denied these requests, and instructed the jury that they should consider all the facts and circumstances in the case, the danger to employes from the use of cars and handholds, and their effect upon human life and action, should then say upon their oaths what reasonable inspec-



tion of the car required, and, having fixed that standard, should render a verdict for the defendant if the inspection made measured up to that standard, and for the plaintiff if it did not. These rulings are assigned as error.

[1] In *Louisville, N. A. & C. Ry. Co. v. Bates*, 146 Ind. 564, 572, 45 N. E. 109, 111, the Supreme Court of Indiana said:

"In making an inspection, it is the duty of the inspector to use the usual and ordinary tests, and such tools as persons of ordinary prudence use, if any, under like circumstances. No man is held to a higher degree of skill or care than a fair average of his trade or profession, and the standard of due care is the conduct of the average prudent man. If the inspection is made in the usual and ordinary way, the way commonly adopted by those in the business, it cannot be said that it was done negligently. In determining whether an inspection was made with ordinary care a jury can only find facts showing whether the same was made in the usual and ordinary manner, the one commonly adopted by men of ordinary care and prudence engaged in the same business under like circumstances. If it was so performed, it was made with due care, and a jury cannot be permitted to say that it was negligent. They cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of a community."

In *Shankweiler v. Baltimore & Ohio R. Co.*, 148 Fed. 195, 197, 198, 78 C. C. A. 353, 355, 356, the plaintiff had been injured by the breaking of a brake-rod. The defect in the rod was not discoverable before the accident by a visual inspection, but could have been found by stripping the rod. The car had been subjected to a visual inspection. The testimony was, as it is in this case, that this was the only inspection that is usually made by railroad companies while a car is in transit. The Circuit Court of Appeals of the Sixth Circuit, then composed of Judges Lurton, Severens, and Richards, said:

"The box car on which the rod broke was in course of transportation, and there is no question but that the inspection made was all that is customarily made by well regulated and prudently conducted railroads. Against such an inspection the defect was latent, undiscoverable. We think it would be going too far to say that, because the inspection did not disclose the defect, it was not a proper one and ordinary care required something more. Ordinary care does not require an impracticable inspection, one which will cripple and embarrass a railway company in the operation of its trains. \* \* \* The court could not have properly permitted the jury to indulge in mere speculation, find the railroad company guilty of negligence, because, although it used the ordinary method of inspection, it did not use this method suggested by one person, or that method suggested by another, when there was an utter lack of testimony showing or tending to show that either had ever been used by any prudently conducted company, or, if used, would prove effectual."

In *Washington, etc., R. R. Co. v. McDade*, 135 U. S. 554, 569, 10 Sup. Ct. 1044, 1049 (34 L. Ed. 235), where the question was what degree of care it was the duty of the railroad company to exercise in furnishing machinery for its employes to use, the Supreme Court declared that a charge that it "had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe was in strict accord with the principles laid down by the decisions of that court."

In *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 416, 12 Sup. Ct. 679, 682 (36 L. Ed. 485), this charge was approved:

"You fix the standard for reasonable, prudent, and cautious men under the circumstances of this case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved by that standard."

And in *Union Pacific Ry. Co. v. Daniels*, 152 U. S. 684, 690, 14 Sup. Ct. 756, 758 (38 L. Ed. 597), the Supreme Court gave its sanction to the rule that the railroad company's duty to keep advised of the condition of its cars and machinery "was discharged by the defendant if the care disclosed by it in these several matters accorded with that reasonable skill and prudence and care which careful, prudent men, engaged in the same kind of business, ordinarily exercised."

These authorities, and a multitude more, sustain the established rule that the standard of ordinary or reasonable care is that degree of care (1) which ordinarily prudent persons, (2) engaged in the same kind of business, (3) usually exercise under similar circumstances. It is plain that the care which extraordinarily cautious or unusually careless persons use would not be a correct standard. Nor would the care which prudent persons engaged in other kinds of business would use be the true standard. The care a farmer or merchant would deem proper, in the absence of evidence to guide him, and would use in running an engine, or building a bridge, would be no criterion of the ordinary care exercised by persons customarily engaged in those occupations. Nor would the degree of care that prudent persons use or would use under different circumstances furnish a just criterion of ordinary care under the circumstances of a given case.

Moreover, this rule that ordinary care, and hence ordinary inspection, is that degree of care and of inspection which ordinarily prudent railroad companies, their officers and employes engaged in the same kind of business commonly use under similar circumstances, is also the logical and unavoidable result of the reason of the case. The rule that requires reasonable inspection is a corollary of the general rule that it is the duty of a railroad company to use ordinary care to furnish, and ordinary care to keep in repair, reasonably safe cars, rails, engines, and other parts of the great machine which its railroad and equipment constitute. In the absence of proof to the contrary, the legal presumption always is that each railroad company, its officers and employes, are faithfully discharging this duty. This presumption is but an application of the universal principle which underlies all civilized government and conditions the enforcement of all rights and the administration of all remedies that all men are presumed to obey the laws, and to discharge their legal, moral, and social duties until the contrary is proved. *Cole v. German Saving & Loan Society*, 124 Fed. 113, 119, 59 C. C. A. 593, 599, 63 L. R. A. 416. Railroad companies, their officers and employes, are not exempt from this principle. The presumption in the case at bar, therefore, was in the first instance that the defendant inspected this car with ordinary, and hence with reasonable, care, and the burden was upon the plaintiff to prove that it failed to do so. When the degree of care which the railroad com-

pany actually exercised had been proved and the question arose whether or not this was ordinary or reasonable care, the legal presumption still prevailed that other railroad companies, their officers, and employes commonly exercised ordinary care in making such inspections, and the uncontradicted evidence of their customary method of making these inspections under like circumstances necessarily established, in the absence of countervailing evidence, the true standard of ordinary care by which the inspection made by the defendant must be measured.

The validity of the general abstract rule that the measure of care required of an employer is that degree of care which an ordinarily prudent man, engaged in the same kind of business, would have exercised under similar circumstances, is conceded. In cases like *Texas & Pacific Ry. Co. v. Behymer*, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905, and *Chicago, Milwaukee & St. Paul Ry. Co. v. Moore*, 166 Fed. 663, 92 C. C. A. 357, 23 L. R. A. (N. S.) 962, in which there is no proof of the degree of care which other ordinarily prudent persons engaged in the same kind of business commonly use, juries may measure the care required of a defendant by the application of this rule to other facts and circumstances in evidence before them. But the best evidence of the degree of care which ordinarily prudent persons would have exercised under given circumstances is the degree of care which ordinarily prudent persons, engaged in the same kind of business, customarily have exercised and commonly do exercise under similar circumstances. And, when the evidence of this degree of care is substantial or undisputed, it furnishes the true and the best standard of ordinary care by which that actually used should be measured in all debatable cases.

What the true standard of ordinary care is in cases of this character is an exceedingly grave and important practical question to all employers and employes. It is very important that this standard should be as fixed, certain, and well known as possible, so that employers can know before the events whether or not they are exercising the requisite care and faithfully discharging their duties. The degree of care commonly exercised by other persons engaged in the same kind of business under similar circumstances presents such a standard. The opinions and verdicts of juries, no two of which would probably agree, fixing the standard by which to measure the employers' care after the events have happened, would necessarily be variant, uncertain, and speculative, and would furnish no reasonably certain standard of measurement whatever.

It is not denied that exceptional cases sometimes arise in which the degree of care exercised is so clearly insufficient, or so plainly ample, that the customary use of the same degree by others in like circumstances becomes immaterial. *Dawson v. C., R. I. & P. Ry. Co.*, 114 Fed. 870, 872, 52 C. C. A. 286, 288; *Gilbert v. Burlington, C. R. & N. Ry. Co.*, 128 Fed. 529, 534, 63 C. C. A. 27, 32. But the case at bar is not of that character. It is one of the great multitude of cases in which the sufficiency of the degree of care exercised by the defendant was, in the absence of evidence, debatable, and in which its sufficiency must be measured by the evidence in the case and rules of

law applicable thereto. In such cases the best test of actionable negligence and the true standard for the measurement of ordinary care is the degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercise under like circumstances. If the care exercised in the case rises to or above that standard, there is no actionable negligence. If it falls below that standard, there is. *Chicago Great Western Ry. Co. v. Egan*, 159 Fed. 40, 45, 86 C. C. A. 230, 235; *H. D. Williams Cooperage Co. v. Headrick*, 159 Fed. 680, 682, 86 C. C. A. 548, 550; *Lake v. Shenango Furnace Co.*, 160 Fed. 887, 895, 88 C. C. A. 69, 77; *Cryder v. Chic. R. I. & Pac. Ry. Co.*, 152 Fed. 417, 418, 81 C. C. A. 559, 560; *Chicago Great Western Ry. Co. v. Minneapolis, St. Paul & S. S. M. Ry. Co.*, 176 Fed. 237, 242, 100 C. C. A. 41, 46, 20 Ann. Cas. 1200; *Southern Pacific Co. v. Hetzer*, 135 Fed. 272, 281, 285, 68 C. C. A. 26, 35, 37, 1 L. R. A. (N. S.) 288; *Illinois Central R. Co. v. Coughlin*, 132 Fed. 801, 804, 65 C. C. A. 101, 104; *Shankweiler v. Baltimore & O. R. Co.*, 148 Fed. 195, 197, 198, 78 C. C. A. 353, 355, 356; *Louisville, N. A. & C. Ry. Co. v. Bates*, 146 Ind. 564, 45 N. E. 109, 111; *Baltimore & O. R. Co. v. Coppock*, 179 Fed. 682, 684, 103 C. C. A. 86, 88; *The Olympia*, 61 Fed. 120, 9 C. C. A. 393; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 416, 12 Sup. Ct. 679, 36 L. Ed. 485; *Washington, etc., R. Co. v. McDade*, 135 U. S. 554, 559, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Union Pacific R. R. Co. v. Daniels*, 152 U. S. 684, 690, 14 Sup. Ct. 756, 38 L. Ed. 597; *Chicago, I. & L. Ry. Co. v. Wilfong* (Ind. App.) 88 N. E. 953, 954; *Allen v. Union Pacific Ry. Co.*, 7 Utah, 239, 26 Pac. 297; *Iron-Ship Building Works v. Nuttall*, 119 Pa. 149, 158, 13 Atl. 65; *Titus v. Railroad Co.*, 136 Pa. 618, 626, 20 Atl. 517, 20 Am. St. Rep. 944.

And where, as in this case, that degree of care is established by uncontradicted evidence, and the proof is clear that the care exercised by the defendant rose above it, it is error to permit the jury to establish in their minds a higher standard of ordinary care after the accident, a standard unknown, uncertain and speculative, and to cast the defendant in damages because the care it used did not reach that standard. The court below should have given to the jury the instructions requested by the defendant and it should have refrained from instructing the jury that they might fix in their own minds and measure the care of the defendant by a standard of ordinary care different from the degree thereof which the proof established was commonly used by prudent and well-regulated railroad companies, their officers, and employés under similar circumstances.

[3] The other question in the case is: Was it the duty of the court to instruct the jury to return a verdict for the defendant? It is the duty of the trial court to direct a verdict at the close of the trial when the evidence is undisputed, and when, upon a question of fact, it is so clearly preponderant, or of such a conclusive character, that the court would be bound, in the exercise of a sound judicial discretion, to set aside a finding in opposition to it. *Southern Pacific Co. v. Pool*, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; *Union Pacific R. R. Co. v. McDonald*, 152 U. S. 262, 283, 14 Sup. Ct. 619, 38 L. Ed. 434;



Delaware, Lackawanna & Western R. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Patillo v. Allen-West Commission Co., 131 Fed. 680, 686, 65 C. C. A. 508; Chicago Great Western Ry. Co. v. Roddy, 131 Fed. 712, 713, 65 C. C. A. 470, 471; Woodward v. Chicago, M. & St. P. Ry. Co., 145 Fed. 577, 578, 75 C. C. A. 591, 592.

[2] The degree of care exercised by the defendant in the inspection of the car was proved by the uncontradicted testimony of the Inspector Brown. Evidence of the degree of care exercised by other railroad companies, their officers and employes, engaged in the same kind of business, in like circumstances, was competent and admissible, because the legal presumption is that they were reasonably prudent and that they discharged their legal and moral duties, and because the degree of care they exercised presented the correct standard of ordinary care by which to measure the care used by the defendant in its inspection. Upon the question of negligence, or none, evidence of the ordinary practice and of the uniform custom, if any, of other persons of ordinary intelligence and prudence engaged in the same kind of business under similar circumstances, in the performance of acts like those which are alleged to have been done negligently, is competent, and it is error to reject or disregard it because it presents to the jury the correct standard for the determination of the issue. Chicago G. W. Ry. Co. v. Minneapolis, St. Paul & S. S. M. Ry. Co., 176 Fed. 237, 242, 100 C. C. A. 41, 46, 20 Ann. Cas. 1200; Lake v. Shenango Furnace Co., 160 Fed. 887, 895, 88 C. C. A. 69, 77; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 416, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; Union Pacific Ry. Co. v. Daniels, 152 U. S. 684, 691, 14 Sup. Ct. 756, 38 L. Ed. 597; Washington, etc., Ry. Co. v. McDade, 135 U. S. 554, 569, 10 Sup. Ct. 1044, 34 L. Ed. 235; Texas & Pacific Ry. Co. v. Barrett, 166 U. S. 617, 619, 620, 17 Sup. Ct. 707, 41 L. Ed. 1136; Choctaw, etc., R. Co. v. McDade, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96; Charnock v. Texas & Pacific R. Co., 194 U. S. 432, 437, 24 Sup. Ct. 671, 48 L. Ed. 1057; Chicago Great Western Ry. Co. v. Egan, 86 C. C. A. 230, 159 Fed. 40.

[4] Such evidence was produced. It was uncontradicted, and it conclusively established the fact that the degree of care customarily used by other railroad companies, their officers and employes, in the inspection of foreign cars in transit, was that which gave them visual inspection only. Brown's uncontradicted testimony was that he gave this car such inspection and more; that, in addition to that inspection, he tested the handhold which gave way, by pulling upon it with the claw or hook of his hammer; in other words, that he inspected it with more than ordinary care. Unless, therefore, the jury was at liberty to disbelieve or disregard his testimony, the defendant was entitled to their verdict. There was no evidence or circumstance to contradict or countervail his testimony except the fact of the accident. But that fact was insufficient to overcome the mere legal presumption that the inspection was made with ordinary care in the absence of all evidence to support it. Much less can it be permitted to overcome that presumption and the testimony of this unimpeached inspector.

The fact of an accident raises no presumption of the negligence of an employer and the burden is on the employé, notwithstanding the accident, to prove that the employer was guilty of negligence which caused the injury. *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361; *Texas & Pacific Ry. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; *Midland Valley R. Co. v. Fulgham*, 181 Fed. 91, 95, 104 C. C. A. 151, 155; *Minneapolis General Elec. Co. v. Cronon*, 166 Fed. 651, 659, 92 C. C. A. 345, 353; *Cryder v. Chicago, R. I. & Pac. Ry. Co.*, 81 C. C. A. 559, 561, 152 Fed. 417, 419; *Northern Pacific Ry. Co. v. Dixon*, 139 Fed. 737, 740, 71 C. C. A. 555, 558; *Chicago & N. W. Ry. Co. v. O'Brien*, 67 C. C. A. 421, 424, 426, 132 Fed. 593, 596, 598.

[5] The witness Brown was not impeached. His testimony was not contradicted by any witness, nor were there any countervailing facts or circumstances to overcome it, and neither the jury nor the court could be permitted to disregard it. A trial at which it should be disregarded would not be a trial according to the law and the evidence. The unavoidable result is that the evidence conclusively proved that the degree of care exercised by the defendant in making the inspection rose above the ordinary care commonly exercised by prudent and well-regulated railroad companies, their officers and employés, under like circumstances, that the defect in the fastening of the handhold was a latent, hidden one which was not discoverable by an inspection with ordinary care, and the failure of an employer to find and remove such latent defects which ordinary care is unable to discover constitutes no negligence on his part, because the limit of his duty is to exercise reasonable care, and the discovery and repair of such defects falls without that limit. *Cryder v. Chicago, R. I. & Pacific Ry. Co.*, 152 Fed. 417, 419, 81 C. C. A. 559, 561; *Illinois Central R. Co. v. Coughlin*, 132 Fed. 801, 802, 65 C. C. A. 101, 102; *Hodges v. Kimball*, 104 Fed. 745, 753, 44 C. C. A. 193, 201; *Killman v. Robert Palmer & Son Ry. Co.*, 42 C. C. A. 281, 102 Fed. 224; *Carruthers v. C., R. I. & P. Ry. Co.*, 55 Kan. 600, 605, 40 Pac. 915; *Allen v. Union Pacific R. Co.*, 7 Utah, 239, 26 Pac. 297, 298; *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 660, 666, 7 Pac. 204. And there is no escape from the conclusion that the plaintiff below failed to produce any substantial evidence of the negligence of the company and the court should have instructed the jury to return a verdict in its favor. The judgment below must therefore be reversed, and the case must be remanded to the trial court, with instructions to grant a new trial.

HOOK, Circuit Judge. Though I agree to a new trial in this case, I do not agree to some parts of the foregoing opinion regarding the effect of custom upon the question of the care to be exercised by a particular employer. What is generally done in the like calling or occupation to prevent injuries is, of course, evidence of the proper precaution but it is not more. It seems to me that here it has been given an undue if not, practically, a controlling influence.

## SPENCER et al. v. SMITH et al.

(Circuit Court of Appeals, Eighth Circuit. December 10, 1912.)

No. 121, Original.

**1. CORPORATIONS (§ 566\*)—CAPITAL STOCK—"TRUST FUND"—CONTRACTS BETWEEN STOCKHOLDERS.**

The assets of a corporation represented by its capital stock are a trust fund for the payment of its debts; and hence stockholders may not legally agree among themselves that such fund shall be appropriated by them or some of them as against the claims of corporate creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2283-2286; Dec. Dig. § 566.\*]

For other definitions, see Words and Phrases, vol. 8, p. 7127.]

**2. CORPORATIONS (§ 566\*) — STOCKHOLDERS — PREFERRED STOCK — SECURITY — RIGHTS.**

Corporate preferred stock guaranteed 10 per cent. out of net profits reserved to the corporation the right to redeem after a specified date, bound it to redeem before a later date, and provided that the holders, on failure to pay dividends, might foreclose a trust mortgage given to secure the stock on all the corporation's property, in which the stockholders were entitled to participate ratably. *Held*, that the provision for a preference of \$11 per share to the holders referred only to a distribution of assets as between stockholders, without reference to the distribution of assets for the payment of debts, and that the holders of such preferred stock were stockholders, and not creditors of the corporation, and were entitled to a preference only as between themselves and the holders of the common stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2283-2286; Dec. Dig. § 566.\*]

Preference by insolvent corporation to officers and stockholders, see note to *Ellsworth v. Lyons*, 104 C. C. A. 8.]

**3. CORPORATIONS (§ 566\*)—PREFERRED STOCKHOLDERS—PREFERENCE RIGHTS.**

A provision in the certificates of preferred stock of a corporation that the stockholders should be entitled to a preference in the distribution of assets, if construed as referring to a distribution of assets to pay debts, would be against public policy and void.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2283-2286; Dec. Dig. § 566.\*]

**4. CORPORATIONS (§ 627\*)—PREFERRED STOCKHOLDERS—RIGHT TO DIVIDENDS—SECURITY—MORTGAGE.**

Rights of preferred stockholders in the distribution of profits and in the distribution of the corporation's assets after payment of debts may be secured by mortgage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2476; Dec. Dig. § 627.\*]

Petition for Revision of Proceedings of the District Court of the United States for the District of Colorado, in Bankruptcy; Robt. E. Lewis, Judge.

In the matter of bankruptcy proceedings of the Fifty Gold Mines Corporation. On petition of Fermor J. Spencer, trustee in bankruptcy, to revise in matter of law a judgment of the District Court (190 Fed. 105), adjudging the owners of certain certificates of stock to be preferred creditors, and not stockholders. *Reversed*.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. L. Bennett, of Colorado Springs, Colo. (J. E. Robinson, of Denver, Colo., and Henry C. Hall, of Colorado Springs, Colo., on the brief), for petitioners.

Charles H. Haines, of Denver, Colo. (Harry E. Kelly, of Denver, Colo., on the brief), for respondents.

Before SANBORN and CARLAND, Circuit Judges, and W. H. MUNGER, District Judge.

CARLAND, Circuit Judge. This is a petition to revise in matter of law a judgment of the United States District Court for the District of Colorado adjudging the owners of certain certificates of stock of the Fifty Gold Mines Corporation, a bankrupt, to be preferred creditors, and not stockholders. The case in which the judgment was rendered arose as follows:

June 6, 1911, Fermor J. Spencer, as trustee in bankruptcy of the above-named bankrupt, filed with the referee in bankruptcy a petition asking that a certain deed of trust executed by said bankrupt corporation February 20, 1906, whereby said bankrupt corporation conveyed all of its real estate to the Empire Trust Company of New York City to secure an issue of \$1,000,000 of the preferred stock of said bankrupt corporation with certain guaranteed dividends, be declared null and void. At the same time the Corporation Trust Company of New Jersey, which, as trustee, was the grantee in a certain other deed of trust executed by said bankrupt corporation to secure certain bonds, filed a similar petition.

Thereupon, the referee caused a hearing to be had, after due notice to all persons interested, and at said hearing William K. Smith, George M. Griswold, Wells Campbell, Fred B. Farnsworth, Robert E. Menrose, and Frank Armstrong, being beneficiaries and holders of the preferred stock mentioned in the above deed of trust to the Empire Trust Company, appeared by counsel in opposition to the prayer of the petition. On said hearing, the following facts appeared:

The Fifty Gold Mines Corporation was incorporated under the laws of Colorado November 9, 1905. Its articles of incorporation provided for seven directors, and that the capital stock should be \$3,000,000, to be divided into 300,000 shares of \$10 each; 100,000 shares being preferred stock and 200,000 shares being common stock. The board of directors held its first meeting on January 3, 1906, at which meeting each of the directors subscribed and paid for one share of the common stock of the corporation. At this time, O. B. Thompson was the owner of property afterwards conveyed to the corporation which was worth, according to Thompson's undisputed testimony, \$3,000,000. January 3, 1906, he made a proposition to the corporation which was submitted to the stockholders at a meeting held that day. The proposition was in writing, and by it Thompson offered to convey all this property to the corporation upon the issuance and delivery to himself or order of the entire amount of unsubscribed capital stock of the corporation. This included all the stock of the corporation, both preferred and common, excepting the seven shares issued to the directors. The offer also provided that the corporation should execute a first-



mortgage lien upon the property to be conveyed to it to secure the preferred stock, the language upon this point being that the mortgage should provide therein that it was executed for the sole and exclusive purpose of guaranteeing to the holders of the preferred stock of said corporation that all and each of the provisions contained therein should be fully and promptly complied with. The offer further contained an agreement upon the part of Thompson that he would place the preferred stock in the hands of a trustee under an agreement that out of the proceeds of the sale thereof a certain percentage should be paid over to the treasurer of the corporation. This proposition was duly accepted at stockholders' and directors' meetings. At a directors' meeting held on the same day a resolution was passed instructing the officers of the corporation to issue and file with the Secretary of State a certificate that the capital stock of the corporation had been fully paid. This certificate was executed January 3, 1906, and was filed about the same time. Under and by virtue of the agreement so made and accepted, Thompson conveyed the property now held by the trustee in bankruptcy to the corporation, and received from it the deed of trust above mentioned and a certificate for the shares of the preferred stock referred to therein. Thompson placed this preferred stock in the hands of certain agents in New York City for sale. Sixty-five thousand dollars worth of said stock was sold to various parties, and the proceeds thereof were distributed as follows: One-fourth to the agents making the sales for commissions; one-half to Thompson; and one-fourth to the corporation. Afterwards, in consideration of the increase of the capital stock to \$10,000,000, Thompson surrendered to the corporation all of the unsold preferred stock so issued to him. Up to the time of the bankruptcy proceedings, the corporation had taken up and canceled of the \$65,000 of preferred stock sold as aforesaid, all but between \$31,000 and \$32,000. Dividends thereon to the extent of \$8,000 or \$9,000 were unpaid at the time of the hearing before the referee, but the corporation made no profits out of which these dividends could be paid.

The certificate of preferred stock issued to Thompson was in the following language:

"This is to certify that O. B. Thompson is the owner of one hundred thousand (100,000) shares of the preferred capital stock of the Fifty Gold Mines Corporation, fully paid and nonassessable and transferable only by entry on the books of the corporation, upon surrender of this certificate properly indorsed.

"The preferred stock is entitled to cumulative dividends of ten (10) per cent. per annum, payable quarterly, commencing April 1st, 1906, from the net profits of the corporation before any dividends are paid on the common stock and the common stock is entitled to all dividends in excess of said ten (10) per cent. In the event of the dissolution of the corporation, or a distribution of its assets, the preferred stock outstanding at that time shall first be paid at eleven (\$11.00) dollars per share, plus all accumulated unpaid dividends, and the remainder of the corporate assets shall be divided ratably among the holders of the common stock.

"The owner of unredeemed preferred stock, may at his option exchange the same at any time for common stock of the corporation, share for share. The voting power at any stockholders' meeting is confined exclusively to owners of common stock.

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"The Fifty Gold Mines Corporation reserves the right to redeem any number or all of its certificates of preferred stock at eleven dollars (\$11.00) per share, plus all accumulated unpaid dividends at any time after January 1st, 1911, and to determine by lot which certificates shall first be redeemed, and said corporation expressly agrees to redeem all its preferred stock on or before January 1st, 1916. A failure of said corporation for a period of ninety days to pay any quarterly dividend hereon, after the same becomes due and payable, shall render the corporation in default as to such payment, and thereby entitle the owner of this certificate to a foreclosure of the mortgage securing the same.

"As a guarantee that the Fifty Gold Mines Corporation will promptly pay all dividends upon its preferred stock and redeem the same in strict accordance with the provisions of this certificate, said corporation has made, executed and delivered to the Empire Trust Company of New York City, N. Y., as trustee, a first-mortgage lien upon all its property in the amount of \$1,000,000.00 in which security all owners of preferred stock participate ratably.

"This certificate is not valid until countersigned by the Empire Trust Company of New York City, N. Y.

"Witness the seal of the corporation and the signature of its duly authorized officer this 3rd day of January, A. D. 1906.

"The Fifty Gold Mines Corporation,  
 "By Thomas Fielding, President,  
 and J. L. Fielding, Treasurer.

"Countersigned and registered:

"The Empire Trust Company, by \_\_\_\_\_."

The trust deed securing the preferred stock contained the following, among other provisions:

"That whereas, the said mining company, acting within the scope of its corporate powers, is engaged in the operation of certain mines and mills and in the tramming, milling and reduction of ores in the county of Gilpin, state of Colorado, and for that purpose is fully vested with all necessary powers, rights and privileges, and has a total capital stock of three million (3,000,000) dollars, divided into two hundred thousand (200,000) shares of common stock of the par value of ten dollars (\$10) each, and one hundred thousand shares (100,000) of preferred stock of the par value of ten dollars (\$10) per share, all of which capital stock has been issued, said preferred stock being evidenced by one certificate for one hundred thousand (100,000) shares of ten dollars (\$10) each, and which said certificate of preferred stock, among other things, provides for the payment of a dividend of ten per cent. (10%) per annum thereon, payable quarterly, commencing April 1st, A. D. 1906, and

"Whereas, the said mining company, at and by its said meeting of stockholders held January 3rd, A. D. 1906, did fully authorize and direct the making of a mortgage or deed of trust, conveying all its real estate and mining, milling and tramming properties in the county of Gilpin, in the state of Colorado, together with all buildings and improvements thereon, easements and rights of way, ditches and ditch rights, water and water rights, with all improvements and appurtenances, for the purpose of securing the payment of the said dividend in said preferred stock provided, and for the purpose of securing and guaranteeing the faithful performance of each and every of the covenants in said preferred stock mentioned, which vote of the stockholders was taken by ballot, as required by law; and the proceedings of said meeting were duly entered of record in the minute book of said mining company \* \* \*

"Now therefore, for and in consideration of the premises and of the sum of ten dollars, lawful money of the United States, to said mining company, paid by said trustee and for other good and valuable considerations, the receipt and sufficiency of which are hereby confessed, and in execution of the powers in this behalf conferred by law, and in order to secure the payment of said certificate of preferred stock and also to secure equally and ratably the payment of the dividends in any and all such certificates of preferred stock as shall be issued from said certificate hereinabove set forth, as well as to secure the faithful keeping and performances of each and every of the terms,

covenants and conditions of said preferred stock, whether issued contemporaneous with the execution of this mortgage or hereafter duly issued out of or from said above named certificate, the said the Fifty Gold Mines Corporation has granted, bargained, sold, conveyed, assigned, transferred and delivered and by these presents does hereby grant, bargain, sell, assign, transfer and deliver to the said the Empire Trust Company and to its successor or successors in trust hereby created, its and their assigns forever, all of the following described property, real and personal, situate in the county of Gilpin, state of Colorado, to wit: \* \* \*

"To have and to hold the above-described premises together with every right and privilege, usually had and enjoyed therewith unto the said second party, trustee, and to its successors in said trust forever.

"In trust, however, for the following purposes, to wit: That the same shall be held as security for the payment of the cumulative dividends in said certificate of preferred stock provided, and for the equal pro rata benefit and security of the several respective holders of said certificates of preferred stock in the event of the issuances thereof as above provided, without preference or priority of one certificate over another, upon the following express trust, uses and purposes.

"It is hereby mutually covenanted and agreed between the parties hereto, that if the said first party shall well and faithfully pay all of said cumulative dividends on said preferred stock when the same fall due, as herein expressed, and shall provide for and pay the said dividends as they severally fall due, and according to the tenor and effect of said certificate or certificates, and shall well and faithfully keep and perform all the other covenants contained in said certificate or certificates of preferred capital stock, and this deed, on its part to be kept, then this deed shall be void and the property hereby conveyed shall be released to the first party, its successors and assigns."

On this state of facts the referee decided that the deed of trust given to the Empire Trust Company to secure the holders of said preferred stock of said corporation was null and void both as to secured and unsecured creditors of the corporation, and as to the trustee, for the reason that the transaction was against public policy. The beneficiaries under the trust deed hereinbefore mentioned caused the ruling of the referee to be certified to the United States District Court, and thereafter on May 2, 1911, the findings and order of the referee were overruled, and the referee was directed to allow the claims of the holders of the preferred certificates as preferred claims against the bankrupt estate.

The certificate of preferred stock evidenced a contract between the stockholders of the corporation. Stockholders may make such contracts between themselves as are not contrary to law or against public policy. The contract which the stockholders intended to make in issuing the stock in question must be determined from the language of the stock itself, taken in connection with the articles of incorporation. As the corporation made no profits, the present holders of the preferred stock have no claim for dividends. The only claim they have arises from that provision of the certificate of stock which provides that, in the event of a distribution of the assets of the corporation, the preferred stock outstanding at that time shall first be paid at \$11 per share, and the remainder of the corporate assets shall be divided ratably among the holders of the common stock. The question now presented is: Are the present holders of outstanding preferred stock creditors of the corporation, or are they simply preferred stockholders? If they are creditors, they have a secured claim

against the bankrupt estate. If they are preferred stockholders, then the above provision is valid as against the holders of common stock, for the preference in the distribution of assets was a matter concerning which the stockholders could lawfully agree as between themselves. If, however, the provision giving a preference in the distribution of assets to the preferred stockholders is sought to be upheld as against creditors of the corporation, it must fail as being against public policy and therefore void.

[1] The assets of a corporation represented by its capital stock are a trust fund for the payment of its debts, and the law will not permit stockholders to agree among themselves that this trust fund shall be appropriated by them or some of them as against the claims of creditors.

[2, 3] We are therefore of the opinion that the present holders of the preferred stock of the corporation are not creditors thereof, but stockholders; that the provision contained in the certificate of preferred stock, giving a preference of eleven dollars per share to the holders thereof, refers only to the distribution of assets as between stockholders, and has no reference to the distribution of assets for the payment of the debts of the corporation; that, if by any interpretation it could be construed as referring to the distribution of assets to pay debts, then it is void as being against public policy. These views are sustained by an examination of the certificate of stock and the decisions of the courts. What parties to a contract may call it, of course, is not binding upon the courts if it is clearly something else. Still, in arriving at the intention of the parties, we may look to the language which they used in reducing their contract to writing.

In the articles of incorporation, in the stock itself, and in the mortgage, the stock in controversy is called "preferred stock." There is no evidence that any party concerned in the issuance of the stock thought that it was anything else. There is no provision in the certificate of preferred stock which, if properly construed, is not appropriate to such a certificate. After issuing the preferred stock, the corporation owed Thompson nothing for the property conveyed by him to it. He transferred his property to the corporation in payment for its stock, and the corporation issued the certificate of preferred stock in payment for the property.

[4] If thereafter the corporation made profits, the holder of any preferred stock would receive dividends; and, if at any time the corporation was dissolved and its assets were distributed, the preferred stock would be preferred as against the common stock. The performance of this agreement could be and was secured by mortgage. This view renders the transaction reasonable and valid.

Generally speaking, at the present time, although formerly there was some doubt and discussion, the law is clearly settled that a preferred stockholder is not a corporate creditor. Cook's Corporations (6th Ed.) § 271; 2 Clark and Marshall on Private Corporations, pp. 1313-1317; Grover v. Cavanagh, 40 Ind. App. 340, 82 N. E. 105. In Hamlin et al. v. Toledo, St. L. & K. C. R. Co., 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826, Circuit Judge (now Justice) Lurton, in



holding certain preferred stockholders not to be creditors, used the following language:

"One cannot well be a creditor as respects creditors proper and a stockholder by virtue of a certificate evidencing his contribution to the capital of the corporation. Stock is capital, and a stock certificate but evidences that the holder has ventured his means as a part of the capital. It is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of reimbursing the principal of the capital stock until the debts of the corporation are paid. These principles are elementary. *Warren v. King*, 108 U. S. 389, 2 Sup. Ct. 789 [27 L. Ed. 769]; *Cook, Stock, Stockh. & Corp. Law* (3d Ed.) § 271. The chance of gain throws on the stockholder, as respects creditors, the entire risk of the loss of his contribution to capital. 'He cannot be both a creditor and debtor by virtue of his ownership of stock.' *Warren v. King*, *supra*. If the purpose in providing for these peculiar shares was to arrange matters, so that, under any circumstances, a part of the principal of the stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby. *Cook, Stock, Stockh. & Corp. Law* (2d Ed.) §§ 270, 271; *Chaffee v. Railroad Co.*, 55 Vt. 110; *McCutcheon v. Capsule Co.*, 19 C. C. A. 108-115, 71 Fed. 787 [31 L. R. A. 415]; *Morrow v. Steel Co.*, 87 Tenn. 262, 10 S. W. 495 [3 L. R. A. 37, 10 Am. St. Rep. 658]. If that was the purpose of this arrangement, most doubtful language was employed. There is a sense in which every shareholder is a creditor of the corporation to the extent of his contribution to the capital stock. In that sense every corporation includes its capital stock among its liabilities. But that creditor relation is one which exists only between the corporation and its shareholders. It is a liability which is postponed to every other liability, and no part of the capital stock can be lawfully returned to the stockholders until all debts are paid or provided for. The violation of this well-understood principle is a breach of trust, and a creditor affected thereby may pursue the stockholders, and recover as for an unlawful diversion of assets."

Preferred stock of a railroad company is not an indebtedness which can be considered in determining whether its obligations are such as to prevent its operating a passenger train separately from its freight trains. *People ex rel. W. S. Cantrell et al. v. St. Louis, A. & T. H. R. Co.*, 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

The following cases support the general proposition that holders of preferred stock are not corporate creditors: *Mercantile Trust Co. v. Bal. & O. R. Co. et al.* (C. C.) 82 Fed. 360; *Belfast & Moosehead Lake R. Co. v. City of Belfast*, 77 Me. 445, 1 Atl. 362; *Burch v. Cropper*, 14 App. Cases, 525; *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136; *Taft v. Hartford, Providence & Fishkill R. Co.*, 8 R. I. 310, 5 Am. Rep. 575; *Chaffee v. Rutland R. R. Co., and Trustees*, 55 Vt. 110; *Davenport, Rec., v. George O. Lines*, 72 Conn. 118, 44 Atl. 17; *Warren v. King*, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. Ed. 769; *Guaranty Trust Co. v. Galveston City R. Co.*, 107 Fed. 311, 46 C. C. A. 305.

The case of *Miller, Executor, v. Ratterman, Treasurer*, 47 Ohio St. 141, 24 N. E. 496, is very instructive on the point under consideration. In deciding that the holders of certain preferred stock secured by mortgage were not creditors, the court used the following language:

"The relation of a holder of preferred stock is, in some of its aspects, similar to that of a creditor, but he is not a creditor save as to dividends after the same are declared. Nor does he sustain a dual relation to the corporation. He is either a stockholder or a creditor. He cannot, by virtue of the same

certificate, be both. If the former, he takes a risk in the concerns of the company, not only as to dividends and a proportion of assets on the dissolution of the company, but as to the statutory liability for debts in case the corporation becomes insolvent. If the latter, he takes no interest in the company's affairs, is not concerned in its property, or profits as such, but his whole right is to receive agreed compensation for the use of the money he furnishes, and the return of the principal when due. Whether he is one or the other depends upon a proper construction of the contract he holds with the company. It is said that 'a mortgage creditor, although denominated a preferred stockholder, is a mortgage creditor nevertheless; and interest is not changed to dividend by calling it a dividend.' 'The question is not, what did the parties call it, but what do the facts and circumstances require the court to call it.' The aptness of this language arises in a case where it has been determined that such holder is a creditor. It may not furnish material aid in ascertaining the fact whether he is such or not. However, what the parties in the given case have called the subject of the contract is of no little significance in determining their purpose, and, when that purpose is ascertained, it is of much importance in giving construction to the contract. The object of all rules of construction is to arrive at the meaning of the parties. What was the object to be accomplished? What did the parties intend, and are the means taken in harmony with that intent, and with the law applicable to the subject? These are questions addressed to the court in this case, and when answered the case is decided.

"As supporting the claim that it was not stock that was issued but certificates of indebtedness, special attention is called in argument to those portions of the certificates which provide that holders shall not vote upon them at any meeting of the holders of the capital stock of the company; that the rights of the holders to the dividends are guaranteed, and are to be secured by mortgage on the property, rights, and income; that no further or other mortgage shall thereafter be made to the prejudice of the holders of the preferred stock; that the dividends are guaranteed by the Cincinnati, Hamilton & Dayton Company, which company had executed a mortgage to Stanley Matthews, trustee, to secure the payment of dividends.

"As to some of these provisions, it may be conceded that they are consistent with the idea that a debt was being created, but does it follow that they are inconsistent with the opposite view? While each part of the contract should be considered by itself, yet the several parts should be construed together, and the intent gathered from a consideration of the whole."

In *Ellsworth v. Lyons*, 181 Fed. 58, 104 C. C. A. 4, in deciding that certain holders of preferred stock were stockholders and not creditors, Knappen, Circuit Judge, used the following language:

"The law is well settled that a corporation may lawfully give security to one class of stockholders over another class. *Warren v. King*, 108 U. S. 389 [2 Sup. Ct. 789, 27 L. Ed. 769]; *Hamlin v. Toledo, St. L. & K. C. R. Co.* (6th Circuit) 78 Fed. 664, 670, 24 C. C. A. 271, 36 L. R. A. 826; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* (C. C., N. D. Ohio), 86 Fed. 929, 949; *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.* (6th Circuit) 95 Fed. 497, 531, 36 C. C. A. 155. It is equally well settled that a contract between a corporation and a stockholder by which the latter is to receive the par value or any part of his stock before all corporate debts are paid is contrary to public policy, and void. *Warren v. King*, 108 U. S. 389, 396, 2 Sup. Ct. 789, 27 L. Ed. 769; *Hamlin v. Toledo, St. L. & K. C. R. Co.* (6th Circuit) 78 Fed. 664, 670-672, 24 C. C. A. 271, 36 L. R. A. 826; *Guaranty Trust Co. v. Galveston City R. R. Co.* (5th Circuit) 107 Fed. 311, 46 C. C. A. 305; *American Steel & Wire Co. v. Eddy*, 130 Mich. 266, 269, 89 N. W. 952; s. c., 138 Mich. 403, 407-410, 101 N. W. 578; *Clark v. E. C. Clark Machine Co.*, 151 Mich. 416, 424, 115 N. W. 416; *Cook on Stock and Stockholders* (3d Ed.) § 271."

The following cases are cited as being opposed to the views expressed in this opinion:

*Heller v. Bank*, 89 Md. 602, 43 Atl. 800, 45 L. R. A. 438, 73 Am. St. Rep. 212. This case when properly understood supports our views. It was there in substance decided that, as between creditors and ordinary preferred stockholders, the latter, as owners of the property of an insolvent corporation, are, upon a distribution of its assets, entitled to nothing until its creditors are first fully paid; but, if the statute under which what is called preferred stock is issued by a corporation provides that such preferred stock shall constitute a lien on the company's property and be entitled to priority of payment over general creditors, then such stock is not preferred stock in the ordinary sense, although so called in the statute, and although it possesses many of the incidents of ordinary preferred stock. The statute which authorized the issuance of the preferred stock in the case cited provided that "said preferred stock shall be and constitute a lien on the franchises and property of such corporation, and shall have priority over any subsequently created mortgage or other incumbrance." The court simply held that the holders of the preferred stock were entitled to the lien and priority expressly given to it by the statute.

*Mulford v. Exploration Co.*, 45 Colo. 81, 100 Pac. 596. This case has no bearing upon the case at bar. The plaintiff in that case purchased treasury stock of the Exploration Company with the right to return the stock and have the consideration which he gave therefor returned to him within six months. It was held that such a sale of stock was not in violation of the Colorado statute prohibiting corporations from using any of their funds for the purchase of stock in their own company or corporation, except such as might be forfeited for the nonpayment of assessments thereon.

*Savannah Real Estate, Loan & Building Co. v. Silverberg*, 108 Ga. 281, 33 S. E. 908. This case comes nearest to being opposed to our views, but it involved stock in a building and loan association, and was governed largely by the statute authorizing the issuance of the stock.

*Cook v. Equitable Building & Loan Association*, 104 Ga. 814, 30 S. E. 911. This was another building and loan association case, and its decision depended largely upon the law peculiar to building and loan associations.

We are therefore of the opinion, as hereinbefore indicated, that the holders of the preferred stock are preferred stockholders of the corporation, and not creditors; that the provision of the stock certificate which provides in case of the dissolution of the assets of the corporation that \$11 per share shall be first paid to the holders of preferred stock is valid as against the holders of common stock, and that this was all the parties to the certificate intended; that if, by any construction of the provision, it could be held to have intended a preference as against the creditors of the corporation, it is void as being against public policy. What has been said also compels the holding that the agreement contained in the stock certificate that the corporation will redeem all its preferred stock on or before January 1, 1916, if con-

strued as allowing the corporation to pay the preferred stockholders \$11 per share for the preferred stock, plus accumulated unpaid dividends, before paying the debts of the corporation, is void as being against public policy.

The decree of the district court, therefore, must be reversed, and the case remanded, with instructions to enter a decree avoiding the lien of the trust deed as against bona fide creditors of the corporation. And it is so ordered.

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**J. W. PAXSON CO. v. BOARD OF CHOSEN FREEHOLDERS OF  
CUMBERLAND COUNTY.†**

(Circuit Court of Appeals, Third Circuit. December 20, 1912.)

No. 1,671.

**1. COURTS (§ 356\*)—FEDERAL COURT—REVIEW—ACTION TRIED WITHOUT JURY—FINDING OF FACTS.**

Where an action at law in a federal court is tried without a jury by stipulation under Rev. St. § 649 (U. S. Comp. St. 1901, p. 525), which provides that the court's finding of facts shall have the same effect as the verdict of a jury, a general finding of facts, like a general verdict, is not reviewable by the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.\*]

**2. EVIDENCE (§ 83\*)—PRESUMPTIONS—PROCEEDINGS BY COUNTY OFFICERS.**

Where the authorities of a county built a bridge across a navigable stream under an act requiring a draw placed "in the most convenient place for the navigation of the river," the presumption is that it was so placed, and the burden of proof rests on one asserting otherwise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.\*]

**3. TRIAL (§ 68\*)—TRIAL WITHOUT JURY—PROCEDURE—DISCRETION TO REOPEN CASE.**

On the trial of an action of tort without a jury, where the court was not satisfied with the evidence on the question of damages, it was within its discretion to reopen the case and hear further evidence after the argument.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 158-163; Dec. Dig. § 68.\*]

**4. DAMAGES (§ 6\*)—TORTS—SUFFICIENCY OF EVIDENCE.**

Where a bridge owned by a county was so injured by the wrongful act of defendant that a portion had to be rebuilt, the county is not to be denied recovery of damages in substantially the amount expended, because the rebuilt structure may be of greater value than the old and it is impossible to make a nice estimate of the difference in value.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 5; Dec. Dig. § 6.\*]

In Error to the District Court of the United States for the District of New Jersey; Joseph Cross, Judge.

Action at law by the Board of Chosen Freeholders of Cumberland County against the J. W. Paxson Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 196 Fed. 156.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
† Rehearing denied February 10, 1913.



Martin V. Bergen, Jr., and Howard M. Long, both of Philadelphia, Pa., for plaintiff in error.

Walter H. Bacon and Roscoe C. Ward, Co. Sol., both of Bridgeton, N. J., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. This was an action in tort, originally instituted in the New Jersey Supreme Court and afterwards removed by the defendant to the Circuit Court of the United States for the District of New Jersey, for the recovery of \$20,000 damages, for the negligent destruction by defendant of a portion of plaintiff's drawbridge over the Maurice river, in Cumberland county, N. J., August 30, 1909. As the case was tried, upon stipulation by the attorneys for the respective parties, before the court without a jury, under the provisions of section 649 of the Revised Statutes (U. S. Comp. St. 1901, p. 525), the facts of the case and conclusions of law arrived at can best be understood by quoting the opinion of the court as a whole. It is as follows:

"Cross, District Judge. The above-entitled action was tried before the court without a jury, a jury having been waived by written stipulation pursuant to the statute. The action was brought by the plaintiff to recover damages for the destruction of a drawbridge belonging to it and spanning Maurice river, at Mauricetown, in the county of Cumberland and state of New Jersey, on the 30th of August, 1909, through the alleged negligence of the defendant's agents. On that date a barge known as the 'Mildred McNally' was being towed on a hawser by a tugboat known as the 'Lizzie D,' which tugboat was owned and in charge of the servants of the defendant. The barge was 187 feet long on the water line, and 23.9 feet beam, and was at the time loaded with about 700 tons of sand. The drawbridge in question was originally built by the Maurice River Bridge Company, a private corporation thereunto authorized by an act of Legislature of this state (P. L. 1864, p. 583). Pursuant to that act, said company built a bridge over the Maurice river at the point in question. Subsequently in 1871, by an act of Legislature passed in that year (P. L. 1871, p. 303), said bridge company was authorized and empowered to convey the bridge to the board of chosen freeholders of the county of Cumberland, the plaintiff herein, and pursuant thereto, such a conveyance was subsequently made, since which time the title to said drawbridge has been vested in and the bridge maintained and operated by said board of chosen freeholders, and was so maintained and operated on August 30, 1909. The draw of said bridge turned on a pivot, resting upon a pier constructed for that purpose. When the draw was turned, two open ways for the passage of boats were provided through the bridge, one on either side of the center pier, each 58 feet in width. They are known in the case as the eastern and western draws. The accident happened while the tug and her tow on their way down the river were attempting to go through the eastern draw. The tug at the time had the barge in tow on a hawser of from 35 to 40 fathoms in length. The tide was ebb and running at the rate of about 3 miles an hour, and the tug 'clear of the current' about 3 miles an hour. The river above the bridge was about 250 feet in width. The evidence on behalf of the plaintiff shows that the tug, before coming into the reach of water leading to the bridge, signaled the bridge tender to open the draw, which was promptly done; that the tug and its tow as they approached the bridge, and for several hundred feet above it, were too far to the westward to make the eastern draw; that in crossing over to make that draw, which, because of a cross-current, was the customary one for boats to make in coming down the river, the barge in tow sheered, by reason of the tide striking its port side nearly

abreast, so that, while the tug was able to go through the draw, the barge was carried down by the tide and struck the eastern wing or fender of the bridge, passed through it and struck the eastern span of the bridge, which was thereby thrown off and into the water and destroyed. The testimony, showing that the barge and her tow were too far to the westward to make the eastern draw, was given by four experienced witnesses, three of whom at least, were disinterested; they all unite in saying that the tug and barge were, as they approached the bridge, too far to the westward and farther than was customary for boats coming down the river, and intending to pass through the eastern draw. It is true that their testimony is denied by that of the captain of the tug, but in view of the fact that the plaintiff's witnesses are disinterested, and that their testimony affords the only possible way of accounting for the collision, it must be, and is accepted as true. It is accordingly concluded that the tug and barge being too far to the westward, as they approached the bridge, were as their course was changed to make the eastward draw, brought nearly abreast of the tide, and the barge having no power of its own, was thereby carried down to and against the eastern wing and span of the bridge. The hawser was broken by the collision and the tug passed through the draw safely. The defendant, under the circumstances, as the owner and manager of the tug is clearly liable. It towed the barge into a position where it became dangerous and from which it was unable to, or did not, extricate it. The collision was the result of faulty towing for which, under the evidence, the defendant is liable.

"Pursuant to the provisions of the acts of the New Jersey Legislature above referred to, it became and was the duty of the plaintiff to erect and maintain suitable and sufficient wings to said bridge, and as an incident thereto, to exercise ordinary care to maintain them in reasonably good and proper condition for the purpose for which they were built.

"The defendant insists that the plaintiff did not discharge its duty in this behalf, and that accordingly it was guilty of negligence which contributed to produce the injury which it received. In support of this contention, it has introduced evidence to show that the piles and timbers constituting the wing and fender of the eastern span of the bridge, were at the time of the accident, rotten and wholly unfit for the purpose for which they were designed and constructed. A careful examination of the testimony upon this point, however, satisfactorily shows that only the sappy portion of the heads of the piles were decayed, which condition will, according to the evidence, exist after a year or two of service, where they are not located wholly under water. The heart of the piles, however, was sound, and the braces and sheathing of the fender had been renewed about three years before, so that the structure as a whole was, when the accident occurred, in reasonably good repair and condition. This is shown not only by direct evidence, but inferentially by the fact that only a day or two before the accident in question, the same fender had been run into by a vessel, but withstood the shock without apparent injury. That the blow which the fender received from the scow when the accident in question happened, was of great force and violence, must be inferred from the fact that a stick of hard yellow pine of the best quality, twelve inches square, which had been in use three years and was perfectly sound, was broken directly in two. The severity of the blow must therefore be accepted as a fact, notwithstanding evidence on the part of the defendant that it was of so slight a character that the paint on the bow of the barge was not even scratched. Such testimony under the circumstances is incredible and must be disregarded.

"Upon the question of damages, it appears that the eastern span of the bridge was, according to the evidence, totally destroyed and the fender nearly so. The iron with which the framework of the span was constructed was bent and twisted, and the entire structure thrown into the river, and undisputed evidence shows that it would have cost more to have raised, straightened and reconstructed the old span from the wrecked material, which was iron, or to have built one like it of the same but new material, than it did to build the new one, which was of steel. There is also evidence which shows that the new span of steel has neither the durability nor the strength of the

one of iron, now forming the western span of the bridge, which it is stipulated in the case, was built at the same time and was in material, workmanship and generally like the one destroyed. Consequently, it inferentially but conclusively appears that the new span is not so good or durable as the old one was at the time of its destruction, and since the old one could not have been repaired or reconstructed without greater expense than was involved in building the new one, it seems but right and proper to allow as damages the cost of the new span and fender, less certain deductions from the cost of the fender, to which reference will later be made.

"In addition to the cost of such construction, the plaintiff seeks to recover the amount of certain fees for two meetings of the members of the board of chosen freeholders, and for meetings of its committee which had in charge the superintendence of the construction of the new span and fender; also for the cost of advertising for contractors' bids and other incidental expenses. The items just referred to cannot, however, be allowed because they are not claimed in the declaration and because, moreover, they are not the direct natural and proximate result of the defendant's negligence.

"The plaintiff also seeks to recover as an element of damage, an item of several hundred dollars which it was compelled to allow the contractor who rebuilt the span and fender, for delay in the performance of his contract caused, as alleged, by the conduct of the defendant. In this connection, it appears that at or about the time the construction of the span was commenced, an officer of the defendant company, with others, complained to the War Department of the way in which the span was about to be reconstructed; that the department investigated the matter and after hearing the parties, permitted the span to be rebuilt on the old lines. The allowance claimed by the contractor for the resulting delay was more than double the amount which was finally allowed him by the plaintiff. The amount, however, is immaterial, since for the reasons above given for the disallowance of certain other items, no part of it can properly be allowed. Furthermore, it was the right, if not the duty, of the defendant, its officers, or indeed any one else, to make the complaint in order that the question of whether or not the bridge was being rebuilt at a proper place, and in a proper manner, might be investigated and determined by competent authority. That item is accordingly disallowed. The fender was practically, but not totally destroyed. The evidence shows that the new one cost in the neighborhood of \$2,000 and that the depreciation in value of the old one was from \$500 to \$700. Allowing \$600 as representing such depreciation, and \$250 as the value of the undestroyed portions, a deduction of \$850 will be made from the cost of the new one and the balance of \$1,150 allowed as the fair and reasonable damage sustained by the plaintiff on account of the fender. The contract for rebuilding the span and fender was entire, and called for the payment to the contractor therefor, of the gross sum of \$9,500, deducting therefrom \$850 as above allowed on account of the fender, there remains a balance of \$8,740, for which, with interest thereon from May 28, 1910, together with costs of suit, judgment for the plaintiff will be entered."

In accordance with this opinion, judgment was entered by the court against the defendant and in favor of the plaintiff, for \$9,997.10.

After the filing of its opinion by the court below, bills of exception, presented by the defendant, were allowed and sealed by the learned trial judge. The exceptions were to alleged findings of fact, and in the assignments of error founded thereon, these findings are challenged as unsupported by the evidence, all of which is before us in the record brought up by the writ of error.

[1] It is objected by the defendant, at the threshold of the argument, that error is not assignable upon such exceptions. As the case was tried and determined under section 649, Revised Statutes, section 700 of the Revised Statutes (U. S. Comp. St. 1901, pp. 525, 570),



though referring to the review of such cases in the Supreme Court, is now applicable to the like review in Courts of Appeal. These sections are as follows:

"Sec. 649. Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

"Sec. 700. When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

We are of opinion that the finding of the court was general and not special, and therefore, like the verdict of a jury, is not now reviewable by this court. No request was made for special findings, and unless some other request, or motion equivalent to a motion for peremptory instructions, or judgment non obstante veredicto was made, with proper exception to the refusal thereof, the findings of fact cannot be the subject of assignments of error.

The finding of the court was equivalent to a general verdict, though accompanied by a reasoned opinion. Treating the opinion, however, as embodying special findings of fact, we have carefully examined all the testimony in this voluminous record, bearing upon such of them as are covered by the exceptions and assignments of error.

The thirty-eighth, thirty-ninth, and fortieth assignments of error refer to those so-called findings of fact, upon which the general finding of the negligence of defendant is based.

The thirty-seventh assignment of error alleges that the court erred in finding as a fact, that the evidence showed that the bridge in question was originally built pursuant to law by the Maurice River Bridge Company, and that said Bridge Company was subsequently authorized by an act of the Legislature to convey the bridge to the board of chosen freeholders of the county of Cumberland, the plaintiff herein.

The forty-first assignment, referring to the opinion, alleges error in the findings of fact upon which, and in the method by which, the court assessed the damages against the defendant.

It will, of course, answer no good purpose to discuss at length the evidence upon which these findings are based. It suffices to say, as to all except the last mentioned, in reference to damages, that the findings as made must stand, if there was any substantial evidence to sustain them. From our examination of the testimony, we have no difficulty in concluding that there was substantial evidence to support every one of the so-called findings objected to. It is, of course, not permissible that we should weigh the evidence, pro and con, as to these findings, and give our own judgment on the side on which we think the evidence preponderated.

[2] As counsel for appellant seems to be under the impression



that they had properly raised a question as to the finding of the court, in regard to contributory negligence, we will say that we agree with what the court below has said in regard to this question, and that the testimony satisfactorily shows that no negligence on the part of the plaintiff was a contributing cause of the injury to the bridge. On this point, the counsel for the appellant has insisted very strongly that, inasmuch as a bridge over a navigable stream is, *prima facie*, a public nuisance, it was incumbent upon the plaintiff in this case to affirmatively show that it was authorized by law and constructed strictly in accordance with the requirements thereof. Therefore, it is contended that, as the original act of 1864, authorizing the building of the bridge by the Bridge Company, imposed upon the company the duty of constructing "a convenient draw or swing thereon of at least 40 feet opening, to be placed in the most convenient place for the navigation of said river, with sufficient wings, extending not less than 50 feet from said bridge," it was incumbent on the plaintiff to affirmatively show that when the bridge was rebuilt in 1888 by the freeholders of the county, the draw was placed in the most convenient place for the navigation of said river. (It does not seem to be seriously denied that all the other simple requirements of the statute for the construction of the bridge had been more than faithfully met.) Upon this contention, we have to remark that it was sufficient for the plaintiff to show the legislative authority for the building of said bridge in the public laws of the state of New Jersey. As we have said, the few and simple requirements of the act, that the bridge should be built across the river "from the foot of High street at Mauricetown, and should be at least 16 feet in width, except the draw, which may be 12 feet, with good and sufficient side rails for the safety of the travelers," and that the draw or opening should be at least 40 feet, were abundantly proved to have been complied with by the opening testimony in the case. As to the placing of the draw "in the most convenient place for the navigation of the river," the presumption is in favor of the judgment of the public officers who located it, in that respect. This is not a requirement of the act that can be affirmatively shown, in the sense that the other physical requirements are required to be shown. It is a matter that rests in opinion, and the burden is upon the defendant to rebut the presumption that the officials properly exercised the judgment reposed in them by law.

The matter which seems to have given the court below most difficulty, was the question of damages. On this point, evidence was produced to show that the eastern span of the bridge, which was of iron, as well as the substructure, which was of timber, was entirely destroyed, or at least so injured as not to be capable of repair. It was therefore necessary that a new span and substructure should be built. As to this, no serious controversy is made. A contract was accordingly entered into with the Owego Bridge Company, by which a steel span of the dimensions and general character of the old iron span, was put in place, and certain parts of the substructure renewed;

also a new fender, to replace the old fender that had been damaged, though not destroyed, by the barge. It is not disputed that Owego Bridge Company was a competent construction company. The contract price for the whole work was \$9,920. This included a new fender in the draw, constructed of piles, as the old one had been, which was injured by the collision of the barge, but there was no evidence to show the cost of this fender separately from that of the other work. There was expert testimony to show that the new fender probably cost in the neighborhood of \$2,000. As the old one had not been entirely destroyed, the depreciation in the value of the old one was estimated, upon expert testimony, at \$600, and \$250 was in like manner estimated as the value of the undestroyed portions. A deduction of \$850 was therefore made from the contract price of \$9,920, leaving a balance of \$8,740—the amount found by the learned judge of the court below as the damages, with interest thereon from May 28, 1910.

[3] A very strenuous objection was made in the court below, and has been renewed in this court, as to the propriety of this assessment of damages, and of the method by which it was made. It was there stoutly contended, as here, that the new steel span was necessarily much more valuable than the old iron span, which had been put in place when the bridge was reconstructed in 1888, and that therefore, as the plaintiff had the benefit of this greater value in the span, it was ground for abatement in the damages, to be measured by the difference in value of the old and new structures. The extreme position was even taken by the defendant, that if it were impossible to arrive at this difference in value by any satisfactory method, only nominal damages could be recovered. The court below seems to have been impressed at first with this argument, and before arriving at the conclusion, as above quoted, required new evidence to be produced on both sides, and fixed a day therefor. After due consideration for some days, the learned judge again notified the parties that he was still not satisfied on the question that had been raised, and appointed a day for another hearing, several weeks after which, the court delivered the so-called conclusions of law and findings of fact, in the form of an opinion, as hereinbefore set out.

It is contended by counsel for the plaintiff in error, that the court below abused its discretion in thus reopening the case on these different occasions, to permit plaintiff to supplement its proof of damage. We think, however, that there is nothing in the case upon which to rest this contention. If the court did not abuse its discretion in this respect, this court cannot review the exercise thereof.

We go further, however, and say that the court were fully justified in thus reopening the case. It was for the purpose of satisfying its own judgment and conscience as to the important question of damages, and there is no suggestion that injustice or injury was done the defendant by the exceeding care taken by the learned trial judge to arrive at a correct conclusion in this important matter.

[4] We have carefully reviewed the evidence upon which the

judge's finding as to damages was made. It was shown by expert testimony, and not seriously controverted, that the new steel structure was a less durable and less costly structure than the old iron one; that the exactly similar iron span on the western side of the draw, put in place in 1888, when the bridge was reconstructed, was still strong and in good condition. We have no difficulty, however, as to the method adopted for arriving at the damages. It was clearly shown by the evidence that the iron span, as well as the wooden substructure, was so far destroyed as to be incapable of repair, and the construction of a new span, with its appurtenances, was absolutely necessary, in order that this bridge should again be fitted for public use. There was a real difficulty in getting the actual cost of repairs to the fender, which was included in the lump sum to be paid for the whole work. It was a matter, however, of a few hundred dollars only. The injury done to the bridge made necessary a new span and a new fender. The learned trial judge made liberal allowances for the value of the old fender, or parts thereof, and confined the damages, as far as he could, to the approximate cost of the rebuilding of the span. The plaintiff was compelled, by the negligence of the defendant, to build a new structure, which, as a new structure, was possibly, though not certainly, more valuable than the old one. But the old structure sufficed for the purposes of the plaintiff, and the plaintiff was damaged by being compelled to procure a new structure in place of the old one, for the contract price of which it was obliged to pay. The sufferer by the negligence of the defendant cannot be compelled to perform the impossible task of re-creating the old span, without buying a new one, or make a nice computation of the difference in value between the old one and the new. The plaintiff did not need a new span. The old one was sufficient, and the county was damaged by being compelled to incur the cost of a new one.

In *Jenkins v. Penna. R. R. Co.*, 67 N. J. Law, 331, 51 Atl. 704, 57 L. R. A. 309, the manner in which the Court of Errors and Appeals of New Jersey dealt with the assessment of damages, with reference to facts involving a different point of view but not a different principle, commends itself. The question in that case presented the difficulty of distinguishing between damages arising from the negligent operation of its locomotives by the defendant, so as to cause them to emit smoke denser and more offensive, and greater in volume than was reasonably required for the careful operation of its railroad, to the injury of plaintiff's property situate near the railroad, from damage which was caused by smoke necessarily emitted in the careful operation of the road. After a thorough discussion of the question, the court concludes:

"To say that the plaintiff must be denied a substantial recovery because of the impossibility of distinguishing between the consequences that were lawfully originated and those that were unlawfully imposed upon him, is to say that in such circumstances, the best approximation to justice obtainable in a court of law is to require the injured party to bear the entire burden of loss. From the standpoint of natural justice, it would be better to permit the wrongdoer to bear the whole."

The other assignments of error, referring to rejection or admission of testimony during the trial, are numerous, but none of them, in our opinion, discloses injurious error.

We think the judgment of the court below should be affirmed, and it is so ordered.

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ERNST et al. v. MECHANICS' & METALS NAT. BANK OF CITY OF  
NEW YORK.

HOTCHKISS v. NATIONAL CITY BANK OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. December 9, 1912.)

No. 55—127.

1. BANKRUPTCY (§ 165\*)—VOIDABLE "PREFERENCES"—ACTS CONSTITUTING.

A transfer by an insolvent, to be a voidable "preference" under Bankruptcy Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), must be on account of a pre-existing debt, and where one gives an insolvent present value for a transfer, or where he makes an exchange of property, there is no preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5498, 5499; vol. 8, p. 7759.]

2. BANKRUPTCY (§ 165\*)—VOIDABLE PREFERENCES—ACTS CONSTITUTING.

A contract between a bank making loans from day to day to a stockbroker and the broker, which stipulates that the day loans shall be used specifically for the release of the broker's pledged securities, that their proceeds or the proceeds of substituted securities shall be immediately deposited in the bank in repayment of the loan, and that the broker shall actually take up the pledged securities and deliver them to purchasers against payment of the price, does not create a voidable preference by the broker within Bankruptcy Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), and it makes no difference under the contract that the bank does not know what specific securities are to be released.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.\*]

3. BANKRUPTCY (§§ 165, 188\*)—VOIDABLE PREFERENCES—ACTS CONSTITUTING.

A bank made loans to a stockbroker from day to day pursuant to an agreement stipulating that securities deposited by the broker with the bank as collateral should be held by the bank as security for any other liability to the bank then existing or subsequently contracted, and that the bank could require the deposit with it of collateral securities to an amount satisfactory to it, and on failure so to do the liabilities of the broker should at the option of the bank become due. The bank, pursuant to the agreement, demanded security generally and took whatever security it could procure; but neither it nor the broker when transfers were made spoke of securities specifically covered by loans. *Held*, that the bank did not acquire an equitable lien on securities subsequently delivered and cash deposited by the broker, so as to prevent a subsequent delivery and deposit becoming a voidable preference under Bankruptcy Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266, 270, 286-295; Dec. Dig. §§ 165, 188.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



**4. CUSTOMS AND USAGES (§ 15\*)—PAROL EVIDENCE—VARYING WRITTEN CONTRACTS.**

A written contract between a bank making loans from day to day to a stockbroker and the broker, stipulating that securities deposited by the broker as collateral should be held by the bank as security for any other liabilities of the broker, then existing or thereafter contracted, and that the bank could at all times require the broker to deposit other security as collateral to an amount satisfactory to the bank, etc., contemplated collateral delivered against loans and was not contradicted or modified by proof of a usage as to which day loans were to be applied.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 30-33; Dec. Dig. § 15.\*]

**5. BANKRUPTCY (§ 165\*)—"PREFERENCE"—ACTS CONSTITUTING.**

A bank made clearance loans to a stockbroker from day to day, and such loans were credited to his general account. All the moneys received by the broker in the course of his business throughout the day from whatever source was deposited in the bank and credited to the general account. In the course of the day, the broker drew and had certified checks against the account used to pay off demand or time loans and obtained the release of collateral securities, or to take up securities which he had agreed to purchase or to borrow stock for delivery or for the substitution of securities; but it was understood that no portion of the proceeds of the day or clearance loan would be used for any purpose other than to clear securities. The securities so received by the broker were mingled with all other securities coming into his possession in the course of his daily business, and the securities were used by him to make deliveries on sales in the course of his business, or as collateral in new demand or time loans, or were substituted for other collateral then in demand or time loans. He kept no separate account of the moneys received on deliveries of stock acquired by him, and all moneys received by him were deposited to the credit of his account with the bank. Checks received by him from the sale of securities cleared by the proceeds of the day or clearance loans were deposited with the bank to pay off such clearance loans. It was necessary for him to obtain a demand or time loan at the stock exchange for the bank. The collateral security used for such loans might be any or all securities in his possession, or he might apply directly to the bank for a new demand loan on securities in his possession. The amount of the loan was credited to his general account and the clearance loan would be paid at the close of the day by check drawn against the account. The broker generally repaid the bank for the loan on the same day, and generally with the proceeds of the released securities or of substituted securities, and it was understood and expected that that should be done. *Held*, that securities delivered to the bank by the broker while insolvent constituted a voidable preference within Bankruptcy Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.\*]

**6. BANKRUPTCY (§ 305\*)—PREFERENCES—LIABILITY.**

Where a trustee in bankruptcy left the disposition of securities transferred by the bankrupt to a bank to the absolute discretion of the bank, their proceeds if sold to stand in the place of the securities, the trustee, entitled to avoid the transfer as a preference within the bankruptcy act, was entitled only to a return of the securities and an accounting as to any dividends or interest collected in the meantime; and he could not hold the bank liable for a depreciation in the value of the securities.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 466-468; Dec. Dig. § 305.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**7. BANKRUPTCY (§ 166\*)—VOIDABLE PREFERENCE—ACTS CONSTITUTING.**

A deposit in a bank by a depositor after the bank has knowledge of his insolvency, or at least after the bank is put on inquiry, to repay a loan, is a voidable preference under Bankruptcy Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.\*]

Appeals from the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

Suits by Irvine L. Ernst and another, as trustee in bankruptcy, against the Mechanics' & Metals National Bank of the City of New York, and by Henry D. Hotchkiss, as trustee in bankruptcy, against the National City Bank of New York. From decrees granting relief (200 Fed. 287, 295, 299), defendants appeal, and Hotchkiss, as trustee, also appeals. Affirmed.

Joline, Larkin & Rathbone, of New York City (L. H. Freedman, Adrian H. Larkin, and Leland B. Garretson, all of New York City, of counsel), for appellant Mechanics' & Metals Nat. Bank.

Shearman & Sterling and John A. Garver, all of New York City, for appellant National City Bank.

William A. Barber, of New York City (Abram I. Elkus, of New York City, of counsel), for appellant Hotchkiss.

Hays, Hershfield & Wolf, of New York City (Daniel P. Hays and Edwin D. Hays, both of New York City, of counsel), for appellees.

As to the Ernst Case:

Before LACOMBE, COXE, and WARD, Circuit Judges.

As to the Hotchkiss Case:

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. These cases are alike in respect to the main question involved, which is said to be of great importance to the business of stockbrokers in New York City and may be disposed of together as to it. Certain features in which they differ will be considered separately.

January 19, 1910, between 12 and 1 o'clock, the stockbroking firms of J. M. Fiske & Co. and Lathrop, Haskins & Co. failed, as the result of the collapse of a pool or pools in the stock of the Columbus & Hocking Valley Coal & Iron Company.

At the beginning of banking hours on that day Fiske & Co. had arranged for a day or clearance loan of \$400,000 from the Mechanics, now the Mechanics' & Metals National Bank, and Lathrop, Haskins & Co. had arranged for one of \$500,000 from the National City Bank. The banks, becoming uneasy about the financial condition of the brokers as the day progressed, demanded security for their accounts and obtained from each a large quantity of collaterals. Between 12 and 1 o'clock the firms notified the Stock Exchange that they were unable to meet their engagements, and subsequently each was adjudicated a bankrupt. The trustee of each estate brought a plenary action in equity for recovery of the securities or their value as a preference

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

voidable by him under section 60 of the Bankruptcy Act and also in the case of Fiske & Co. for some \$54,000 in cash deposited by them on the morning of the 19th in their account with the bank. The proceedings were referred to a special master, who took testimony and reported that each transaction was a voidable preference and directed the banks to account for the securities and cash to the trustees in bankruptcy of the failed firms. This report was confirmed by the District Court, and the banks have taken the appeals which are now to be disposed of.

Fiske & Co. had been dealing with the Mechanics' National Bank since November 8, 1901, under the following written contract:

"Know all men by these presents that the undersigned, in consideration of financial accommodations given, or to be given, or continued to the undersigned by the Mechanics' National Bank of the City of New York, hereby agree with the said bank that whenever the undersigned shall become or remain directly or contingently, indebted to the said bank for money lent, or for money paid for the use or account of the undersigned, or for any overdraft or upon any indorsement, draft, guaranty, or in any other matter whatsoever, or upon any other claim, the said bank shall then and thereafter have the following rights, in addition to those created by the circumstances from which such indebtedness may arise against the undersigned, or his, or their executors, administrators or assigns, namely:

"(1) All securities deposited by the undersigned with said bank, as collateral to any such loan or indebtedness of the undersigned to said bank shall also be held by said bank as security for any other liability of the undersigned to said bank, whether then existing or thereafter contracted; and said bank shall also have a lien upon any balance of the deposit account of the undersigned with said bank existing from time to time, and upon all property of the undersigned of every description left with said bank for safe-keeping or otherwise, or coming to the hands of said bank in any way, as security for any liability of the undersigned to said bank now existing or hereafter contracted.

"(2) Said bank shall at all times have the right to require from the undersigned that there shall be lodged with said bank as security for all existing liabilities of the undersigned to said bank, approved collateral securities to an amount satisfactory to said bank; and upon the failure of the undersigned at all times to keep a margin of securities with said bank for such liabilities of the undersigned satisfactory to said bank, or upon any failure in business or making of an insolvent assignment by the undersigned, then and in either event all liabilities of the undersigned to said bank shall at the option of said bank become immediately due and payable, notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

"(3) Upon failure of the undersigned either to pay any indebtedness to said bank when becoming or made due, or to keep up the margin of collateral securities above provided for, then and in either event said bank may immediately without advertisement, and without notice to the undersigned, sell any of the securities held by it as against any or all of the liabilities of the undersigned, at private sale or broker's board or otherwise and apply the proceeds of such sale as far as needed toward the payment of any or all such liabilities together with interest and expenses of sale, holding the undersigned responsible for any deficiency remaining unpaid after such application. If any such sale, be at broker's board or at public auction, said bank may itself be a purchaser at such sale free from any right or equity of redemption of the undersigned, such right and equity being hereby expressly waived and released. Upon default as aforesaid, said bank may also apply toward the payment of the said liabilities all balances of any deposit account of the undersigned with said bank then existing.

"It is further agreed that these presents constitute a continuing agree-

ment, applying to any and all future as well as to existing transactions between the undersigned and said bank."

On January 19th they applied for a day loan (which was granted), as follows:

"New York, January 19, 1910.

"Mechanics' National Bank, New York City:

"Please loan us to-day \$100,000. Crediting this amount to our account, and oblige,  
J. M. Fiske & Company."

On the same day Lathrop, Haskins & Co. applied to the National City Bank for a day loan of \$500,000 and signed two notes differing only in amount, in the following form:

"\$300,000.

New York City, January 19, 1910.

"On demand for value received we promise to pay to the National City Bank of New York, or order, three hundred thousand (\$300,000) dollars, hereby agreeing that said bank shall have a lien upon all property of the undersigned now or hereafter in its possession or under its control, as security for any indebtedness of the undersigned now existing or hereafter contracted, with the right at any time to demand additional security, and with the right, upon default in payment, to sell, without advertisement or notice to the undersigned, any or all of the securities or property so held, at public expense or private sale, or to otherwise dispose of the same in the discretion of any of the officers of said bank, applying the proceeds upon the said indebtedness together with interest and expenses, legal or otherwise, the undersigned to be liable for any deficiency.

"Lathrop, Haskins & Co."

The proofs show that in New York City contracts of brokers to deliver stock sold and to pay for stocks purchased must be carried out the next day and that credit from banks is absolutely necessary to enable them to release the securities they have sold, which are generally pledged in banks or trust companies, and with their proceeds to pay for the securities they have bought. To enable them to clear these transactions the banks at 10 a. m. of each business day extend a credit which must be repaid by 3 p. m. of the same day. These loans are made from day to day and are called day or clearance loans; no interest being charged upon them.

[1] We have no doubt that both the firms in question were insolvent when they delivered the securities and deposited the cash and that the banks had reasonable cause to believe so. But it is not every transfer by an insolvent within the four months' period that is voidable by the trustee. It must be on account of a pre-existing debt. When one gives an insolvent present value for a transfer of property or when he makes an exchange of property, there is no preference. Authorities upon this subject may be found in Collier on Bankruptcy (8th Ed.) p. 664, and Loveland on Bankruptcy (4th Ed.) § 512.

[2] No doubt a contract might be made between a bank and a broker stipulating that the day loan should be used specifically for the release of the broker's pledged securities and that their proceeds or the proceeds of substituted securities should be immediately deposited in the bank in repayment of the loan. As it would not be possible for the bank itself to send around checks to the various trust companies and actually take up the pledged securities belonging to



its stockbroking depositors and deliver them to purchasers against payment of the price, the agreement of the broker to do this would make him agent or trustee of the bank and would seem to be quite sufficient to bring the transaction within the cases held not to constitute preferences. The loan and repayment the same day should be regarded as one transaction; the fact that they were not literally contemporaneous being a necessary result of the nature of the business. It would not be possible to act like a farmer, who holds the cow's tail in one hand until he gets payment for her in the other. We think it would make no difference, under such a contract, that the bank did not know what specific securities were to be released or that it permitted the broker to deliver the same to purchasers. See, on the subject generally, *Sexton v. Kessler*, 172 Fed. 535, 97 C. C. A. 161; *Id.*, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995; *Mills v. Virginia-Carolina Lumber Co.*, 164 Fed. 168, 90 C. C. A. 154, 21 L. R. A. (N. S.) 901. A particularly apposite case is *Dressel v. North State Lumber Co.* (D. C.) 119 Fed. 531.

[3] In these cases the banks seek to escape by claiming that they had an equitable lien upon the securities subsequently delivered and cash deposited by the brokers and that they were receiving only their own property. Each of them, however, admits that it made the day loan under the written agreements above mentioned. Each contained provisions as to securities in the possession, but none as to securities not in the possession of the bank. Those in question here were not in the possession of the banks. Moreover, neither the banks nor the brokers when the transfers were made spoke of securities specifically covered by their loans. The banks simply demanded security generally and took whatever they could get. The conduct of the parties at the time is inconsistent with any claims to specific securities or their proceeds. We see no ground for claiming an equitable lien under these contracts alone.

[4] The banks, however, also allege a usage of the business which requires the clearance loan to be so applied which they seek to annex to the written contracts. It is objected that such a usage cannot be proved, because it contradicts or adds to the written contract. We do not think the usage contradicts the contracts because they contemplated collateral delivered against loans, whereas these day or clearance loans are never made against collateral. Proof of such a usage would only be as to the way in which the day loans were to be applied and would be entirely consistent with the written contracts. It may very well be that, if the broker failed to carry out the contract, equity would not aid the bank to the prejudice of creditors generally; but this is no ground for saying that, if the contract had been carried out, equity would intervene to disturb it.

[5] The following extract from a stipulation made in the case is the best statement made in support of the bank's claim:

"It is further stipulated that, if members of the stock exchange houses to which the said banks made the said so-called day or clearance loans were called as witnesses herein, each of the said brokers called would testify respectively that the amount of the so-called day or clearance loan was credited to his general account with the bank; that in this general account

there was also credited the balance he had on deposit with the bank at the opening of the day.

"That all of the moneys received by him in the course of his business throughout the day, from whatever source, was deposited with the bank making the so-called day or clearance loan, and credited to his general account as aforesaid.

"That in the course of the day he drew and had certified checks against the said account which were used to pay off demand or time loans and obtain the release of securities held as collateral thereto, or to take up stocks, bonds, or other securities which he had agreed to purchase, or to borrow stock for delivery, or for the substitution of securities; but it was expected and understood that no portion of the proceeds of the day or clearance loan was used for any purpose other than to clear securities, although the broker is at liberty to draw against the balance standing to the credit of his account in excess of that derived from said day or clearance loan to pay the general expenses of his business and to meet the general obligations thereof.

"That the securities he received as aforesaid were not kept separate, but were mingled with all the other securities coming into his possession in the course of his daily business, and that the said securities were freely and at all times used by him to make deliveries on sales made in the course of his business, or were used as collateral in new demand or time loans or were substituted for other collateral then in demand or time loans.

"That he kept no separate account of the moneys received on the deliveries of stock acquired by him as before mentioned, but that all the moneys received by him, in the course of the day, from whatever source, were deposited by him to the credit of his said account with the bank making the said loan.

"That the said day or clearance loans were paid off by his check or checks drawn to the order of the bank, at the close of the day. That during the day, as soon as checks were received by him from the sale of securities cleared by the proceeds of the day or clearance loan, or as soon as moneys were received by the broker from new loans made with the securities cleared by the day or clearance loan, the checks or moneys resulting therefrom were promptly deposited with the bank during the day as soon as or within a reasonable time after the same were received; and that in order to pay off such day or clearance loans, if he had not sufficient funds on deposit with said bank which made such day or clearance loans, it would be necessary for him to obtain a demand or time loan at the Stock Exchange for and on behalf of the identical bank making the day or clearance loan as aforesaid. The collateral security used for such demand or time loan might be any or all securities in his (the broker's) possession from whatever source and however those securities were acquired by him; or he (the broker) might, if occasion required, apply directly to the bank making the said day or clearance loan for a new demand loan on such securities in his possession as aforesaid, as would be acceptable to the bank, in order to discharge his indebtedness under the day or clearance loan at the close of the day. The amount of such loan would be credited to his general account with the bank and the so-called day or clearance loan would be paid at the close of the day by check drawn against this account."

We do not think that the usage alleged was proved. It was abundantly established that the brokers do repay banks for the clearance loan on the same day and generally with the proceeds of the released securities or of substituted securities and that it is understood or expected that this shall be done. This, however, only shows the way in which the business is done. It could hardly be done, and certainly could not be continued, in any other way. Such a course of business does not establish that the brokers have agreed to do these things, or are bound by usage to do them, or that the banks are entitled to the proceeds of the released securities. Indeed, we understand that the

question as to the rights and obligations of the parties if the broker fails to repay or secure the clearance loan on the day it was made is raised for the first time in the cases now under consideration. Therefore we agree with the conclusion of the special master and the court below on the main question involved in both cases.

There are two particulars in which the cases differ from each other, now to be considered separately.

[6] In the case of the National City Bank, the trustee claims that he is entitled to the value of the securities at the time they were transferred; they having in the meantime depreciated considerably. The Bankruptcy Act, § 60b, does provide that in the case of a voidable preference the trustee "may recover the property or its value." The special master and the court below, however, held, and we think rightly, that the trustee had left the disposition of the securities to the absolute discretion of the bank; their proceeds, if sold, to stand in their place. Under such circumstances, it would be inequitable to hold the bank liable for the depreciation. All the trustee is entitled to is a return of the securities and an accounting as to any dividends or interest collected in the meantime.

[7] In the case of the Mechanics' National Bank, a deposit was made by Fiske & Co. on the morning of January 19th, which the trustee claims should be returned with interest as a voidable preference; this for the reason that the bank had ordered no more certifications to be made before the deposit was received, which it is contended was a closing of the account, so that the relation of debtor and creditor between the firm and the bank did not exist as to this fund. The special master and the court below held that the deposit was made after the bank had knowledge of the broker's insolvency or at least was put on inquiry, so that the deposit was a voidable preference, just as much as the delivery of the securities. In this view we concur.

The decrees are affirmed.

NOYES, Circuit Judge (concurring). I concur in the conclusion reached in the National City Bank Case, and in the opinion except so far as it discusses the question whether a valid contract could be made to cover the situation. I think that question does not arise in the case and prefer to express no opinion upon it.

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### MISSOURI PAC. RY. CO. v. HARPER BROS.†

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,796.

#### 1. SIGNATURES (§ 4\*)—BY HAND OF ANOTHER—CONTRACT OF SHIPMENT.

Where the owner of live stock authorized another to ship the same, and an employé of such other in his presence signed the shipping contract, it was in legal contemplation signed by the owner, and is binding on him.

[Ed. Note.—For other cases, see Signatures, Cent. Dig. § 6; Dec. Dig. § 4.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied December 24, 1912.

**2. CARRIERS (§ 62\*)—CONTRACT OF TRANSPORTATION—VALIDITY.**

In the absence of fraud or mutual mistake, a shipper who is *sui juris* will not be heard to say that he did not read and understand his duly executed contract of shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 195-206½; Dec. Dig. § 62.\*]

**3. CARRIERS (§ 158\*)—LIMITATION OF LIABILITY—VALIDITY OF CONTRACT.**

Neither the common law nor section 20 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 909), which makes an interstate carrier liable for loss or damage caused by it or a connecting carrier to property in shipment, and prohibits contracts exempting it from such liability, makes illegal or invalid a contract fairly entered into fixing the valuation of the property for which the carrier shall be liable in case of loss.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 663-667, 699-703½, 708-710, 718, 718½; Dec. Dig. § 158.\*]

**4. CARRIERS (§ 135\*)—LOSS OF PROPERTY IN SHIPMENT—ACTION—ATTORNEY'S FEES.**

The provision of section 16 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 (U. S. Comp. St. Supp. 1907, p. 902), for an allowance to a shipper of an attorney's fee, applies only to suits based on orders of the Interstate Commerce Commission making awards for violation of the act, and does not authorize the allowance of such fees in an action for loss or damage to property in shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 557-559, 599-602, 603; Dec. Dig. § 135.\*]

In Error to the Circuit Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Action at law by Harper Bros., a corporation, against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Defendant in error, plaintiff below, alleged in its declaration that on February 10, 1910, it was the owner of 67 mules and 6 horses; that it delivered the animals in good condition to defendant to be transported on its railway from Conway Springs, Kan., to East St. Louis, Ill.; that through the negligence of defendant in operating its train 60 of the animals were killed, and the remainder were severely injured; that plaintiff thereby suffered damages in the sum of \$25,000, and became entitled to its reasonable attorney's fees to be fixed by the court.

Defendant pleaded the general issue, tender, and certain special defenses based upon a written shipping contract. A demurrer to the latter was sustained on the ground that all the special defenses so pleaded were admissible under the general issue.

At the trial defendant introduced in evidence a "freight tariff," together with evidence of its having been filed with the Interstate Commerce Commission and posted in the freight office at Conway Springs. This tariff showed the rate on horses and mules by car load to be \$72 from Conway Springs to East St. Louis, and contained the following with respect to "valuation of live stock": "The rates on live stock published in this tariff are based on the following valuations, which agents must be particular to see inserted in the live stock contracts: Each horse or pony (gelding, mare, or stallion) or jack, \$100. \* \* \* If owners or shippers are not agreeable to forwarding their stock subject to the above valuations, the rates will be increased 25 per cent. for each 100 per cent. or fraction thereof in excess of the above valuations." Defendant's offer of the written shipping contract, on plaintiff's objections.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



was rejected. This contract, covering the transportation at the rate of \$72 a car, provided "that in case of total loss of any of the live stock covered by this contract from any cause for which the first party will be liable, payment will be made therefor on the basis of the actual cash value at the time and place of shipment, but in no case to exceed \$100 for each horse," etc. Defendant proved tender of an amount sufficient to cover the value of the animals as fixed in the contract; but plaintiff recovered judgment for a much larger sum and was allowed attorneys' fees.

Further facts are stated in the opinion.

L. O. Whitnel, of E. St. Louis, Ill. (M. L. Clardy, of St. Louis, Mo., of counsel), for plaintiff in error.

Rudolph J. Kramer, Walter S. Loudon, Edward C. Kramer, and Bruce A. Campbell, all of E. St. Louis, Ill., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Technical objections to the record and to the assignments of error are urged, but we find them to be without substantial merit. An examination of the record makes it clear, beyond cavil, that court and counsel fully understood that plaintiff's right to recover more than defendant had tendered depended on the admissibility and effect of the contract.

F. H. Harper, vice president of plaintiff, after purchasing the animals, left Conway Springs before the shipment was made. Prior to departing he told Henry Stayton, of Stayton Bros., to "ship them," and informed defendant's freight agent that Stayton Bros. would attend to shipping the animals. One Sanders, an employé of Stayton Bros., in the presence and at the direction of Henry Stayton, signed the shipping contract as follows: "F. H. Harper, shipper, by Stayton Bros."

[1] 1. Sanders' act in signing the contract in the presence and at the direction of Stayton was equivalent to Stayton's signing. And Stayton had been directed by Harper to "ship the animals." Shipment was therefore made, in legal contemplation, by F. H. Harper for the benefit of plaintiff. "The delivery to the carrier or his agent may be made not only by the shipper in person, but also by his authorized agent. Where the owner of goods places them in the hands of an agent to secure their transportation by a carrier, the latter, in the absence of a known limitation upon the agent's authority, is justified in considering the agent authorized to exercise all the powers necessary to effect the purpose of the agency, and the acts of the agent in that respect will be binding upon the principal, as in giving directions as to the time or manner of shipment or the terms and conditions upon which the transportation is to be undertaken." *Hutchinson on Carriers* (3d Ed.) § 108; *Elliott on Railroads* (3d Ed.) § 1408.

[2] 2. Illinois rulings (*Wabash Ry. Co. v. Thomas*, 222 Ill. 337, 78 N. E. 777, 7 L. R. A. [N. S.] 1041) that the carrier must prove, not only that the shipper signed the contract, but additionally that he understood and agreed to its terms, have been limited to intrastate shipments. *Coats v. C., R. I. & P. Ry. Co.*, 239 Ill. 154, 87 N. E. 929.

But at all events the Illinois rule would not control interstate transportation. In many businesses, like insurance and carriage, contracts are almost necessarily closed by the applicants' signatures to or acceptances of printed forms prepared by their adversaries; and transactions would be seriously impeded and might wellnigh be brought to a standstill if terms and conditions had first to be discussed and agreed on with each applicant, and then be reduced to writing and signed. Remedies would seem to be best sought in legislative control of the terms of policies, bills of lading, and the like. But in courts the general rule, applicable here, should be maintained, that, in the absence of fraud or mutual mistake, a person *sui juris* will not be heard to say that he had not read and understood his duly executed contract. *Cau v. T. & P. Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053; *Hutchinson on Carriers* (3d Ed.) §§ 408-9.

[3] 3. Was the contract rejectable on the ground that it would be without effect under either the common law or section 20 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169])?

1. At common law a carrier of goods is virtually an insurer of safe delivery; but his right by contract to eliminate insurance and to be liable only for negligence is thoroughly established. To go further and seek by stipulation, though based on the consideration of lower rates, to escape liability for negligence, is strictly denied. *Rld. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627. And if liability for negligence cannot be avoided by a deliberate contract to that effect, the logical consequence is that no fractional part of such liability can be escaped. That is, a carrier cannot negligently destroy \$200 worth of goods and hold the shipper to a contract that the carrier shall respond for only half the value, even though the contract expressed their mutual intent, and was founded on a full consideration. But from very early times value has been recognized as a legitimate element in rate-making. "The reward ought to be proportionable to the risque." *Gibbon v. Paynton*, 4 Burrow, 2298. And so, if a valuation of goods is made in good faith, whether proposed by the shipper or by the carrier, and if the rate is based on such valuation, the agreed value is the measure, not of the liability for the loss, but of the amount of the loss. In the precedents that must be accepted by us as controlling we have found no departure from the principle laid down in *Hart v. Pennsylvania Rld. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717:

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in con-

dict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

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 "The distinct ground of our decision in the case at bar is that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

In *George N. Pierce Co. v. Wells Fargo & Co.*, 189 Fed. 561, 110 C. C. A. 645, the Circuit Court of Appeals for the Second Circuit applied the Hart Case to a shipment of a car load of automobiles, of the evident value of at least \$15,000, under a bill of lading in which the property was valued at the lump sum of \$50. One of the judges dissented on the ground that, on the face of the transaction, \$50 could have no real relation to the value of a car load of automobiles, that the purported valuation was not "fairly made" as in the Hart Case, but was wholly fictitious; in short, that the stipulation was inserted, not as the measure of the amount of the loss, but as a limitation upon the liability for the loss. In the present case such an attack cannot prevail, for we are unable to say on the face of the transaction and without extrinsic evidence that \$100 has no fair relation to the average value of horses, highly and lowly bred, sound and unsound, vigorous and decrepit, in the territory for which the defendant had based its primary rate on that valuation. And, if extrinsic evidence were to be received, it would have to go to the extent of warranting a conclusion that the disparity in that territory between \$100 and the fair average value of horses was so great that the carrier intended, not a fair valuation as an element in rate-making, but a shield against its full liability for negligence. And if the carrier's primary offer of valuation and rate was made fairly and in good faith, the fact that the shipper, in accepting the rate, had mental reservations respecting average value or the value of his particular shipment would be irrelevant. And if the increase of rates above the primary rate, for valuations above the primary valuation, was disproportionate to the increase of risk and service, a subject-matter would appear which might well be brought before the Interstate Commerce Commission, but which would have no place in litigation over a past transaction unless evidence should be forthcoming to prove that the disproportionate increase had been adopted and used to coerce shippers into accepting the primary valuation and rate.

2. A part of section 20 of the Interstate Commerce Act, as amended (U. S. Comp. St. Supp. 1907, p. 909), reads as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such com-

mon carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

Plaintiff's contention is that this provision abrogates the common-law rule respecting valuation. We are unable to find any new "liability hereby imposed" except that the initial carrier shall be liable for the actionable conduct of connecting carriers. Liability for loss through negligence is stated in the statute as the rule stood at common law: There can be no exemption from such liability. But full liability for negligence and a fairly made valuation of the property are separate matters; and the statute's adoption of the common-law rule as to liability does not in and of itself indicate a disapproval of the common-law rule as to valuation. If the Congress ever undertakes to eliminate value as a lawful element in rate-making, we have no doubt that the intention will be unmistakably expressed.

[4] 4. Allowance of attorney's fees was unauthorized. Provision for fees in section 16 of the Interstate Commerce Act applies only to cases before the Interstate Commerce Commission. It has no relation to actions in court.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

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### LATINETTE v. CITY OF ST. LOUIS.

(Circuit Court of Appeals, Seventh Circuit. November 21, 1912.)

No. 1,882.

**1. EMINENT DOMAIN (§ 9\*)—POWER OF UNITED STATES—DELEGATION TO MUNICIPALITY—ST. LOUIS BRIDGE.**

Act June 25, 1906, c. 3539, 34 Stat. 461, authorizing the city of St. Louis, Mo., to construct, maintain, and operate a bridge across the Mississippi river and approaches thereto, and for that purpose "to receive, purchase and also acquire by lawful appropriation and condemnation in the states of Illinois and Missouri, upon making proper compensation, to be ascertained according to the laws of the state within which the same is located, real and personal property and rights of property," conferred on the city the right to maintain proceedings in a federal court in Illinois for the condemnation of land in that state for approaches, although it had no authority to maintain such proceeding under the laws of Illinois.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 27-34; Dec. Dig. § 9.\*]

**2. EMINENT DOMAIN (§ 9\*)—POWER OF UNITED STATES—DELEGATION TO MUNICIPALITY—INTERSTATE BRIDGE.**

The United States has power to construct, or to authorize the construction of, an interstate bridge across a navigable stream to serve as a post-road and a way for interstate commerce, and to that end may confer power on a state municipal corporation, authorized to construct and maintain such a bridge, to condemn land for approaches thereto in another state, independently of the laws of such state.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 27-34; Dec. Dig. § 9.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



In Error to the Circuit Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Proceeding by the City of St. Louis against Eugene Latinette, Sr., to condemn land. Judgment for petitioner, and defendant brings error. Affirmed.

P. W. Haberman and G. L. Stern, both of St. Louis, Mo., Daniel Hogan, Jr., of Danville, Ill., and Henry L. Stern, of Chicago, Ill., for plaintiff in error.

Lambert E. Walther and Maurice V. Joyce, both of E. St. Louis, Ill., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. By the judgment to which this writ of error is addressed, St. Louis, a municipal corporation of Missouri, acquired by condemnation for the eastern approach to a bridge across the Mississippi certain of Latinette's lands situate in Illinois.

Questions of law arising from the admitted facts, stated in the city's petition, concern, first, the jurisdiction of the United States Circuit Court for the Eastern District of Illinois, and, second, the right of the Missouri municipality to appropriate lands in Illinois.

In the petition proper averments were made respecting the organization and existence of the city as a corporation under the laws of Missouri and the citizenship of Latinette in Illinois and his residency in the Eastern District. Besides jurisdiction by reason of diversity of citizenship it will appear in the consideration of the merits that the decision depends wholly upon a question of right under the Constitution and laws of the United States.

It is conceded that St. Louis was not authorized by the laws of Illinois to maintain this condemnation proceeding. A federal grant of authority is alone counted upon in the petition. That Missouri by her statutes and decisions (*Haeussler v. St. Louis*, 205 Mo. 656, 103 S. W. 1034) had authorized St. Louis to build and maintain the bridge in question, together with the necessary approaches, and for that purpose to buy or appropriate lands in Missouri, to buy lands in Illinois, and to accept a federal grant of right to appropriate lands in Illinois, seems to be settled beyond controversy. There remain an examination of the alleged federal grant, and an inquiry into the power of the federal government to make a grant of that character.

[1] By the general bridge act (Act March 23, 1906, c. 1130, 34 Stat. 84 [U. S. Comp. St. Supp. 1907, p. 1058]) Congress provided that "when, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States," the bridge should not be built except in accordance with plans and specifications approved by the Secretary of War and the chief of engineers; that the bridge when built should be recognized as a post route; that the United States should have the right to construct and maintain, without charge, telegraph and telephone lines upon the bridge and its approaches; and that equal priv-

ileges in the use of the bridge and its approaches should be granted by the owner to all railroad, telegraph, and telephone companies.

Congress on June 25, 1906 (34 Stat. at L. p. 461, c. 3539), enacted:

"Section 1. That the city of St. Louis, a corporation organized under the laws of the state of Missouri, be, and is hereby, authorized to construct, maintain, and operate a railroad, wagon, and foot-passenger bridge, and approaches thereto, across the Mississippi river at St. Louis, Missouri, in accordance with the provisions of the act entitled 'An act to regulate the construction of bridges over navigable waters,' approved March 23, 1906.

"Sec. 2. That for the purpose of carrying into effect the objects of this act, the city of St. Louis may receive, purchase, and also acquire by lawful appropriation and condemnation in the states of Illinois and Missouri, upon making proper compensation, to be ascertained according to the laws of the state within which the same is located, real and personal property and rights of property, and may make any and every use of the same necessary and proper for the construction, maintenance, and operation of said bridge and approaches consistent with the laws of the United States and of said states respectively."

Only consent was given by section 1 of this latter act to build the bridge in the manner and on the conditions expressed in the general bridge statute. Authority to exercise the sovereign power of appropriation, if given at all, was conferred in section 2. Appellant's contention is that the words "according to the laws of the state" show that Congress meant that St. Louis should not have power to condemn except by virtue of state law, and that, inasmuch as Illinois refuses to give St. Louis the power, the judgment must be reversed. But, looking to the construction of the sentence, it seems clear to us that only the "compensation" is "to be ascertained according to the laws of the state." Furthermore, while Congress might tell its agent to go to the state law for the rules of practice, it could not constitutionally effect anything by telling its agent to go to the state law for power to condemn land for a national purpose. Condemnation is an attribute of sovereignty. It must be exercised directly by the sovereign or through an agency appointed by the sovereign. Neither the power nor the selection of agents can be transferred to another. States have the power only for state purposes; the nation, only for national purposes. So, the power to condemn mentioned in section 2 must be referred to the national power. And finally, Congress in framing section 2 used a formula of expression which had already been judicially construed. In *Luxton v. North River Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808, the act provided that the bridge company might "acquire by lawful appropriation and condemnation, upon making proper compensation therefor, to be ascertained according to the laws of the state within which the same is located, real and personal property and rights of property"; and these words, the same as in the case at bar, were held to relate to the national power.

[2] That the construction and operation of the bridge across the Mississippi, so that the bridge should not obstruct navigation of the waterway, and that the bridge and its necessary approaches might serve as a postroad and as a landway for interstate commerce, were national matters, that the nation had the right itself to build and maintain the bridge and approaches, and, for the purpose of acquiring land for the approaches, to exercise the power of eminent domain either

directly or through a corporation created by it for that end, without the consent or over the objection of the state—are propositions too well settled to warrant elaboration or debate. *Kohl v. U. S.*, 91 U. S. 367, 23 L. Ed. 449; *California v. Pacific R. Co.*, 127 U. S. 39, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808; *Wilson v. Shaw*, 204 U. S. 24, 27 Sup. Ct. 233, 51 L. Ed. 351. Contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. In reason the material thing is the principal's authority, not the parentage or birthplace of the agent. And the decisions of Mr. Justice Bradley at circuit in *Stockton v. B. & N. Rld. Co.* (C. C.) 32 Fed. 9, and of the Supreme Court in *Cherokee Nation v. Kansas Ry. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295, explicitly cover the point.

The judgment is affirmed.

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BALCOMB v. OLD NAT. BANK et al.

(Circuit Court of Appeals, Seventh Circuit. December 2, 1912.)

No. 1,884.

**BANKRUPTCY (§ 166\*)—VOIDABLE PREFERENCES—"AGENT" OF CREDITOR—COLLECTING BANK.**

A bank which was holder of a note made by a corporation indorsed it, and sent it to its Chicago correspondent "for collection and credit." The Chicago bank indorsed and forwarded it to another bank "for collection and remittance." The latter made collection and remittance, and the proceeds were credited by the Chicago bank to the owner of the note. The payment was made within four months prior to the bankruptcy of the maker which was then insolvent, and intended a preference, and the local bank had reasonable cause to believe that a preference was intended, but neither the owner of the note nor the Chicago bank had any knowledge of the maker's condition or purpose. *Held*, that in the absence of any statutory regulation or special contract or usage having the force of law, while the collecting bank was the agent of the Chicago bank, it was not the agent of the creditor, within the meaning of Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445) as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1506), and the payment was not recoverable thereunder as a voidable preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 262-273; vol. 8, p. 7569.]

In Error to the District Court of the United States for the Eastern District of Wisconsin; A. L. Sanborn, Judge.

Action at law by F. W. Balcomb, trustee in bankruptcy of the Lawrence Manufacturing Company, against the Old National Bank and the Paine Lumber Company, Limited. Judgment for defendants, and plaintiff brings error. Affirmed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

F. W. Balcomb, of Chicago, Ill., for plaintiff in error.

Carl D. Jackson and John C. Thompson, both of Oshkosh, Wis., for defendants in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Plaintiff in error failed in his action to recover an alleged preferential payment.

With one exception the facts are the same as in *Campbell v. Balcomb*, 183 Fed. 766, 106 C. C. A. 474. In both cases the collections were made through the Oak Park Bank, of Oak Park, Ill., as agent, and the agent knew the insolvent's condition and purpose, and "had reasonable cause to believe" that preferences were intended. In the *Campbell* Case the Oak Park Bank was unquestionably the agent of the creditor, and the payment was recovered by the trustee as a preference. Here the creditor, the owner of the note executed by the insolvent, was the Old National Bank, of Oshkosh, Wis. The Old National indorsed the note in blank, and mailed it to the First National Bank, of Chicago, Ill., with instructions that it was sent "for collection and credit." The First National indorsed and forwarded the note to the Oak Park Bank "for collection and remittance." The insolvent paid the Oak Park Bank, which remitted the amount to the First National, and the latter in turn credited the Old National. Neither the Old National nor the First National knew the insolvent's condition or purpose, and, of course, had no cause to believe that a preference was intended.

Under section 60b a payment which the bankrupt intends to be preferential cannot be recovered unless the creditor "or his agent acting therein" had reasonable cause to believe that a preference was intended. Was the Oak Park Bank the agent (or subagent) of the Old National, or was it only the agent of the First National?

Tested by the rule of commercial law laid down in *Exchange National Bank v. Third National Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722, as "controlling in all cases in the federal courts," the question is one of privity. If a bank that receives from a customer for collection and credit a note against a payor at a distant point thereby undertakes only to use diligence in selecting a collecting bank—if the first receiving bank and other intermediate banks are mere conduits through which a direct connection is made between the owner and the collector—then privity exists, and the collecting bank is the agent of the owner. This is the rule adopted by several state courts, and is the special contract or usage which many banks, in view of conflicts respecting the true rule, have established with their customers. On the other hand, if the receiving bank undertakes as an independent contractor to collect the note, it is a matter of indifference to the owner whether the receiving bank collects through its own officers or through other agents specially employed for that purpose, the owner's only relationship is with the receiving bank, and there is no privity between the owner and the collector. And this is the rule promulgated by the Supreme Court as applicable, "in the absence of statutory regulations



or special contract or usage having the force of law," to the act of the owner of commercial paper in depositing it in a bank "for collection and credit." "Where a bank, as a collection agency, receives a note for the purposes of collection, its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated are its agents and not the subagents of the owner of the note."

Exchange National Bank v. Third National Bank, *supra*, was a negligence case. That is, the question was whether or not the receiving bank could successfully defend against its alleged liability for the negligence of the collecting bank by asserting that the collecting bank was the agent of the owner (the plaintiff bank), and that the plaintiff bank, of course, could not recover for negligence chargeable to itself. In overruling the defense the Supreme Court reviewed *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392, a preference case, in which the intervention of an independent contractor was held to protect the owner from being chargeable with the collector's act of taking the money from the insolvent with guilty knowledge. When the action against *Wise* to recover the preference was instituted, the collector had remitted the proceeds to the independent contractor, but the latter had not yet turned over the money to the owner. "Whether a different conclusion would have been reached if the money had come to the hands of (the owner)," the Supreme Court said, "we are not called upon to consider." But, the question being one of privity between the owner and the collector, it is hard to see how the supposititious circumstance could have altered the case. When the money was collected by the independent contractor, who was indisputably the owner's agent, it was collected by the owner according to the familiar maxim, "*Qui facit per alium facit per se*." And, further, it seems difficult to distinguish between a negligence case and a preference case. If the intervention of an independent contractor is an impervious wall between the owner and the collector's wrongful act of commission or omission relating to the collection, it should equally cut off the owner from the collector's wrongful act in making the collection with guilty knowledge. In both, the point is lack of privity between owner and collector.

On the present record, with no showing of "statutory regulations or special contract or usage having the force of law," it seems to us impossible to do otherwise than hold that the First National was the independent contractor to collect for the Old National, and that there was no privity between the Old National and the Oak Park Bank. If this results in a supposed omission from the general purpose of the Bankruptcy Act to distribute the bankrupt's inadequate assets equally among his creditors, it is the prerogative of Congress to include in section 60b, not only the owner's agent, but the agent's agent down to and including the agent that actually collects for the last transmitting agent.

The judgment is affirmed.

## FIELD et al. v. CAMP et al†

(Circuit Court of Appeals, Fifth Circuit. January 7, 1913.)

No. 2,318.

## 1. ASSIGNMENTS (§ 8\*)—VALIDITY—CONTRACTS BETWEEN PROSPECTIVE HEIRS FOR DIVISION OF PROPERTY.

An agreement between the children and heirs at law of a decedent, made during her lifetime, for the division of her property between them after her death, without regard to any will she might make, while not binding on the mother, may be enforced in equity as between the parties thereto.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 13; Dec. Dig. § 8;\* Contracts, Cent. Dig. § 509.]

## 2. EQUITY (§ 365\*)—PLEADING—MULTIFARIOUSNESS.

A bill in a federal court, which was multifarious and tendered no clearly defined issue which was within the jurisdiction of the court, *held* properly dismissed without prejudice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 769-771; Dec. Dig. § 365.\*]

Appeal from the Circuit Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge.

Suit in equity by Annie C. Field and another against Sarah A. Camp and others. From a decree dismissing the bill, complainants appeal. Affirmed.

For opinion below, see 193 Fed. 160. See, also, 189 Fed. 285.

Richard H. Field and Charles E. Small, both of Kansas City, Mo., for appellants.

Geo. F. Gober, of Atlanta, Ga., Daniel W. Blair, of Marietta, Ga., and W. G. Brantley, of Brunswick, Ga., for appellees.

Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

SHELBY, Circuit Judge. The case is fully stated in the opinion of the court below. 193 Fed. 160. We concur in the conclusion of the court that relief could not be granted on the bill as framed. It is clearly multifarious, and much of the relief prayed for relates to matters pending in a court of competent jurisdiction, where only the relief asked for could be obtained.

[1] The agreement between the children of Jane M. Camp as to the disposition of her property was, of course, not binding on Jane M. Camp. But such agreements may, in equity, be binding on the parties to them. 1 Story's Eq. Jur. (5th Ed.) § 265; 2 Pomeroy's Eq. Jur. (3d Ed.) § 931, note 6; Clendenning v. Wyatt, 54 Kan. 523, 38 Pac. 792, 33 L. R. A. 278, and note page 266; Parsons v. Ely, 45 Ill. 232; In re Garcelon, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134; Lewis v. Madison, 15 Va. 303; Wethered v. Wethered, 2 Eng. Ch. 184; s. c., 2 Sim. 183; Hyde v. White, 9 Eng. Ch. 425.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied February 25, 1912.

[2] The only real and substantial controversy between the parties to this suit, of which the court below had jurisdiction, is as to the 87 acres of land conveyed to Sarah A. Camp by Jane M. Camp. But that controversy, if presented at all by the bill, is so involved and covered up by other matters, of which the lower court had no jurisdiction, and which are irrelevant to the main question, that we find ourselves unable to hold that the court erred in sustaining the defenses presented. The bill contains no sufficient allegations of facts to show that the deed from Jane M. Camp to Sarah A. Camp of the 87 acres of land was obtained by undue influence or fraud. *Mackall v. Mackall*, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84.

The deed to Sarah A. Camp from her mother bears date December 19, 1908. Her mother died June 3, 1911. She devises the same land by her will to Sarah; but the testatrix had already parted with her title by the deed more than two years before her death, when the will became effective. If the bill had been written solely to enforce the agreement between the heirs, treating the procuring of the deed to the 87 acres as a breach of that agreement and seeking to obtain a decree that Sarah A. Camp held the 87 acres in trust, subject to the terms of the agreement between the expectant heirs of Jane M. Camp, a case would have been presented that at least required a defense by answer. *Bispham's Prin. of Eq.* (7th Ed.) 149, § 91; *Jones v. Van Doren*, 130 U. S. 684, 691, 9 Sup. Ct. 685, 32 L. Ed. 1077. We cannot find in the bill sufficient averments, based on such a theory, to give it equity. It deals, as we have said, with other questions—trusteeships of Jane M. Camp's separate estate, the administration of the estate of George H. Camp, controversies between the executors and controversies between the trustees, and many other irrelevant and disconnected matters—all interesting and important to the parties, but not susceptible of being grouped into one suit.

The decree dismissing the bill will be amended to make the dismissal without prejudice, and, as so amended, is affirmed.

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### W. W. SLY MFG. CO. v. CENTRAL IRON WORKS.

(Circuit Court of Appeals, Seventh Circuit. October 8, 1912.)

No. 1,861.

#### 1. PATENTS (§ 288\*)—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

If it appears that there was no right to an injunction at the time of the commencement of a patent suit, and that the patent will expire before there can be a hearing on the merits, the remedy at law is adequate and a court of equity is without jurisdiction; but, if facts existed when the suit was commenced which might sustain an injunction, the question is not then one of jurisdiction, but of discretion in the exercise of jurisdiction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 460-466; Dec. Dig. § 288.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. PATENTS (§ 313\*)—SUIT FOR INFRINGEMENT—EQUITY—JURISDICTION.**

That a bill charges conjoint infringement of two patents, and that as to one equity is without jurisdiction because of its expiration within a very short time, does not require the dismissal of the bill as to the other for want of jurisdiction.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 313.\*]

Appeal from the Circuit Court of the United States for the Southern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

Suit in equity by the W. W. Sly Manufacturing Company against the Central Iron Works. Decree for defendant, and complainant appeals. Reversed.

The bill was dismissed for want of equity jurisdiction, and complainant appeals. It is a suit brought December 12, 1910, on two patents, one having 56 days to run, and the other several years. Defendant was charged with infringing the claims of patent No. 514,097, expiring February 6, 1911, and the single claim of patent No. 703,313, expiring June 24, 1919. Service of subpoena was made December 13, 1910, appearance of defendant filed before the expiration of the earlier patent, and answer filed February 6, 1911, being the last day of the patent term. The answer denies novelty and usefulness of the alleged inventions, alleges anticipation, prior knowledge, and use, and denies infringement.

It is stated in the bill that the improvements claimed in the two patents are capable of being conjointly used, and have been so used by complainant in the making, use, and sale of machines covered by the first patent. A prior adjudication of the federal Circuit Court for the Northern District of Ohio sustaining the second patent is also averred. Temporary and permanent injunctions and an accounting and damages are prayed. The case was put at issue February 16, 1911, and on August 4, 1911, an ex parte order was made, on motion of complainant, extending the time to take testimony 90 days. Defendant filed a motion August 9, 1911, to set aside this order, but on August 8th complainant served a notice that it would examine witnesses on August 11th. It was stipulated that the time for hearing the motion to set aside the extension order should be postponed to September 11, 1911. The motion was heard on affidavits, showing that the delay in taking testimony was due to the pendency of the suit in Ohio referred to in the bill, in which suit the bill of complaint had been dismissed by the circuit court, but was decided in favor of complainant by the Circuit Court of Appeals of the Sixth Circuit July 12, 1911.

The motion to set aside the order of extension was heard September 20, 1911, when the court vacated such order, and made a final decree dismissing the case for want of jurisdiction. The present appeal was taken from this decree.

J. B. Hull, of Cleveland, Ohio, and Robert H. Parkinson, of Chicago, Ill., for appellant.

Thomas A. Banning, of Chicago, Ill., and Howard G. Cook, of St. Louis, Mo. (George F. Haid, of St. Louis, Mo., of counsel), for appellee.

Before SEAMAN and KOHLSAAT, Circuit Judges, and SANBORN, District Judge.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



SANBORN, District Judge (after stating the facts as above). [1] The ground upon which the bill was dismissed is thus stated in the brief for appellee:

"The court below became convinced that appellant was not entitled to equitable relief by way of a preliminary injunction, and that it could not, under the usage and practice of courts of equity, properly assume jurisdiction of the cause, especially as to claim 1 of patent 514,097, with which the remaining claims of said patent and patent 703,313 were inseparably joined by the thirteenth paragraph of the bill, so that, if the court could not properly assume equitable jurisdiction of claim 1 of patent 514,097, it could not, under the sole allegation of conjoint infringement of both of the patents and of all the claims inseparably and indistinguishably, retain jurisdiction of the remaining claims of the two patents involved, for that would have left the bill defective, in that there would then have been no proper allegation of infringement of such remaining claims, and so the court below quite properly dismissed the bill in its entirety."

It thus appears that the suit was dismissed, not on account of want of jurisdiction over the parties or subject-matter, but for the supposed lack of equity jurisdiction. It was supposed because a court of equity will not usually grant a preliminary injunction in the case of a patent about to expire the jurisdiction in equity was thereby affected.

It is the common practice to dismiss bills brought upon patents about to expire, when it clearly appears that no right to a preliminary injunction existed at the time the bill was filed. Many of the cases are cited in the briefs, the leading one being *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392. Equity jurisdiction in patent cases depends on the right to an injunction at the time suit is commenced. If it appears, therefore, that no facts then existed supporting the right to an injunction, and that the patent sued on will expire before any final decree can be made, the remedy at law is entirely adequate, and the equity suit, since it can avail nothing, must be dismissed because there is no equity jurisdiction. If, however, facts existed when suit was commenced which might, in any view, sustain an injunction, the question is not then one of jurisdiction, but one of discretion in the exercise of jurisdiction. This distinction is explained in *Babcock v. Farwell*, 245 Ill. 14, 33, 91 N. E. 683, 137 Am. St. Rep. 284, 19 Ann. Cas. 74, and was applied to a case quite different from this by this court, in *Chicago Title & Trust Co. v. Newman*, 187 Fed. 573, 109 C. C. A. 263.

[2] The view taken by the trial court was that, no right to a temporary injunction under the first patent appearing, the case upon both patents should be dismissed because of the allegation of conjoint infringement under a claim which might sustain an injunction and others which could not. Even in this view, the question presented was not one of equity power, but merely a suggestion whether the bill should not be amended so as to claim an injunction under the second patent alone. Defendant (under the allegations of the bill), by making and sale of a machine, was taking property rights secured to complainant by two patents, which were conjointly used by complainant. Clearly it is not an abandonment of the right to an injunction for com-

plainant to allege that the improvements described in both patents are conjointly used. This allegation was made to justify joinder of the two patents in one suit, and should not be deemed to destroy the most important remedy given by the patent law, the writ of injunction.

The decree is reversed, with direction to proceed in any manner not inconsistent with this opinion.

Reversed.

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**BARRY et al. v. HARPOON CASTOR MFG. CO.**

(District Court, S. D. New York. December 12, 1912.)

**PATENTS (§ 328\*)—INVENTION—FURNITURE TIP.**

The Alleyn patent, No. 995,758, for a furniture tip consisting of a flattened spheroid of smooth sheet metal for attachment to the bottom of the legs of chairs or other furniture by means of integral prongs on the rim which are driven into the wood, in view of prior structures in the same and analogous arts, which show round-headed nails and rim-pronged nails and spots used as supporting tips for leather bags, etc., is void for lack of patentable invention.

In Equity. Suit by Charles D. Barry and others against the Harpoon Castor Manufacturing Company for infringement of letters patent No. 995,758, for a furniture tip, issued to Henry M. Alleyn June 20, 1911. On final hearing. Decree for defendant.

Beard & Paret and Frederic W. & Alfred E. Hinrichs, all of New York City, for complainants.

Henry N. Paul, Jr., and Joseph C. Fraley, both of Philadelphia, Pa., for defendant.

MAYER, District Judge. Complainants' articles are the furniture slides or castors known as "Domes of Silence" (sometimes called "Invisible Castors"). They have become very popular and successful commercially, as have the "Harpoon" castors of the defendant. If the patent is valid, defendant's devices clearly infringe, and it is refreshing that in this case the defendant does not seek to differentiate, by attenuated distinction, its article from that of complainant, nor to cite a multitude of prior art references, when upon the important and controlling references the case must stand or fall.

The record at first impression presents two basic questions: (1) Patentability in view of the prior art; and (2) patentability in view of the proceedings before the United States Patent Office.

It is contended on the second (*supra*) proposition that, in any event, the proceedings in the Patent Office rendered the patent void. It is unnecessary to determine this question, because it seems to me that the case is disposed of by the prior art.

As introductory, it may be observed that the court is not inappreciative of the proposition that simplicity or slight change does not necessarily negative invention. On the other hand, a clever improvement by the skilled artisan may produce a highly successful device, and yet

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not rise to the dignity of invention and thereby close the door to competition.

A device substantially the same as that under consideration was first patented in Great Britain by one Alleyn, described by himself, and later, somewhat picturesquely by counsel for complainant as a "Ceylon Planter." That is the difficulty. If, instead of being a Ceylon planter, he had been a furniture man, he might not have been so sure of inventive genius. Later, on December 30, 1908, Alleyn filed his application in the United States Patent Office, and the patent was granted June 20, 1911.

Stripped of expert and technical phraseology, the invention claimed consists of three features: (1) A smooth, readily sliding device, practically invisible, whereby a chair can be moved about with a minimum of friction; (2) a physical form which will allow the chair to rest in proper position on a floor whether carpeted or not; (3) a simplicity of construction and material (necessarily hard), which will enable any one to hammer the device, without skill, to the bottom of a chair leg without denting.

The sole claim is:

"In an article of manufacture, a tip for supporting wooden chairs and the like, adapted for contact with a support therefor, consisting of a continuously curved convex portion of smooth sheet metal having an upturned rim continuously connected to said convex portion around its perimeter, and prongs of said sheet metal integral with said rim, projecting substantially in the plane thereof at the point of attachment, and adapted to be driven by the blows of a hammer into the wood of the article to be supported, said convex portion, rim, and prongs, having a resisting power to the blows of said hammer sufficient to substantially prevent the flattening or breaking thereof, whereby said tips may be attached without malformation or fracture."

In the British patent of Alleyn, the patentee here (filed April 2, 1908, complete specification October 2, 1908, and accepted March 11, 1909), it is apparent that what he believed he had invented was a nail in the shape of a flattened spheroid which would be superior to the old-fashioned castors because the chair would slide more readily and the disc be more or less invisible.

Among the fifteen figures, illustrative of his different forms, will be found several which show that the disc has a central shank like any ordinary round-headed nail. Particularly is this evident in Fig. 1, which closely resembles the Thonet chair tip hereinafter to be referred to.

The Fig. 5 shows a tip of similar shape, having rim prongs and representing substantially the "Domes of Silence."

The attachment means figured in the British patent are regarded as equivalent desirable methods of attachment, and no emphasis is laid on the rim-pronged shape which is now the subject of controversy. The disc or castor is necessarily of metal, but no mention is made of the kind of metal to be used. Pronged round-headed nails of all shapes and sizes are old and known to many arts.

The prior or analogous arts may be considered under three heads: (1) Round-headed nails used for chair tips; (2) rim-pronged nails

and spots used for various purposes; (3) rim-pronged "spots" used as supporting tips for leather bags.

1. Round-headed nails used for chair tips:

(a) Gebruder Thonet of Vienna are well-known manufacturers of bent wood furniture with a large branch house in New York. The published illustrated catalogue of this firm, dated September, 1905 (satisfactorily proved), shows in German the following description (translated):

"Carpet saver (parquet saver). On demand, all seating furniture can be made with sliding nails attached to the feet. Advance price 30 Heller per furniture piece."

The sales of this article were substantial.

The only important difference between the Thonet and the Domes of Silence is the method of attachment to the chair; the Thonet involving attachment by a central shank in a bored hole, and the "Domes" attachment by rim prongs hammered directly into the wood.

In the English patent, Fig. 1 would seem to closely resemble the Thonet.

(b) The Berbecker & Rowland chair tips show a slightly more rounded head than the Thonet with a slightly thicker spindle. The evidence as to consistent manufacture and sale since 1896 in this country is convincing. There does not seem to be any substantial difference between these tips and the "Domes," except as to method of attachment; the former by central shank and the latter by rim prongs.

2. Rim-pronged nails and spots used for various purposes:

(a) British Baker patent. The patent is entitled "Improvements in nails for coffins, articles of furniture and other uses," and discloses as its purpose the prevention of detachment of the heads of nails from the shanks.

The Baker nail is practically a hemisphere as distinguished from the flattened spheroid of the Domes of Silence. Complainants' expert emphasizes the V-shaped ears of the nail referred to in the Baker specification as indicating that these ears when driven would expand outward, although some of the figures of the patent show the prongs parallel with the rim of the nail, and figure 3 shows that the shape of the ears when driven into the wood is not a V-shape. In affixing the nail to an article of furniture, Baker states that the head or shell is struck by a hammer "in the usual way," and in making the nail he takes "a circular blank of sheet metal cut out at a press; the said blank being provided at its edge with 2, 3, or more V-shaped ears."

We thus have clearly the suggestion of integral prongs and a hammering presumably without denting. It may be that the Baker patent contemplated an ornamental use, although the specification reads "having an ornamental or *other* head." If we stopped here there might be something to say about the inventive characteristic of complainants' Domes, but the March design patent for an ornamental rivet was granted as far back as November 22, 1898, and shows substantially the same construction as the Domes. It is true that the Domes have three prongs, but there is nothing either in the claim or the specifica-



tion to indicate that more than two prongs are necessary in the manufacture of a device which follows the Alleyn patent.

In the specification, reference is made to "a plurality of integral pointed prongs" and in the claim to "prongs." The March United States Patent (No. 29,699) is owned by Standard Rivet Company, apparently a substantial concern which has been manufacturing "spots" for many years under this patent. All of these "spots" consist of a hollow flattened spheroid with rim prongs, and all sizes are made in two shapes, one more rounded and the other slightly flattened, known, respectively, as the "crown heads" and the "flat heads," the latter of which closely resemble, if indeed they do not correspond to, the shape and configuration shown in the drawing of the Alleyn patent and to the shape of the Domes manufactured thereunder. These spots are used on dog collars, saddles, and, as the catalogue of the Standard Rivet Company states, "other thick work."

3. Rim-pronged "spots" used as supporting tips for leather bags:

But the most important use of the Standard Company "spots," so far as important here, is in connection with hand bags or satchels. Five thousand of these spots were sold in July, 1908, to a large trunk and bag house in Rochester, N. Y., and there is in evidence a bag to which these spots are attached of the style made and sold by this Rochester house throughout the year 1908. A witness for the defense produced an old hand bag purchased in Boston in the year 1904, which likewise has spots or rivets attached to the bottom of it.

With the date thus fixed of the manufacture and sale of these bags with "spot" attachments, it is apparent, and, indeed, well known, that these spots on the bottom of a hand bag are attached in order to enable the hand bag to be slid easily, and necessarily to carry some weight when, for instance, slid along the package room of a railroad station or a hotel. With this bag before him a skilled artisan in this art could, I think, see without much difficulty that the same device could be utilized for the same general purpose when applied to hard wood, provided the material out of which the device was made was sufficiently strong. He might then conclude (if it were an issuable fact in this case), as would likewise be obvious, that three prongs would be better than two.

But in any event, with these Standard Rivet Company's spots before him, the Baker patent, the Thonet, and the Berbecker & Rowland tips, it would not take invention to realize that a strong hard metal would accomplish what is accomplished by complainants' device. *N. Y. Belting & Packing Co., Lim., v. Sierer*, 158 Fed. 819, 86 C. C. A. 79.

The proceedings in the Patent Office show that what really turned the scale in favor of the issuance of the patent was the strength of the material, although the final decision is placed on other grounds, clearly contradictory of the previous decisions of the examiners.

Had there been before the Patent Office a March spot made of German silver, I am inclined to think that the patent would not have been issued.

On the argument I asked that the Standard Rivet Company's spot (No. 37) be specially made of hardened steel. This has been done,

and while, on experiment, it appears that "spots" made of softer metal are dented in the driving, it equally appears that "spots" made of this hardened steel are driven by an inexperienced hand as effectively as the complainants' device. In the dilemma in which Alleyn found himself in respect of material, he concluded that he must leave its selection to the artisan, and so in his specification he stated "the means by which these tips may be rendered sufficiently hard to prevent them from being malformed in use is well known to those skilled in the art"; and in his claim he referred to "smooth sheet metal," which, of course, again left the selection to the artisan. The rest of the claim, so far as it deals with hammering the device, must be regarded as either an evasion or as an obvious result of choosing the right material.

Complainants urge with great emphasis that the success of their article should determine the question of invention.

In a doubtful case success and utility often resolve the doubt. This case cannot be said to be doubtful; but, if it should be so regarded, it is one of the cases where it may well be urged that considerations in addition to the efficiency of the device have contributed to its success, such as the ingenious name under which sold and the more extended use in connection with carpets, rugs, and parquet or other uncarpeted floors of various kinds of devices seeking to accomplish the same result.

Finally, it is urged that a new use was found in employing this article for the legs of furniture as contrasted with its previous application to the bottom of leather bags and satchels. On this branch, the case comes well within such authorities as *Pennsylvania Railroad Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222.

For the reasons outlined, the bill will be dismissed; but, although the defendant has the right to manufacture and sell its device, its method of starting its business was such that I think costs should not be awarded to it.

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UNION SPECIAL MACHINE CO. v. METROPOLITAN SEWING MACHINE  
CO. et al.

(District Court, S. D. New York. December 30, 1912.)

No. 9,172.

PATENTS (§ 328\*)—INFRINGEMENT—RUFFLING SEWING MACHINE.

The Woodward patent No. 655,143 for a ruffling sewing machine, consisting generally of a combination of a sewing machine and a ruffling device with means by which the ruffling device may be thrown in and out of operation without stopping or retarding the sewing, and leaving both hands of the operator free to manipulate the work, narrowly construed as an improvement patent, as required by the prior art, *held not infringed*.

In Equity. Suit by the Union Special Machine Company against the Metropolitan Sewing Machine Company, Lucius N. Littauer, and

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Charles McC. Chapman for infringement of letters patent No. 655,143 for a ruffling sewing machine, granted to Woodward July 31, 1900, and also the Stocker patent No. 583,391, granted May 25, 1897. On final hearing. Decree for defendants.

Joseph C. Fraley, of Philadelphia, Pa., and Charles L. Sturtevant, of Washington, D. C., for complainant.

Edward S. Beach, of New York City, for defendants.

MAYER, District Judge. The controversy has been narrowed to a consideration of claims 5, 9, and 11 of the Woodward Ruffling Sewing Machine. The defenses are invalidity, noninfringement, and joint invention.

On the evidence there is a serious question, to say the least, as to whether Woodward was the sole inventor, and the testimony and surrounding circumstances point strongly to the joint inventorship of Swift and Woodward. The length of time during which Swift kept silent is not necessarily inconsistent with his testimony now. Very often an employ   does just as Swift did and speaks only after he has been discharged, or for some other reason has severed his relations with his employer. It is not necessary, however, to make a determination on this point.

Should there be other litigation, the court under the new equity rules, will presumably have the opportunity of seeing the witnesses; and I am inclined to think that the impression which may be made by Swift on oral examination will be the most important element in reaching a satisfactory conclusion as to the part he played in the claimed invention.

The alleged invention relates to an improvement in sewing machines, and has especial reference to a combined ruffling and sewing machine; the ruffling mechanism being applied to the sewing machine and so arranged as to be thrown into and out of operation without stopping or retarding the action of the stitch-forming mechanism, even when running at very high speed. The special work for which this machine was devised is for gathering or ruffling the back of a shirt across the shoulders and, in a continuous operation, properly turning the edges and securing thereto the pieces of the double yoke. One operator can thus do the work formerly done by three, and thereby a large saving in expense of manufacture is accomplished.

The claims are as follows:

"(5) The combination with a sewing machine, of a ruffling device, actuating mechanism therefor, operative connections between the two, and means under the control of the operator, co-operating with said operative connections, for throwing the latter into and out of operation, the said controlling means being relatively stationary with respect to the operative connections and so located as to be operable independent of the hands of the operator, whereby said controlling means are accessibly presented to the operator irrespective of the speed of the mechanism controlled thereby, the ruffling device may be thrown into and out of operation without stopping or retarding the action of the sewing machine, and both hands of the operator may be left free to manipulate the work; substantially as described."

"(9) The combination with a sewing machine, provided with suitable stitch-forming mechanism, and having in combination therewith means for guid-

ing independent overlapping pieces of fabric to the stitch-forming mechanism, a ruffling device, actuating mechanism therefor, operative connections between the two, and means under the control of the operator, co-operative with said operative connections, but not substantially partaking of the movement thereof, said controlling means being adapted to be operated independently of the hands of the operator, whereby the ruffling mechanism may be rendered operative or inoperative without stopping or retarding the action of the sewing machine, and leaving both hands of the operator free to manipulate the work; substantially as described."

"(11) In combination with a sewing machine, a ruffling device with means for operating it, means for throwing the same into and out of operation without stopping or retarding the action of the sewing mechanism, said means under the control of the operator acting positively upon the ruffling attachment in one direction and automatically acting in the opposite direction when released by the operator; substantially as described."

The term "ruffling device" includes comprehensively any form of mechanism which is capable of fulling, gathering, or puckering a piece of fabric.

The term "stitch-forming mechanism" comprises that group of devices which, in various forms and with great difference of detail, is found in all organized sewing machines; the elements co-operating with one another to manipulate the thread and properly secure it to the fabric.

The expression "controlling means" refers to a group of parts whose elements may be varied, but whose definite function is to throw the ruffling device into and out of operation and maintain it either in its operating or inactive position.

The expression "actuating mechanism" for the ruffling device refers to those particular parts of the organization which cause the operating movements of said device, in order to make it pucker, or crowd, or ruffle the fabric, as distinguished from the group of parts of which it is thrown into and out of operation.

The expression "means for guiding independent overlapping pieces of fabric," comprises certain elements which are not directly included in the stitch-forming mechanism, but which compel the respective pieces of fabric to travel in a definite relation to one another, as they are drawn into the stitch-forming mechanism.

The expressions "acting positively in one direction" and "automatically acting in the opposite direction" denote the fact that the operator must in some way produce, by the hand or foot, a given motion, and that upon the removal of the hand or foot the machine itself will cause the return of the parts to their former position.

The expression "operative connections" refers to a group of parts which intervene between the ruffling device proper (i. e., the blade or its equivalent) and the mechanism which imparts the forward and backward movements thereto. The "controlling means" are said to "co-operate" with these connections, but without partaking of their movement.

Claim 5, which is the broadest of those now in issue, is for a combination of certain main elements, to wit, a sewing machine, a ruffling device, actuating mechanism for the ruffling device, operative connections between the ruffling device and its actuating mechanism, and



means co-operating with said operative connections for throwing them into and out of operation, with certain qualifications of the controlling means stated to be as follows, viz.: They are relatively stationary in respect of their operative connections, and they are so located as to be operable independently of the hands of the operator; the purpose of the organization being that the controlling means shall be "accessibly presented to the operator irrespective of the speed of the mechanism controlled thereby," in order that the ruffling device may be thrown into and out of operation without stopping or retarding the sewing, and also in order that both hands of the operator may be left free to manipulate the work.

This statement of the qualifications and functions of the several parts sets forth the real point claimed for this invention, viz., that the operator shall be enabled to properly manipulate the fabric with her hands, and absolutely control the ruffling action, independently not only of the sewing operation, but independently of her own handling of the fabric, which in commercial work, at the enormous speed now used, is an absolute necessity.

Whilst, theoretically, the operator could employ her hands for shifting the ruffling device at the exact moment, she needs them both to handle the fabric itself, as it is being whirled through the machine at a rate of 40 or 50 stitches per second, which, at the rate of 10 stitches to the inch, means a travel of the goods equal to 4 or 5 inches every second, so that a given piece of work, such as a yoke, is begun and completed in 3 or 4 seconds.

The pieces of work follow each other in immediate succession, so that the operator must be able, within the almost instantaneous act of sewing each one, to get hold of the operating mechanism at the proper instant, control it properly to bring the ends of the fabric out even, and let go at the instant of completion; and this operation must be repeated two or three times during the brief travel of a single piece of work through the machine.

Claim 9 includes the features just enumerated, and introduces the further element of guides, whereby independent, overlapping pieces of fabric are compelled to travel in the proper relation to the stitching mechanism.

Claim 11 covers broadly the combination of the sewing machine, the ruffling devices, and the means for throwing the latter into and out of operation without stopping or retarding the sewing, but adds the qualification that the controlling mechanism acts positively in one direction and automatically in the other, when released by the operator. This may be organized to work either way. In other words, the machine may do the puckering or gathering normally, and it may require a positive action of the operator to throw the ruffling device out of operation; or the ruffling device may be normally inactive, and the operator may be obliged to positively throw them into operation. In either case, however, the automatic mechanism will return the device to what may be considered as its normal position when the operator releases it.

Complainant's machine is commercially known as a "yoke-ruffling" machine, and defendants' machine as a "collarette" machine. They have never come into competition, and were obviously designed for different purposes and uses; the Woodward in connection with the manufacture of shirts, shirtwaists, and the like; the defendants' machine in connection with the sewing on of collarette bindings to the neck of knitted underwear, such as the so-called "athletic" undershirt.

At final hearing a practical demonstration was given, and at first glance this complicated and useful machine in action would impress the layman as a quite remarkable device; but an examination of the prior art demonstrates that the Woodward patent is not primary, and must be narrowly construed. Woodward was by no means a pioneer, and at most an improver. The question of invention is close, in view, especially, of what are called in this suit the Muther, Woodward, and Holland defense and the Laubacher defense; but that question may be left open, because unnecessary to the determination of this case.

The charge of infringement rests on the alleged equivalency of defendants' machine; but that charge is negated by the history of the prior art, and is not sustained by even the complainant's testimony.

(1) Complainant's and defendants' machines are each capable of plain sewing in a straight line, without ruffling or fulling. In such straight-line, plain sewing, complainant's ruffling device, which is mounted on the gooseneck, and which is therefore conveniently referred to as an "overhead ruffling device," and defendants' differential feed-dog, which is mounted underneath the bedplate of defendants' machine, are both out of ruffling or fulling action.

(2) Complainant's overhead ruffling device, when thrown into operation, folds or laps a piece of material upon itself in plaits; and when it is not used for such plaiting or ruffling operation it has no function or utility whatever. On the other hand, defendants' differential feed-dog has two functions, one or the other of which is always actively performed whenever defendants' machine is operated. One of these two functions of defendants' differential feed-dog is to move in unison with a practically integral portion of the main feed-dog underneath the bedplate. In this adjustment and mode of operation, defendants' differential feed-dog moves at the same speed as the main feed-dog, and performs no fulling operation whatsoever. When this nondifferential movement of the differential feed-dog occurs, defendants' machine is similar to complainant's machine in respect to straight-line, plain sewing; and no controversy attaches to defendants' machine as a straight-line, plain sewing machine.

(3) The controversy exists between complainant's machine as a ruffling sewing machine and defendants' machine when its differential feed-dog moves at a higher rate of speed than the main feed. But:

(4) The Woodward patent machine, in relation to the overhead ruffling device, is like a number of prior sewing machines, some of which are shown in prior patents. Machines having ruffling or comparable devices located on the gooseneck, or otherwise above the bed-

plate, constitute a long-existing class of machines, which are entirely distinct in construction and mode of operation from another old class of sewing machines, in which a main feed and a differential feed-dog of one form or another are located underneath the bedplate; the differential feed-dog being mechanically arranged to reciprocate when the main feed reciprocates, but at a different speed, so as to effect a ruffling, plaiting, or fulling operation of one type or another, as desired. The Woodward patent machine may be said to be a mechanical descendant of Davis' United States patent No. 93,063, of July 27, 1869; while defendants' machine may be said to be a mechanical descendant of Israel Singer's differential feed-dog patent No. 14,475, of March 18, 1856.

Complainant's machine cannot perform the only work that defendant's machine is practically capable of doing, to wit, the fulling of knit goods up the front openings and around the necks of knit undershirts, when bindings are to be applied at such openings; and, on the other hand, defendants' machine cannot be practically used for "gathering or ruffling the back of a shirt across the shoulders and at the same time, or in a continuous operation, properly turning the edges and securing thereto the pieces of a double yoke," as stated in the Woodward patent. See test. Stover and Collins.

Finally, the testimony of complainant's expert falls far short of the proof necessary to show equivalency. *Machine Co. v. Murphy*, 97 U. S. 120-125, 24 L. Ed. 935; *Amer. Steel & Wire Co. v. Denning Wire & Fence Co.*, 194 Fed. 117, 114 C. C. A. 195; *William B. Scaife & Sons Co. v. Falls City Woolen Mills (D. C.)* 194 Fed. 139; *Davey Pegging Machine Co. v. Isaac Prouty & Co.*, 107 Fed. 509, 510, 46 C. C. A. 439. He testified that the specific devices in the Woodward patent were not the mechanical equivalents of the corresponding specific means in the defendants' machine, but claimed that, although the individual elements which make up the groups of mechanical devices are not identical nor, part for part, mechanical equivalents of each other, nevertheless the respective groups in the two machines conjointly operate to give the same control of the ruffling, and, regarding these groups of specific devices in the two machines, that they produce the same result. But to support his position he relied on a generic interpretation of the claims (5, 9, and 11) now left in the suit, and such an interpretation cannot be permitted in aid of complainant's contention.

A comparison, detail for detail, would show several important dissimilarities in construction, more especially in that defendants' machine does not contain a corresponding device for lifting the ruffling blade and for returning the blade, without which devices the Woodward is inoperative. See, also, X.-Q. 107, C. R. p. 103.

For the reasons outlined, the complainant cannot prevail, and I may add that I am unable to discover any testimony upon which the individual defendants can be held liable on any theory.

The bill is dismissed, with costs, and the decree may be settled on five days' notice.

**JOHN KRODER & HENRY REUBEL CO. v. AMERICAN PIN CO.**

(District Court, D. Connecticut. December 26, 1912.)

No. 1,344.

**PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT.**

The Stevenson patent, No. 572,778, for a pole socket construed, and held not infringed.

In Equity. Suit by the John Kroder & Henry Reubel Company against the American Pin Company for infringement of letters patent No. 572,778 for a pole socket, granted to John H. Stevenson December 8, 1896. On final hearing. Decree for defendant.

George Cook, of New York City, for complainant.

Oscar W. Jeffery, of New York City, for defendant.

MARTIN, District Judge. This is an action for infringement of letters patent No. 572,778, issued under date of December 8, 1896. Prayer for an injunction and an accounting, but at the hearing plaintiff's attorney stated that no accounting was claimed. The complaint fully describes the patent, and the answer denies infringement and alleges prior art. No question is made but what the letters patent were issued and transferred to the plaintiff according to law.

An examination of the proceedings in the Patent Office and of the letters patent impresses me that the only novelty in the complainant's patent is the adjustment of the "lugs" or "ears." They stand out from the main socket just enough to protect the woodwork from injury by the use of the pole in the springing of the segment of the circle, or in adjusting or removing the pole. Everything else about this device is in my opinion covered by the prior art, and is not the product of genius or anything beyond mechanical skill. The patent thus limited was not seriously questioned by the defendant at the hearing, if questioned at all. It appears there has been no manufacture or use of the complainant's patent, hence the patent should be strictly construed. To hold a party guilty of infringement, it should appear that the particular adjustment of the "lugs" or "ears" of the complainant's patent has been infringed. The most that is claimed as to the defendant's infringement is that the formation of the cup that the defendant attaches to a plate of brass in the articles he manufactures, when flattened out, is substantially of the same shape as the complainant's design, but the cup that is used by the defendant has but one "lug" or "ear," which is riveted to said plate, and is so small that it cannot be used for any of the purposes designated in the complainant's patent. It is not attached to the window casing at all by the use of "lugs" or "ears." It has no "lugs" standing out from the rear of the socket and does not protect the paint from injury or the wood from wear by the use of "lugs," nor is it at all adapted to a warping pole or any of the uses set forth in the complainant's patent.

In my opinion, the articles manufactured by the defendant do not infringe.

Let the petition be dismissed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



## UNITED STATES v. PATTERSON et al.

(District Court, S. D. Ohio, W. D. June 26, 1912.)

No. 862.

**1. MONOPOLIES (§ 10\*)—SHERMAN ANTI-TRUST ACT—CONSTITUTIONALITY.**

The Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), making it a criminal offense to make any contract or engage in any combination or conspiracy in restraint of interstate trade or commerce, or to monopolize or attempt to monopolize or conspire with any other person or persons to monopolize any part of such trade or commerce, is a valid criminal statute, sufficiently clear in itself to inform the accused of the nature and cause of the accusation against him, and criminal prosecutions under it do not deprive the defendants of liberty or property without due process of law.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. § 10.\*]

**2. MONOPOLIES (§ 31\*)—SHERMAN ANTI-TRUST ACT—INDICTMENT FOR VIOLATION.**

If an indictment under the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), charges acts on the part of defendants which are in fact and necessarily in restraint of interstate trade and commerce, or effect a monopoly of some part of such commerce, by wrongfully injuring or destroying the business of competitors, defendants are presumed to have intended such consequences, and to have known that their acts were in violation of the statute.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.\*]

**3. MONOPOLIES (§ 31\*)—SHERMAN ANTI-TRUST ACT—INDICTMENT FOR VIOLATION.**

An indictment under the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), charging a number of defendants with a conspiracy in restraint of interstate trade and commerce, is sufficiently specific where it avers that defendants were the managing officers and agents of a corporation, who controlled the conduct of its business, and, while not naming particular instances specifically, describes the course of conduct and means used by the corporation, by which it compelled many competitors, some of whom are also named, to go out of business, or to sell their business to it.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.\*]

**4. CRIMINAL LAW (§ 1186\*)—RULES OF ADMINISTRATION—TECHNICAL DEFENSES.**

At the present time the reasons which formerly impelled courts to resort to technicalities in criminal cases to avoid the infliction of unjustly severe penalties have ceased to exist, and the effort now on the part of the judges is to overlook technicalities so far as possible, and to administer the law from a broad viewpoint, looking to ultimate justice upon the merits.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219; Dec. Dig. § 1186.\*]

**5. MONOPOLIES (§ 31\*)—SHERMAN ANTI-TRUST ACT—INDICTMENT FOR VIOLATION.**

An indictment for conspiracy in restraint of interstate commerce, in violation of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), charges an offense, where a general charge is made of restraint of trade in a particular article, pur-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

suant to a conspiracy for the purpose, and specific facts are alleged, which, if true, show that defendants have restrained a part of that trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.\*]

**6. MONOPOLIES (§ 12\*)—SHERMAN ANTI-TRUST ACT—CONSPIRACY IN RESTRAINT OF TRADE.**

If the purpose of a conspiracy is to restrain interstate trade, within the meaning of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), the degree of restraint effected thereby is immaterial to the offense.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.\*]

**7. MONOPOLIES (§ 31\*)—SHERMAN ANTI-TRUST ACT—INDICTMENT FOR CONSPIRACY IN RESTRAINT OF TRADE.**

In an indictment under the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), for conspiracy in restraint of interstate trade and commerce, it is not necessary to allege an overt act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.\*]

**8. MONOPOLIES (§ 31\*)—SHERMAN ANTI-TRUST ACT—INDICTMENT FOR "MONOPOLY."**

An indictment for monopolizing a part of interstate trade and commerce, in violation of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), sufficiently charges such monopoly, where it alleges that pursuant to a conspiracy therefor defendants monopolized a part of the trade in a single article entering into such commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4570-4574.]

**D. MONOPOLIES (§ 31\*)—SHERMAN ANTI-TRUST ACT—MONOPOLY OF INTERSTATE COMMERCE.**

Where defendants acquired a monopoly in a part of interstate commerce through a conspiracy for the purpose, the continuance of such monopoly after the conspiracy has accomplished its purpose and ceased to exist is in itself an offense under the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647, § 2 [U. S. Comp. St. 1901, p. 3200]), and the conspirators are criminally liable therefor, although the business is conducted by a corporation which is controlled by them.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.\*]

**10. INDICTMENT AND INFORMATION (§ 129\*)—SHERMAN ANTI-TRUST ACT—INDICTMENT FOR VIOLATION—DUPLICITY.**

In an indictment under the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), counts for conspiracy in restraint of interstate commerce, for conspiracy to monopolize a part of such commerce, and for monopolizing a part of such commerce may be joined.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 414-418; Dec. Dig. § 129.\*]

Criminal prosecution by the United States against John H. Patterson and 29 others. On demurrer to indictment. Overruled.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The following true bill of indictment against the several defendants therein named was presented February 22, 1912:

**First Count.**

**Southern District of Ohio, Western Division—set.**

The grand jurors for the United States of America impaneled and sworn in the District Court of the United States for the Western Division of the Southern District of Ohio at the February term thereof in the year nineteen hundred and twelve, and inquiring for that division and district, upon their oath present, that throughout the twenty years last past, inventors and manufacturers have been busy inventing, producing and putting upon the market divers record-keeping and cash-receptacle devices, usually called cash registers, each consisting generally of a box, principally of metal, but partly of wood, glass and other materials, containing a drawer or recess for the holding of coins and paper money, and a mechanism, manipulated by outside keys or similar means, for the use of employes in registering, for the information of the proprietor, upon a concealed and locked record, the sales made by employes of the business concern making use of the device, and at the same time visibly indicating the amount of each sale or the character of each transaction; the recording or registering devices being so connected with the lock of the money-drawer that when any of said devices is operated the money-drawer is unlocked and opened, so that money can be placed therein and change extracted therefrom; said money-drawer being automatically locked upon being closed, and the interior mechanism of said registering device being protected by a lock, the key of which is retained by the proprietor, from being interfered with by unauthorized persons; numerous patents having, during said twenty years, been issued to inventors, some basic and some for improvements; most of the former and many of the latter having expired long before the three-year period of time in this indictment hereafter mentioned; and the number of such patents being so great as to prevent the setting forth in this indictment of detailed descriptions of the same, or of the various inventions covered by them, even if such descriptions were known to said grand jurors:

That such cash registers have been found so useful and the demand for them has been so great that, during said twenty years, many concerns have been engaged, in the manner and under the circumstances in this indictment hereafter set forth and in competition with each other, except as hereinafter shown, in the manufacture and sale, directly and indirectly under letters patent, and otherwise, of such cash registers; and that a list of the names of such of said concerns as are known to said grand jurors, showing their respective places of manufacture, so far as known to said grand jurors, is as follows, to wit: The National Cash Register Company, a corporation, Dayton, Ohio. [Then follow names of 32 other companies.]

That of the total amount of manufacturing of such cash registers done by all of said concerns during said twenty years, said the National Cash Register Company has done from approximately eighty per cent. early in said period to approximately ninety-five per cent. at the latter end thereof.

That said concerns, during said twenty years, have also respectively sold the greater portion of the cash registers so manufactured by them, some to users of and some to dealers in such cash registers, whose several places of use and business have been situated in all the other states of the United States than those wherein such cash registers have been so manufactured by said concerns respectively, and have consigned for sale other such cash registers to such dealers, and to their own agents, in such other states; that in pursuance of such sales and upon such consignments, said concerns have respectively been continually shipping such cash registers to such users, dealers and agents in such other states; the number of such users, agents and dealers being so great, as said grand jurors, upon their said oath, charge the fact to be, as to make it impracticable, if not impossible, to set forth a list of them in this indictment; that, by reason of the great cost of such cash registers and as a means of furthering the sales thereof to users, it has been customary for said concerns and dealers to sell such cash registers to users

upon deferred payments in installments; and that in and by so manufacturing, selling, consigning and shipping such cash registers into other states than the state of manufacture, each of said concerns has been engaged in trade and commerce among the several states of the United States within the meaning of the act of Congress approved July 2, 1890, and entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said the National Cash Register Company has had certain persons for its principal officers and agents, each of whom, from the day of his becoming such officer and agent to the day of the finding and presentation of this indictment, or, in case he has ceased to be such officer and agent, from the day of his becoming such officer and agent to the day of his ceasing to be such, has been actively engaged in the management of the business and affairs of said the National Cash Register Company, under its authority, and to the full extent of his authority as such officer and agent; and that a list of the names of such of said persons as are known to said grand jurors, showing, so far as known to said grand jurors, the character of their several offices and agencies, and the time of their becoming such officers and agents respectively, and, in case they have ceased to become such officers and agents, the time when they so ceased to become such officers and agents (Christian names unknown to said grand jurors being indicated by initials), is as follows, that is to say: John H. Patterson, President, 1892-1912. [Here follows list of many officers and agents, with dates of service, including defendants charged.]

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said John H. Patterson, Edward A. Deeds, George C. Edgeter, William F. Bippus, William H. Muzzy, William Pfum, Alfred A. Thomas, Robert Patterson, Thomas J. Watson, Joseph E. Rogers, Alexander C. Harned, Frederick S. High, Pliny Eves, Arthur A. Wentz, George E. Morgan, Charles T. Walmsley, Charles A. Snyder, Walter Cool, Myer N. Jacobs, Mont. L. Lasley, Earl B. Wilson, Jonathan B. Hayward, Alexander W. Sinclair, John J. Range and Edgar Park, alias C. D. Foote, and M. G. Keith, W. M. Cummings, J. C. Laird, W. C. Howe and E. H. Epperson, whose Christian names are to said grand jurors unknown, hereinafter referred to as defendants, being as said grand jurors, upon their said oath, here charge they have been, the persons who have, by virtue of their being such officers and agents of said the National Cash Register Company, controlled and directed the business and affairs of said the National Cash Register Company, unlawfully have, continuously and at all times from the days when, as in this count above set forth, they respectively became officers and agents of said the National Cash Register Company to the day of the finding and presentation of this indictment, or to the days when they ceased to be such officers and agents, in cases where they did so cease to be such officers and agents, at and within said Western Division of said Southern District of Ohio, knowingly engaged and consciously participated in a corrupt conspiracy in undue, unreasonable, direct and oppressive restraint of said interstate trade and commerce so as aforesaid, during such times, carried on by the several concerns in this count above named other than said the National Cash Register Company, each of said defendants then and there well knowing, as he then and there did well know, all the premises in this indictment aforesaid, that is to say, a conspiracy to restrain, and which during and throughout such times has in fact restrained, said last-mentioned trade and commerce by divers unfair, oppressive, tortious, illegal and unlawful means, and means which, consideration being given to the advantage over said other concerns held by said the National Cash Register Company in consequence of its resources being, as they were, so great as compared with those of such other concerns respectively, have unlawfully, wrongfully and irresistibly excluded others from engaging in that trade and commerce, none of which has been justified or warranted by any letters-patent, a description of which conspiracy and means is now here set forth:

Intending to obstruct, restrict and restrain the free flow of said interstate trade and commerce so carried on by said concerns other than said the Na-



tional Cash Register Company, and compel those concerns either to go out of business or to sell and transfer their business and their facilities and instrumentalities for carrying it on to said the National Cash Register Company, so that said the National Cash Register Company could, as in most cases it in fact did, discontinue the business and the use of the facilities and instrumentalities so acquired by it, and thereby effectually and inevitably to eliminate and prevent all competition of such other concerns with said the National Cash Register Company (all of such other concerns being hereinafter referred to as competitors), said defendants, in their several capacities as such officers and agents of said the National Cash Register Company, have, by concerted action and continuous endeavor carried on the business and affairs of, said the National Cash Register Company upon a plan involving—

1. The inducing, hiring and bribing of employes and ex-employes of said competitors of said the National Cash Register Company deceitfully and wrongfully to disclose to said the National Cash Register Company the secrets of the business of the concerns by which they were respectively employed, or had been employed, particularly those relating to prospective buyers of cash registers, to customers who had ordered such cash registers, to those who had purchased but had not yet fully paid for such cash registers, to the shipment of cash registers to such customers and to agents and dealers, to the volume of business being done and the places where it was being done by such competitors, to inventions pertaining to cash registers and to drawings, specifications, claims and applications for patents for such inventions, and to the financial condition and connections of such competitors;

2. The inducing, hiring and bribing of employes of carters, truckmen, express companies, railroad common carriers, telegraph companies and telephone companies, wrongfully and unlawfully to disclose to said the National Cash Register Company the secrets of the business of such carters, truckmen, express companies, railroad common carriers, telegraph companies and telephone companies, pertaining to the carriage and transportation of cash registers for such competitors, including the number of such cash registers carted or shipped and the names and addresses of the consignees thereof, and pertaining to communications between such competitors and their agents and customers concerning the business of such competitors;

3. The instructing and requiring all sales agents of said the National Cash Register Company to ascertain and report to said the National Cash Register Company all facts and details pertaining to the business and activities of said competitors, and particularly of competitors newly coming into the competitive field, and the employing of agents especially so to do;

4. The using of the influence of said the National Cash Register Company and of its agents with, and the making of unwarranted and false statements to, banking and other institutions, to injure the credit of said competitors and prevent their securing accommodations of money, credit and supplies convenient and necessary to the carrying on of their business;

5. The instructing and requiring of all sales agents of said the National Cash Register Company to interfere with, obstruct and prevent, in every way possible, sales of such competitive cash registers by said competitors, and by agents of said competitors, and by dealers in cash registers, and by any and all means to bring about sales of the cash registers of said the National Cash Register Company, and also the displacement of such competitive cash registers and the substitution of the genuine cash registers of said the National Cash Register Company therefor in the hands of users of cash registers; and particularly by making to prospective purchasers of such competitive cash registers false and unwarranted statements derogatory of the same, and false, libelous and unwarranted statements reflecting injuriously upon the business character and financial credit of such competitors and upon their ability and intention to perform their undertakings and make good their warranties and promises with reference to the sufficiency, operation, repair and maintenance of their said competitive cash registers, and offering to sell and selling, to such prospective purchasers of cash registers from said competitors, genuine cash registers of said the National Cash Register Company at prices much less than the regular and standard prices therefor and upon unusually

favorable terms as to payments and deferred payments; by inducing, through such false, libelous and unwarranted statements and through said unusual offers, persons who had already ordered such competitive cash registers to cancel such orders and purchase the genuine cash registers of said the National Cash Register Company; by inducing, through such false, libelous and unwarranted statements and through such unusual offers, and through offers to make, and making, further reductions in prices of said genuine cash registers of said the National Cash Register Company equivalent to the amounts paid towards the purchase of such competitive cash registers, persons who had purchased, but only partially paid for, such competitive cash registers to repudiate their contracts of purchase with said competitors, and refuse to pay balances due upon such competitive cash registers, and return the same to such competitors; by inducing, through such false, libelous and unwarranted statements, in some cases persons who had bought and paid for such competitive cash registers, and in other cases persons who had only partially paid for such cash registers, to surrender the same to said the National Cash Register Company in exchange for genuine cash registers of that company upon such basis that those persons would lose nothing on account of their having so purchased such competitive cash registers, for the purpose of exhibiting, and thereupon actually exhibiting, such competitive cash registers, so obtained in exchange, in the windows of stores wherein genuine cash registers of said the National Cash Register Company were on sale, bearing placards, in some cases with the word "junk" printed thereon, in other cases with the words "For Sale at Thirty Cents on the Dollar" printed thereon, and in still other cases bearing words of similar import derogatory of and damaging to said competitive cash registers; by exhibiting and offering for sale to some prospective purchasers of cash registers, cash registers in similitude of any particular competitive cash register any such prospective purchaser was contemplating buying, and this at a price in all cases much lower than the regular price of such competitive cash register and in some cases at a price much less than the manufacturer's cost of such competitive cash register, which cash register so exhibited and offered for sale to such prospective purchaser as aforesaid was one manufactured by said the National Cash Register Company, solely as a so-called "knocker," in such close similitude of the competitive cash register in question as to enable the sales agents of said the National Cash Register Company to represent to such prospective purchaser, and impel such prospective purchaser to believe, as was often done, that it was in fact a cash register of such cheap and poor construction that it would be a waste of money to purchase it or the competitive cash register to which it was similar, such manufacture of such "knocker" by said the National Cash Register Company being discontinued when it was no longer useful as a "knocker"; by exhibiting and offering for sale, to other prospective purchasers of cash registers, cash registers in similitude of any particular cash register any such prospective purchaser was contemplating buying, and this at a price in all cases much lower than the regular price of such competitive cash register and in some cases at a price much less than the manufacturer's cost of such competitive cash register, which cash register so exhibited and offered for sale to such prospective purchaser as last aforesaid was in each case one manufactured by said the National Cash Register Company in such close similitude of the competitive cash register in question as to enable the sales agent of said the National Cash Register Company to represent to such prospective purchaser, and impel such prospective purchaser to believe, as was often done, it to be a counterpart thereof, when in fact it was a cash register having weak and defective interior mechanism and parts, and one manufactured by said the National Cash Register Company, with such weak and defective mechanism and parts, solely as a so-called "knocker," and for the very purpose of being so exhibited and offered for sale and enabling its sales agents to exhibit to such prospective purchaser such weak and defective mechanism and parts, and falsely claim that the competitive cash register to which it was similar had the same weak and defective mechanism and parts, as an argument against his purchasing any such cash register and one in favor of his pur-

chasing a genuine but more expensive cash register manufactured by said the National Cash Register Company, and at any rate for the purpose of shortly bringing about a sale of such genuine cash register to such purchaser, in case he insisted on purchasing such "knocker," through the failure of such "knocker" to operate, and for no other purposes, such manufacture of such last-mentioned "knocker" by said the National Cash Register Company being also discontinued when it was no longer useful as a "knocker"; and, finally, by instructing and requiring sales agents of said the National Cash Register Company, and persons employed for that purpose by that company, secretly to weaken and injure the interior mechanism, and remove and destroy parts of such mechanism, of such competitors' cash registers in actual use by purchasers, as they could by any means get their hands upon, and this for the purpose of causing, as in many cases it actually did cause, persons who had purchased such competitive cash registers to become dissatisfied with them and substitute for them genuine cash registers manufactured by said the National Cash Register Company;

6. The making, in some cases, by said the National Cash Register Company, to such competitors, and to purchasers and prospective purchasers of such competitive cash registers, of threats to begin suits in the courts against them for infringing and for having infringed its patent rights pertaining to its genuine cash registers, when as said defendants each well knew, no such patent rights existed and no such suit was contemplated or would really be begun, and such threats were made merely to harass such competitors, purchasers and prospective purchasers, and deter such competitors from manufacturing and selling such competitive cash registers in such interstate trade and commerce, and such purchasers from using, and such prospective purchasers from buying and using, such competitive cash registers;

7. The beginning, in other cases, by said the National Cash Register Company, against such competitors, and against purchasers of such competitive cash registers, of suits for infringement of patent rights of said the National Cash Register Company pertaining to its genuine cash registers, when in those cases, as said defendants each well knew, no patents upon which such suits could be maintained were in existence or owned or controlled by said the National Cash Register Company, and when, as said defendants each well knew, none of those suits would be further pressed, but all such suits would be kept pending only as long as they served the purpose of harassing such competitors and purchasers;

8. The organizing of cash-register manufacturing concerns and cash-register sales concerns, and the maintaining of them, ostensibly as competitors of said the National Cash Register Company, but in fact as convenient instruments for use in gaining the confidence and obtaining the secrets of said real competitors of said the National Cash Register Company and accomplishing the objects of said unlawful conspiracy; and the making of such use, also, of competitive concerns the ownership and control of which said the National Cash Register Company from time to time secured by the means aforesaid, and this as long as the fact of such ownership and control by said the National Cash Register Company could be kept secret;

9. The inducing, by offers of much greater compensation than they were receiving from said competitors respectively, agents and servants of said competitors, and dealers patronizing said competitors exclusively, to leave the employment of said competitors or cease patronizing said competitors, to enter the employment of or patronize exclusively, said the National Cash Register Company; and this principally for the purpose of embarrassing said competitors and restraining their said interstate trade and commerce;

10. By applying, and causing applications to be made, for letters-patent of the United States, in some cases upon the cash registers of said competitors and in other cases upon improvements upon such competitive cash registers, and this merely for the purpose of harassing such competitors by interference proceedings and suits and threats to institute such proceedings and suits; and—

11. The using of, or originating and using of, and the instructing and requiring of such agents and sales agents of said the National Cash Register



Company to use, or to originate and use, such other unfair, oppressive, tortious, illegal and unlawful means, unlawfully, wrongfully and irresistibly excluding other concerns beside said the National Cash Register Company from engaging in said interstate trade and commerce, as might at any time become, or appear to said defendants or agents or sales agents to be, necessary or convenient (consideration being had for the exigencies of said interstate trade and commerce arising from its being carried on between widely-separated places under many differences of condition and demand) for engaging in and accomplishing the above-described objects of said unlawful conspiracy; a description of which said means last aforesaid, other than that they were similar in character to the means hereinabove described, said grand jurors are unable to set forth in this indictment because, as they charge the fact to be, such means were so numerous in kind and so shifting in character as to make such description impossible.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said John H. Patterson, Edward A. Deeds, George C. Edgeter, William F. Bippus, William H. Muzzy, William Plum, Alfred A. Thomas, Robert Patterson, Thomas J. Watson, Joseph E. Rogers, Alexander C. Harned, Frederick S. High, Pliny Eves, Arthur A. Wentz, George E. Morgan, Charles T. Walmsley, Charles A. Snyder, Walter Cool, Myer N. Jacobs, Mont. L. Lasley, Earl B. Wilson, Jonathan B. Hayward, Alexander W. Sinclair, John J. Range and Edgar Park, alias C. D. Foote, and M. G. Keith, W. M. Cummings, J. C. Laird, W. C. Howe and E. H. Epperson, during the three years next preceding the finding and presentation of this indictment, at and within said Western Division of said Southern District of Ohio, in manner and form in this count of this indictment aforesaid, unlawfully have knowingly engaged and consciously participated in a conspiracy in undue, unreasonable, direct and oppressive restraint of trade and commerce among the several states in cash registers, and one to restrain, and which has restrained, that trade and commerce by unfair, oppressive, tortious, illegal and unlawful means, and means which have unlawfully, wrongfully and irresistibly excluded others from engaging in that trade and commerce; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

#### Second Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said John H. Patterson [and the other defendants named in the first count], at divers times during the three years next preceding the finding and presentation of this indictment, at and within said Western Division of said Southern District of Ohio, under the circumstances and conditions, and by use of the means, set forth and described in the first count of this indictment, unlawfully have, by drawing to said the National Cash Register Company and causing that company to grasp it, monopolized a part of the trade and commerce among the several states in cash registers, that is to say, that part of said trade and commerce which, but for their use of those means, in carrying on the business and affairs of said the National Cash Register Company in the manner in said first count specified, would, during that period, have been secured or retained, as a matter of lawful right, by the divers concerns, other than said the National Cash Register Company, mentioned in said first count as having carried on business during said three years; said means being, as in said first count shown and charged, unfair, oppressive, tortious, illegal and unlawful under said circumstances as against said other concerns, and of a nature, under said circumstances, irresistibly to exclude those concerns from engaging in that trade and commerce; said grand jurors being unable, by reason of the great extent thereof, and because the same are unknown to them the said grand jurors, to enumerate or describe the items of such trade and commerce in cash registers so monopolized by said defendants; and the allegations of said first count descriptive of such cash registers, of said interstate trade and commerce in the same and the concerns engaged therein, and of the means employed by said defendants to restrain said interstate trade and commerce, and the allegations of said first count as



to knowledge, intent and overt acts on the part of and by said defendants, being by said grand jurors incorporated in this count by reference as fully as if they were repeated in this count as part of the charge of monopolizing in this count made; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

### Third Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said John H. Patterson [and the other defendants named in the first count], having before the period of three years next preceding the finding and presentation of this indictment, in the manner, by the means, and under the circumstances and conditions, mentioned and described in the first count of this indictment, engaged, as said grand jurors, upon their said oath, here charge they did engage, in the unlawful conspiracy in said first count described, and having, in and by so engaging in that unlawful conspiracy, drawn as said grand jurors, upon their said oath, here charge they did draw, to said the National Cash Register Company, and caused, as said grand jurors, upon their said oath, charge they did cause, said the National Cash Register Company to grasp, a part of the trade and commerce among the several states in cash registers, that is to say, that part of said trade and commerce which, but for their so engaging in that unlawful conspiracy and their use of those means, in carrying on the business and affairs of said the National Cash Register Company in the manner and under the circumstances in said first count specified, would have been secured or retained, as a matter of lawful right, by the divers concerns, other than said the National Cash Register Company, mentioned in said first count as having carried on business before said period of three years (said means being, as in said first count shown and charged, unfair, oppressive, tortious, illegal and unlawful, under said circumstances, as against said other concerns, and of a nature, under said circumstances, irresistibly to exclude those concerns from engaging in that trade and commerce), and each of said defendants well knowing all the premises in this indictment aforesaid, unlawfully have, throughout said period of three years next preceding the finding and presentation of this indictment, continued to hold, conduct and carry on said interstate business of said the National Cash Register Company, so by said means before said period augmented, and thereby have monopolized said interstate trade and commerce in cash registers; said grand jurors being unable, by reason of the great extent thereof, and because the same are unknown to them the said grand jurors, to enumerate or describe the items of such trade and commerce in cash registers so as in this count aforesaid monopolized by said defendants; and the allegations of said first count descriptive of such cash registers, of said interstate trade and commerce in the same and the concerns engaged therein before said period of three years, and of the means so employed by said defendants to restrain said interstate trade and commerce, and draw to said the National Cash Register Company, and cause that company to grasp, said interstate commerce, and also the allegations of said first count as to knowledge and intent on the part of said defendants, being, by said grand jurors, incorporated in this count by reference as fully as if they were repeated in this count as part of the charge of monopolizing in this count made against said defendants; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Sherman T. McPherson, U. S. Atty., of Cincinnati, Ohio, Oliver E. Pagan, of Washington, D. C., Edward Moulinier, Asst. Dist. Atty., of Cincinnati, Ohio, O. E. Harrison, Sp. Asst. Atty. Gen., of Columbus, Ohio, and John L. Lott, Sp. Asst. Atty. Gen., of Tiffin, Ohio, for the United States.

John F. Wilson, of Columbus, Ohio, and Lawrence Maxwell, of Cincinnati, Ohio, for defendants.

HOLLISTER, District Judge. The indictment contains three counts, which may briefly and very generally be described as (1) a charge of conspiracy in restraint of interstate trade in cash registers during the three years preceding the date of the indictment, in the manner and by the means set forth; (2) a charge of creating a monopoly, during the same three years, of the cash register business by the means and in the manner set forth in the first count; (3) a charge of monopolizing such business, built up and augmented prior to the three years prior to the date of the indictment, through the conspiracy and by the means in the first count described, by continuing the business during those years.

The validity of the indictment is challenged on a number of grounds:

1. Because the matters and things set forth and charged do not constitute an offense against the laws of the United States.

2. Because the provisions of the act of Congress of July 2, 1890 (26 Stat. 209, c. 647), entitled "An act to protect trade and commerce against unlawful restraints and monopolies" are too vague, uncertain, and indefinite to create a criminal offense.

3. Because said act, in so far as it attempts to create offenses and impose penalties, is repugnant to the Constitution of the United States, and especially to section 1 of article 1, and to the provision of the fifth amendment, that no person shall be deprived of life, liberty, or property without due process of law, and to the provision of the sixth amendment, that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation, and to the tenth amendment.

4. Because the averments are too general, vague, indefinite, and uncertain to inform the defendants of the nature and cause of the accusation against them, or to apprise them with such reasonable certainty of the offense with which they are charged or what they may expect to meet on the trial as to enable them to make their defense.

5. Because it is not charged that any of the defendants has done any act to effect the object of the pretended conspiracy, or, if any such act is intended to be charged by the matters and things alleged in paragraphs 1 to 11, inclusive, of the first count, the same is not charged with sufficient definiteness and certainty.

6. Because it undertakes to charge separate and distinct offenses, and is therefore bad for duplicity.

[1] Among others, the broad question is here presented whether or not there can be any criminal prosecution under the Sherman Anti-Trust Act. The question is of the utmost importance. There is apparently much diversity of opinion upon it, and the Supreme Court have not yet directly passed upon the subject.

Counsel for defendants admit—as they must, in view of the many decisions of the Supreme Court sustaining civil actions under the act, brought either by the government or by individuals by virtue of express provisions of the act—that civil actions may be prosecuted, but contend that by reason of alleged vagueness and uncertainty, brought about by the decisions in the Standard Oil Case, 221 U. S. 1, 31 Sup.

Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, and the Tobacco Case, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, and because the statute itself fixes no standard of lawfulness or unlawfulness to which the conduct of individuals or corporations may be referred, no criminal prosecution can be based upon it.

The statute is vague and uncertain, they say, because, as they assume, the Supreme Court in *United States v. Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, have held that every restraint of trade, however slight or in whatsoever way it might be regarded at common law, comes under the ban of the statute; that by the later decisions the Supreme Court have interpolated the word "unreasonable" into the statute, and hence no man is advised by the statute whether any act contemplated by him is unreasonable or not; and that, as he cannot know, neither can any 12 men who are called upon to determine the quality of his acts, and that one jury might take one view and another jury a different view of the same conduct. Predicating their case on these assumptions, the defendants cite important authorities in support of their conclusion.

The substance of all the decisions relied on by them is found briefly stated by Justice Brewer, sitting with Caldwell, Circuit Judge, in *Tozer v. United States* (C. C.) 52 Fed. 917, 919:

"In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

The subject is discussed at length in a decision by Judges Baxter, Hammond, and Key in this circuit. *Louisville & Nashville R. R. Co. v. Railroad Commission of Tennessee* (C. C.) 19 Fed. 679. The case involved a statute of Tennessee, which created a Railway Commission, with power to revise tariffs and make new rates, if the present rate "is more than a just and reasonable compensation," or "amounts to unjust and unreasonable discrimination." The act provided, also, that the new rates were to be "a just and reasonable compensation," and if the corporations continued to demand more than that they were subject to indictment, and that "no rates or charges for service in the transportation of freight over any railroad shall be held or considered extortionate or excessive," if the evidence showed that the net earnings from its traffic would not amount to more than "a fair or just return" on a certain valuation. The statute was held invalid, because its provisions were too indefinite, vague, and uncertain to sustain a suit for the penalties imposed, and did not sufficiently define the offenses declared in it.

The same conclusions are found in *Louisville & Nashville R. R. Co. v. Commonwealth*, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457, *United States v. Capital Traction Co.*, 34 App. D. C. 592, 19 Ann. Cas. 68, *Czarra v. Board of Supervisors*, 25 App. D. C. 443, and *Ex parte Jackson*, 45 Ark. 158.

This claimed want of standard is emphasized in *C., B. & Q. R. R. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep.

278, and *Railroad v. People*, 77 Ill. 443, in which, under a statute similar to the Tennessee statute, it was held that the want of certainty of standard in the first section would not invalidate the act, because the eighth section provided for schedules of reasonable and maximum rates to be made by the Railroad Commission. In other words, there was a standard of rates provided by the act to which the railroads could conform.

The defendants justly attach importance to the report of the judiciary committee of the Senate, January 27, 1909, upon the then proposed amendment of the anti-trust act that:

"No suit or prosecution by the United States under the first six sections of the said act, approved July 2, 1890, shall hereafter be begun for or on account of this act, or any action thereunder, unless the same be an unreasonable restraint of trade or commerce among the several states or foreign nations."

This committee of eminent lawyers reported adversely, saying (page 10 of their report):

"The Anti-Trust Act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is reasonable or unreasonable would render the act, as a criminal or penal statute, indefinite and uncertain, and hence to that extent \* \* \* nugatory and void, and would practically amount to a repeal of that part of the act. \* \* \* Justice Brewer, in the case of *Tozer v. United States*, 52 Fed. 917, makes this perfectly clear and plain. In this case the defendant was indicted for violating the interstate commerce act, \* \* \* and upon this the court holds: 'In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be definiteness and certainty. \* \* \* No penal law can be sustained, unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.'"

Justice Harlan, in his dissenting opinion in the *Standard Oil Case* (221 U. S. 96, 97, 98, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834), quotes at length from that part of the report which deals with this subject. It is not to be overlooked, however, that the learned justice did not himself express an opinion on the point.

Attorney General Bonaparte and Solicitor General Hoyt, in their briefs in *American Express Co. v. United States*, 212 U. S. 522, 29 Sup. Ct. 315, 53 L. Ed. 635, commenting upon the failure of the Elkins Act to limit the word "discrimination" to "undue" or "unreasonable" or "unjust," argue that criminal prosecutions could not be based successfully upon statutes defining an offense with such uncertainty as the use of these adjectives import into them.

But even if defendants' assumption of the effect upon this statute of the decisions in the *Standard Oil Case* and the *Tobacco Case* be acquiesced in, and even if the word "unreasonable" were actually written into the law, there is strong ground for holding that the Supreme Court have in effect already decided the question.

*Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417, on error to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, involved the anti-trust statutes of that state, which made it unlawful for any corporation transacting or



conducting any kind of business in Texas to enter into or become a party to any agreement or understanding with any other corporation or individual to fix or regulate the price in Texas of any article of manufacture or merchandise, or to control or limit in Texas the trade in any article of manufacture or merchandise. It was further made unlawful for any such corporation to bring about or permit any union or combination of its capital, property, trade, or acts with the capital, property, trade, or acts of any other person or corporation, whereby the price in Texas of any article of manufacture or merchandise would be fixed or sought to be fixed, regulated or sought to be regulated, or whereby the price in Texas of any such article would be reasonably calculated to be fixed or regulated, or whether the trade in such article would be sought to be controlled or limited, or would be reasonably calculated to be controlled or limited.

It was in that case, among other things, insisted that the anti-trust laws of Texas were "so vague, indefinite, and uncertain as to deprive them of their constitutionality, in that they punish by forfeiture of the right to do business, and the imposition of penalties, under provisions of an act which do not advise a citizen or corporation, prosecuted under them, of the nature and character of the acts constituting a violation of the law." The objections are found in the words denouncing contracts and arrangements "reasonably calculated" to fix and regulate the price of commodities, etc., and acts which "tend" to accomplish the prohibited results.

The Supreme Court held that the anti-trust laws of Texas were not in contravention of the Constitution, as depriving any one of due process of law, because vague and indefinite in the prohibition of acts which "tend" or are "reasonably calculated" to restrain trade and competition. The opinion was delivered by Justice Day, who cites *Tozer v. United States* (C. C.) 52 Fed. 917, *Railroad Co. v. Dey* (C. C.) 35 Fed. 866, 1 L. R. A. 744, and *Louisville & Nashville R. R. Co. v. Commonwealth*, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457, and distinguishes the Texas statutes from these, in that those statutes—

"do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited."

And he goes on to say that the criminal law punishes not only a completed act, but also acts which attempt to bring about the prohibited result, and that it is sufficient if the acts really tend to bring about monopoly and to deprive the public of the advantages which flow from free competition. And he says further (212 U. S. 110, 29 Sup. Ct. 227, 53 L. Ed. 417):

"As to the phrase, 'reasonably calculated,' what does it include less than acts which, when fairly considered, tend to accomplish the prohibited thing, or which make it highly probable that the given result will be accomplished?"

He notes the fact that the decisions which announce the rules on which his opinion is based are in civil cases arising under the Sherman Anti-Trust Act, but he draws no conclusion from the fact. He also notes that the Texas laws were enacted by the Legislature of that

state and sustained in its courts, and then says (212 U. S. 111, 29 Sup. Ct. 227, 53 L. Ed. 417):

"We are not prepared to say that there was a deprivation of due process of law because the statute permitted, and the court charged that there might be a conviction not only for acts which accomplished the prohibited result, but also for those which tend or are reasonably calculated to bring about the things forbidden."

There would seem to be little difference in principle between submitting to a jury the question whether certain acts were "reasonably calculated" to bring about a certain result, and submitting to them the question whether acts in restraint of trade were unreasonable or not.

One cannot escape the conviction, after considering this decision, that the anti-trust acts of Texas are upheld as criminal statutes, not because of the difference in breadth of power given a court or jury to determine the criminality of an act in accordance with their belief in its reasonableness or unreasonableness, as the case might be, or because through process of law one charged with an offense under them could have his day in court, but because the Supreme Court of the United States in *United States v. Knight*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, the *Addyston Pipe Case*, 175 U. S. 237, 20 Sup. Ct. 96, 44 L. Ed. 136, the *Northern Securities Case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, and in *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, have decided that it is not essential, in order to bring a contract or combination in restraint of trade under the act, that its result should be a complete monopoly, but it was sufficient if it really tended to that end, and to deprive the public of the advantages which flow from free competition.

A clear deduction from this would seem to be that while in civil cases it is sufficient that a contract is in restraint of trade in the meaning of the act when it tends to restrain trade, so in criminal cases the same rule should be applied, as it indeed was applied in the Texas case, and that when a contract tends to restrain trade, or the acts complained of are "reasonably calculated," or are acts which "tend," to accomplish the prohibited thing, then the definition of the offense in a criminal statute containing such a description is not vague and uncertain, and it is not undue process of law to permit a jury to determine the tendency of the acts proscribed, and whether or not they are reasonably calculated in their tendency to accomplish the prohibited thing. In the evolution of the common law to meet changed conditions, an act directly tending to restrain trade, or the purpose of which was to restrain trade, was an unreasonable restraint, because it brought about an injury to the public, caused by enhancement of prices which the common law in the beginning sought to avoid.

The extent to which the Supreme Court have gone in upholding criminal statutes containing adjectives not exactly describing the offense at which the statute is aimed, but leaving room for the exercise by the jury of some discrimination in determining whether or not the acts complained of come within the characterization of the adjective, is illustrated by the case of *Ellis v. United States*, 206 U. S. 246, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589, in which the act

of August 1, 1892 (27 Stat. 340, c. 352 [U. S. Comp. St. 1901, p. 2521]), limiting the hours of laborers and mechanics employed by the United States or any contractor or subcontractor upon any of the public works of the United States to eight hours per day except in cases of "extraordinary emergency." Necessarily what constitutes an extraordinary emergency is a matter of opinion. Different juries might disagree on the same facts, and yet the court were clearly of opinion that whether or not the facts in the particular case constituted an extraordinary emergency might be left to the jury. And, further than that, the court seemingly have taken advanced ground in the modern desire and process of simplifying and freeing from ancient technicalities the administration of the law in criminal cases, by declaring that the judge below did right in instructing the jury that the evidence did not show an "extraordinary emergency" within the meaning of the act. In delivering the opinion of the court, Justice Holmes says (206 U. S. 257, 27 Sup. Ct. 601, 51 L. Ed. 1047, 11 Ann. Cas. 589):

"Even if, as in other instances, a nice case might be left to the jury, what emergencies are within the statute is merely a constituent element of a question of law, since the determination of that element determines the extent of the statutory prohibition and is material only to that end. The ruling was correct."

There seems to be firm ground upon which to base a ruling, even if the word "unreasonable" had been written into the statute, or even if the Supreme Court have read the word "unreasonable" into the statute, that the anti-trust act would not be so vague and uncertain, and so lacking in establishing a standard to which the acts of merchants must conform as to infringe any constitutional guaranties. But it is not true that the decisions in the Standard Oil Case and in the Tobacco Case have introduced the word "unreasonable" into the statute, or have required the use of that adjective in describing such acts as are to be avoided by those who wish to comply with the law, and it is not true that there is no standard erected by the statute by reference to which a man may know whether or not his acts come within its inhibition.

The Supreme Court say in those cases that the statute must be interpreted in the light of reason, guided by the principles of law, and to effect the purpose the law against restraints of trade always had in view. That purpose originally was to prevent restraints of any kind upon the free flow of commerce, since restraints brought about the attendant evils, particularly the enhancement of prices. The evils were at first supposed to flow from every restraint upon commerce, and the common law forbade any restraint. But in the course of time and under changed conditions it was seen that the application of the common law in its strictness was a bar to the free flow of commerce and proper development of trade, rather than a protection to it; and for that reason, but to accomplish the same purpose, namely, the protection of the public and the preservation of the right of individuals to contract, a rule by way of exception to the common law arose, which looked to the purpose or motive which underlaid contracts or acts in restraint of trade. If the purpose was to injure the public, by limit-

ing or suppressing competition and the right of individuals to contract, thereby enhancing prices and bringing about monopoly in whole or in part, or tending to do either, then such contracts or acts were held, under the changed condition of things, to be in restraint of trade.

Partial restraints—restraints incidental or collateral to the main purpose of the contract, accidental, secondary, or remote, and not directly the effect of it—are not regarded as restraints in the view of the law, in that they do not bring about the evils to which the public and individuals are subject by the suppression or the limiting of free competition, which same evils were aimed at by the rule at common law as it was originally and as it, in its evolution to bring about the same ends, has become; that is to say, such restraints are not wrongful. This is clearly pointed out by Chief Justice White in the Standard Oil Case, and he shows that that was the state of the law at the time the Sherman Anti-Trust Act was passed, both in England and in the United States (Standard Oil Case, 221 U. S. 56, 31 Sup. Ct. 514, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834 et seq.), and he shows to the extent of conclusive demonstration that, notwithstanding the apparent decisions in the Freight Association Case and in the Joint Traffic Association Case, in reality the rule applied in their decision was the same as the “rule of reason” adopted in the Standard Oil Case. He proves that the contracts enjoined in those cases were enjoined, not because there might incidentally result some restraint of trade in their operation, but because they operated directly and immediately upon interstate trade, and thereby suppressed or limited competition and created or tended to create monopoly, which results the common law forbade from the beginning. After reviewing the early English cases and acts of Parliament on the subject he says:

“From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law.”

And as the conclusion and the summing up of the whole matter he says (221 U. S., at page 58, 31 Sup. Ct. at page 515, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834):

“Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal of all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, *but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as the enhancement of prices, which were considered to be against public policy.*” (The italics are mine.)



When, therefore, a contract is of such character that it in itself directly brings about a restraint of trade, or tends to do so, it is wrongful, and comes within the description and meaning of the anti-trust act. The purpose of such a contract is disclosed on its face, and the contractors will be presumed to intend the consequences it naturally entails. When the acts which are in restraint of trade, or monopolize—which is the same thing (*Standard Oil Case*, 221 U. S. 61, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834)—or tend to monopolize trade, are proved, it is decided that the persons charged are to be held to have intended the necessary and direct result thereof. *Ad-dyston Pipe Co. v. United States*, 175 U. S. 216, 243, 20 Sup. Ct. 96, 44 L. Ed. 136.

In *Ellis v. United States*, 206 U. S. 246, 257, 27 Sup. Ct. 600, 602, 51 L. Ed. 1047, 11 Ann. Cas. 589, it appears that Ellis attempted to justify the employment on a public work undertaken by him of men for nine hours a day (the statute making such employment for more than eight hours unlawful) on the ground that he had more difficulty than he expected in getting certain oak and pine piles called for by the contract and was in a hurry to get the work done. The trial court instructed the jury that, if Ellis intended to permit the men to work over eight hours, he intended to violate the statute. In passing upon this charge, Justice Holmes said:

"The argument against the instruction is that the word 'intentionally' in the statute requires knowledge of the law, or at least that to be convicted Ellis must not have supposed, even mistakenly, that there was an emergency extraordinary enough to justify his conduct. The latter proposition is only the former a little disguised. Both are without foundation. If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

"In every case," says Chief Justice White, "where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied." *Standard Oil Case*, 221 U. S. 66, 31 Sup. Ct. 518, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834.

From the decisions in the *Standard Oil Case* and in the *Tobacco Case* and in the cases in the Supreme Court involving the anti-trust act, and the evolution of the common law (*Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 409, 9 Sup. Ct. 553, 32 L. Ed. 979; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865; *Mogul Steamship Co. v. McGregor*, L. R. [1892] A. C. 25, as illustrations) to meet modern conditions, and not to unduly restrain, but to encourage, trade, it may be said that a contract, combination, or conspiracy is in restraint of trade when it directly affects trade, and is entered into with intent to do wrong to the general public and to individuals, by restraining the free flow of commerce, and by bringing about or tending to bring about the maintenance or enhancement of prices, which, but for such acts, would adjust themselves

under conditions of free competition. Here, then, is to be found the standard of conduct, the absence of which, say the defendants, nullifies the criminal provisions of the anti-trust act. See remarks of the Chief Justice, *Standard Oil Case*, 221 U. S. 58, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834.

The defendants admit, as they must, that ignorance of the law will not excuse them. They must be held, then, to have known that at common law every restraint of trade was wrongful, and hence that, if they did what the indictment charges them with having done, their acts were contrary to the anti-trust act in its literal language; and they must be held to know of the exception to the common law which gives them a wider field of operation—which makes every restraint, brought about with the wrongful purpose of preventing the free flow of commerce and limiting the right of the individual to contract, unlawful. Let the act be interpreted either literally or in the light of reason—that is to say, to effect the purposes of the common law as they were from the beginning, whether meaning any restraint at all, or any restraint brought about by wrongful purpose—the defendants, if the acts charged in the indictment are true, were advised of the prohibitions of the act and the penalties provided therein. If the facts alleged are true, wrongful purpose is disclosed in every one of them. Indeed, if the defendants have in fact done what they are charged with having done, there is exhibited in this indictment a flagrant case of commercial piracy.

While the Supreme Court have not as yet directly sustained the validity of the anti-trust act as a criminal statute, yet the subject has received consideration by eminent authority. The constitutionality of the act has been sustained by Judge Carpenter in the *Beef Trust* prosecution, in his charge to the jury; by Judge Angell in the *Bath Tub Trust* prosecution, in which he overruled the demurrer to the indictment; by Judge Hand, in the *Sugar Trust* prosecution; and by Judge Putnam, in the *Shoe Machinery Trust Case* (D. C.) 195 Fed. 578, all since the decisions in the *Standard Oil Case* and in the *Tobacco Case*.

The act does not primarily grant any right to be enforced in a civil action. It creates an offense, a crime, describing what the crime is. To do the acts proscribed in the first and second sections is declared to be unlawful; that is to say, criminal. Hence the right given by section 7 to an individual to recover for injury to his business or property with threefold damages, and the right given by section 4 to the government to prevent by injunction a continuance of the acts complained of, are rights growing out of the commission of a crime, by whomsoever it may be, whose acts also subject him to the criminal penalties of the statute. If he has been guilty of a crime described in sections 1 or 2, then he may be restrained by the government in a civil action, or be compelled by an individual who has been injured in his business or property to respond in threefold damages.

In *United States v. Swift* (D. C.) 188 Fed. 92, 95, 96, 97, the so-called *Beef Trust* prosecution, Judge Carpenter points this out very clearly, showing that the Supreme Court must have considered and passed on the act as a criminal statute in giving effect to the civil

proceedings provided by it. And it is most persuasive that Chief Justice White, then Associate Justice, in his dissenting opinion in the Freight Association Case, 166 U. S. 290, at page 353, 17 Sup. Ct. 540, at page 563 (41 L. Ed. 1007), says:

"The well-settled rule is that where technical words are used in an act, and their meaning has previously been conclusively settled, by long usage and judicial construction, the use of the words without an indication of an intention to give them a new significance is an adoption of the generally accepted meaning affixed to the words at the time the act was passed. *Particularly is this rule imperative where the statute in which the words are used creates a crime, as does the statute under consideration, and gives no specific definition of the crime created.* Thus in *United States v. Palmer*, supra, Mr. Chief Justice Marshall, referring to the term 'robbery,' as used in the statute, said (3 Wheat. 630, 4 L. Ed. 471): 'Of the meaning of the term "robbery," as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined at common law.' " (The italics are mine.)

But it is suggested by counsel for defendants that, inasmuch as there is great contrariety of opinion as to the meaning of the law in its operation as a criminal statute, the demurrer be sustained, in order that the government may, as authorized by law, at once take the case to the Supreme Court for an early decision, and thereby save the time of the court here, and the annoyance and great expense attendant upon such a long trial as would result from the overruling of the demurrer. One cannot but appreciate the force of this suggestion, and its adoption would be an easy way to dispose of the matter; but, on the other hand, there is upon this court the plain duty of deciding the case according to conviction, and of so deciding as to make the law effective, rather than to destroy it if its constitutionality is fairly clear. This is in accordance with the established rule that an act of Congress should not be set aside as unconstitutional unless clearly so. *United States v. Coombs*, 12 Pet. 72, 76, 9 L. Ed. 1004; *Presser v. Illinois*, 116 U. S. 252, 269, 6 Sup. Ct. 580, 29 L. Ed. 615; *Hooper v. California*, 155 U. S. 648, 657, 15 Sup. Ct. 207, 39 L. Ed. 297; *Knights Templars et al. v. Jarman*, 187 U. S. 197, 205, 23 Sup. Ct. 108, 47 L. Ed. 139; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836.

I hold, therefore, from all of these considerations, that the Sherman Anti-Trust Act is a valid criminal statute, sufficiently clear in itself to inform the accused of the nature and cause of the accusation against them, and that criminal prosecutions under it in no way deprive the defendants of liberty or property without due process of law.

[2] If this conclusion is right, the defendants are presumed to know the law applicable to their acts or contemplated acts, and are presumed to intend the consequences of them as heretofore shown. The discussion might end here; but other considerations suggest themselves, which, while perhaps not necessary for decision, are so pertinent as to warrant some reference.

Having in view the purposes of the common law and of the exception which has grown up in its evolution, and appreciating that these purposes are the same, there seem to be compelling reasons for the conclusion that moral considerations are involved in the question

of the intent with which an act in restraint of trade is done. Judge Hook puts it this way:

"There is more of the decalogue in the common law respecting the trading of merchants than is sometimes supposed." *United States v. Standard Oil Co.* (C. C.) 173 Fed. 177, 196.

Eminent authority, beginning with Lord Chief Justice Hale (*Taylor's Case*, 1 Vent. 293, 3 Keb. 607), have declared that the Christian religion is a part of the law of England. There are in a number of states decisions to the effect that the same is true of the law of the United States, and it is said by Justice Brewer in *Church of Holy Trinity v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, that the United States is a Christian nation. No finding on this question is here made, for it is not necessary; but it may safely be said that civilization, as we understand it, so far as the recognition of the individual in the community and his rights are concerned, is the outgrowth of the appreciation that, among many other things, dealings between man and man must be on terms of justice, and justice requires that no man shall build up his business by acts whose purpose is to put the purchasing public at his mercy or to exploit others for his advantage, and destroy thereby the opportunities of others to exercise their talents and desires in the same field of mercantile activity. The common law in many of its phases developed through the appreciation of these rights and is based upon justice in the abstract. It may therefore be said to have a moral basis.

The ancient law against some voluntary restraint put by contract on an individual's right to carry on his particular trade or calling was established because it was deemed that such restraints were injurious to the public as well as to the individuals who made them; and the evils of monopoly are:

"(1) The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; (2) the power which it engendered of enabling a limitation on production; and (3) the danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale." *Standard Oil Case*, 221 U. S. 52, 31 Sup. Ct. 512, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834.

It was unjust to the community that a man should contract away his right to do business, and thereby possibly become, with his family, a charge on the community. It was unjust to the community to monopolize a product, and thereby enhance, or have the power to enhance, the prices the public were to pay for it. It was unjust to deprive an individual of his right and power of freely contracting, and of carrying on any lawful business he desired, and selling his product at prices fixed by free competition; and it was recognized that when the evils were brought about by the purpose to inflict them then that purpose was wrongful, and wrongful because unjust. If in a remote and comparatively barbarous civilization every contract in restraint of trade was deemed wrong, hence unlawful, because it was thought to work an injury to the public and to individuals, and if in our own time of advanced civilization the contract in restraint of trade is held to be wrong, hence unlawful, because its purpose is to bring about the same



injuries, then the motive underlying the contract is the criterion by which the contract is to be judged.

If in the doing of a thing a man entertains a wrongful purpose, he knows it better than anybody else can know it. And if, under the law, a man is presumed to intend the consequences of his acts, how much the more must he be held blameworthy when his deliberate purpose is to bring about the evils condemned by the common law from the beginning—condemned because restraints of trade were wrongful to the community and to the individual and wrongful because they were unjust?

It is hard to sympathize with the often-repeated expression that a merchant is not advised by the anti-trust act of the character of a contemplated act. If the act is wrong under commonly accepted moral or ethical standards, it was wrong at common law, and wrong under the exception to the common law, and always was and always must be wrong, so long as there is community life, with common and relative rights belonging to each individual in the community and to the public as a whole. How can any fair-minded man engaged in trade, whose deliberate purpose in his acts and contracts in trade is to work injustice to his competitors and to the public, honestly claim want of knowledge of the quality of his acts? The Golden Rule may not as yet be the standard by which the law requires contracts in restraint of trade to be measured, but the ancient adage, "Live and let live," has its application to trade and is a safe rule to go by.

But it is said that contracts and acts in restraint of trade were not criminal at common law. It is unnecessary to decide whether they were or not, for they are made criminal by the anti-trust act, and by it the defendants were advised either that it meant every contract in restraint of trade, a construction which would hamper rather than encourage trade, or that it meant such contract, the purpose of which was wrongful in the sense so often hereinbefore stated.

The claim that the act is in contravention of section 1 of article 1 of the Constitution, which lodges all legislative power in the Congress, and of the tenth amendment, which reserves to the states or the people powers not delegated to the United States by the Constitution, nor prohibited by it to the states, is passed with only the remark that the Supreme Court in the Standard Oil Case and the Tobacco Trust Case did not attempt to make the law, but merely to declare it, as was their duty, and that it is now somewhat late, in view of the many decisions of the Supreme Court upholding the act in question, to claim that Congress has no power to regulate interstate commerce through the means adopted in this act. *Northern Securities Case*, 193 U. S. 197, 347, 24 Sup. Ct. 436, 48 L. Ed. 679.

[3] We pass, then, to the grounds of complaint directed to specific allegations in the indictment itself. It is claimed that the averments in the several counts are too general, vague, indefinite, and uncertain to inform the defendants of the nature and cause of the accusation against them, or to apprise them with such reasonable certainty of the offense with which they are charged, or what they may expect to meet on the trial, as to enable them to make their defense.

The first count describes cash registers, with the statement that for

the past 20 years many concerns have been engaged in the business of manufacturing and selling them, and sets forth the names of some 33 different cash register companies, and avers that of the total business of making cash registers the National Cash Register Company has done from approximately 80 per cent., early in the period of the 20 years, to approximately 95 per cent. at the latter end thereof. It then avers that all the cash register companies during that time have sold the greater portion of their product to users and dealers in all other parts of the United States than those wherein the registers were manufactured, and have consigned registers for sale to dealers, and to their own agents, in other states, and shipping the same to these various persons, the number of which would be impracticable, if not impossible, to set forth. It then sets forth a list of names of some 137 individuals, who were officers and agents of the National Cash Register Company, and the dates at which each had been actively engaged in the management of the business and the nature of his official relation to the company. Included in the list are the names of 30 persons who are the defendants in the case, and the count charges that by virtue of their official relation to the company they controlled and directed its business from the dates when they became officers or agents, and that they knowingly and consciously participated in a corrupt conspiracy in undue, unreasonable, direct, and oppressive restraint of the interstate trade described and carried on by the several concerns other than the National Cash Register Company; that is to say, a conspiracy to restrain, and which did restrain, such commerce, and by divers unfair, oppressive, tortious, illegal, and unlawful means, and means which, "consideration being given to the advantage over said other concerns held by said the National Cash Register Company in consequence of its resources being, as they were, so great as compared with those of such other concerns, respectively," the defendants "have unlawfully, wrongfully, and irresistibly excluded others from engaging in that trade and commerce, none of which has been justified or warranted by any letters patent." Then a description of the conspiracy and means are set forth, the effect of which is that the defendants intended to restrain the free flow of interstate trade so carried on by the concerns named, other than the National Cash Register Company, and to compel those concerns either to go out of business or sell and transfer their business to the National Cash Register Company, so that it could, as in most cases it did, discontinue the business of the other concerns so acquired by it, and thereby effectually eliminated and prevented all competition of the other concerns with the National Cash Register Company.

The count then goes on to say that the defendants, as officers and agents of the National Cash Register Company have "by concerted action and continuous endeavor carried on the business and affairs of said the National Cash Register Company upon a plan involving—" Then follow 11 different descriptions of acts, all of a general character, so far as the naming of particular instances is concerned, but all very specific as describing a course of conduct. And the count winds up with the charge that the 30 defendants "during the three years next preceding the finding and presentation of this indictment,

at and within said Western Division of said Southern District of Ohio, in manner and form in this count of this indictment aforesaid, unlawfully have knowingly engaged and consciously participated in a conspiracy in undue, unreasonable, direct, and oppressive restraint of trade and commerce among the several states in cash registers, and one to restrain, and which has restrained, that trade and commerce by unfair, oppressive, tortious, illegal, and unlawful means, and means which have unlawfully, wrongfully, and irresistibly excluded others from engaging in that trade and commerce."

It would manifestly be impossible to set forth in detail each separate transaction and the names of the individuals engaged therein, by which those plans of operation were carried out, without producing a paper so voluminous as probably to warrant the court in striking it from the files of its own motion as needlessly incumbering the record. The names of the individuals who carried on the various transactions, the names of the other cash register companies which were dealt with as alleged, and the quality and character of the acts by which the alleged illegal results were obtained are all clearly detailed. If there were no such transactions, then, of course, the government would fail; and if there were any innocent transactions through any of these individuals or other employés of the National Cash Register Company who are named, all the facts connected with those transactions are in the possession of the defendants, who know them better than anybody else can know them, and if they are susceptible of an explanation consistent with innocence, the defendants know whom to call in their defense. It would seem that the particulars for which the defendants call are matters of evidence which the government must produce when it attempts to prove the charges made by it. *King v. Eccles*, 1 Leach, 274; *King v. Parsons*, 1 Bl. Rep. 392; *Cope's Case*, 1 Strange, 144.

These defendants are charged with a conspiracy in restraint of trade in cash registers generally, and particularly that carried on by the several concerns named. The defendants, as officers and agents of the National Cash Register Company, were in control of its affairs, as alleged. They know the detail of dealings between that company and each of those concerns, and the manner of treatment of them by the National Cash Register Company as the agency through which the officers and agents controlled and operated, and the methods of their respective absorption, if they were absorbed, by the National Cash Register Company. They must know whom to call in each to establish their defense. It seems to me they are advised of the nature of the charges against them quite sufficiently for them to make a defense, and that, under the peculiar circumstances of the case, it is sufficient to set out the character of the acts of the defendants controlling the National Cash Register Company, and that these acts had to do with the various other cash register companies named. While no direct authority may be found completely justifying a charge in an indictment framed as this is, yet I think it meets the rule of particularity of time, place, and circumstances, laid down in *United States v. Cruikshank* 92 U. S. 542, 23 L. Ed. 588, *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, and other cases.

The Supreme Court say that the object of an indictment is to fur-

nish the accused with such a description of the charge as will enable him to make his defense and avail himself of his conviction or acquittal for protection against further prosecution for the same cause, and to inform the court of the facts alleged, so that it may decide whether it is sufficient in law to support a conviction, if one should be had. They say that a crime is made up of acts and intents, and that these must be set forth in the indictment with reasonable particularity as to time, place, and circumstance. The facts alleged reasonably meet this test. In this connection the remarks of Mr. Justice Holmes in *Swift & Co. v. United States*, 196 U. S. 375, 395, 396, 25 Sup. Ct. 276, 49 L. Ed. 518, and of Judge Adams in *Smith v. United States*, 157 Fed. 721, 725, 85 C. C. A. 353, may be read with profit.

[4] In early times, and extending up to not a very remote period, when there were many capital offenses which would now be regarded as comparatively trivial, indictments were subjected to the closest scrutiny by the judges, and reasons in the highest degree technical were availed of to save the infliction of the severest penalty. Those reasons no longer obtain, and the effort now on the part of the judges is to overlook technicalities, so far as possible, and to administer the law from a broad viewpoint looking to ultimate justice upon the merits of the particular case. This ground of demurrer is, therefore, held to be untenable.

On the ground that no offense against the laws of the United States is charged in the indictment, in addition to other grounds of demurrer going to the same point, the defendants claim the indictment is otherwise fatally defective in that, according to my understanding of their contention—

[5] (1) The anti-trust act is one of generic terms, as frequently stated in the *Standard Oil Case* and in the *Tobacco Case*, and it is not sufficient to charge a crime in the general language of such a statute; but the specific acts constituting the offense must be set forth with reasonable particularity of time, place, and circumstance, as said in *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588:

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be by common law or statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars."

And a number of cases are cited. This claim involves considerations already referred to. If the first count is examined with care, it will appear (page 2) it is charged that during 20 years prior to the finding of the indictment many concerns were engaged in competition with each other in the manufacture and sale of cash registers, and a list of such concerns as were known to the grand jurors was set forth. On pages 10 and 11 of the indictment the defendants are charged with having entered into a conspiracy in restraint of said interstate trade carried on by the several concerns named, intending to restrain the free flow of interstate trade, and (page 20) defendants are charged with—

"a conspiracy in undue, unreasonable, direct, and oppressive restraint of trade and commerce among the several states in cash registers, and one to



restrain, and which has restrained, that trade and commerce by unfair, oppressive, tortious, illegal, and unlawful means, and means which have unlawfully, wrongfully, and irresistibly excluded others from engaging in that trade and commerce."

We are dealing with the first count, for the others refer to it, and it will be seen from a consideration of the entire count that not only is the general charge made of restraint of trade in cash registers, but the specifications go to that part of interstate trade in cash registers which these certain concerns other than the National Cash Register Company carried on. The authorities are numerous that a contract in restraint of trade is unlawful if it directly restrains or tends to restrain that trade, or its purpose is to accomplish either of these ends. It would seem that when there is a general charge of restraint of all trade in cash registers, and the specific facts alleged show that, if true, the defendants have restrained a part of that trade, an offense against the laws of the United States has been alleged.

(2) The defendants claim also that there is really no charge of conspiracy to do the things set forth in the indictment, but that the charge amounts to nothing more or less than that the defendants did the things described in the indictment; that is to say, the indictment charges that in carrying on their business the defendants did the things charged with intent to restrain the free flow of interstate commerce, but does not charge that the defendants agreed, or combined, by concerted action to accomplish an unlawful purpose, and that it charges the concerted action, or the "concurrent action," as being the conspiracy itself.

There seems to be no merit in this claim, for the reason that the defendants are distinctly charged with conspiracy in the direct restraint of trade in cash registers, and particularly the trade in cash registers carried on by the several cash register companies other than the National Cash Register Company named, and that they adopted a plan which involved the doing of certain things which were done all with the intent to restrain the free flow of interstate trade as carried on by the other concerns named. The indictment clearly charges the defendants with devising a scheme involving the doing of certain things in restraint of trade through a concerted plan adopted for the purpose and carried on through concerted action and continuous endeavor. It does not specifically allege the agreement to do the unlawful acts complained of, but the acts alleged necessarily involve a continuing agreement to do them. The "plan" is set forth, and the way it was carried out is alleged. Justice Holmes says:

"A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it." *United States v. Kissel*, 218 U. S. 601, 608, 31 Sup. Ct. 124, 126 (54 L. Ed. 1168).

This is sufficient in the law to meet the requirements of an indictment under this statute.

[6] There is no foundation for the complaint (quoting from brief of defendants' counsel, p. 30):

"The volume of interstate trade of these concerns is not stated, nor is it sufficiently described. It does not appear that the interstate trade of any or all of the alleged competitors is substantial in amount. For all that appears in the indictment, the aggregate may have been infinitesimal."

The degree of restraint is immaterial. It is sufficient if the contract is of such a character, as, with wrongful purpose, to directly affect trade, or if it only tends to do so. If the purpose of the agreement or conspiracy is to restrain trade within the meaning of the act, it surely can make no difference if in a particular case it only affected a very small part of that trade.

"Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 672, cited in *Northern Securities Case*, 193 U. S. 197, 340, 24 Sup. Ct. 436, 48 L. Ed. 679.

Aside from this, however, the defendants misapprehend the force and meaning of the facts stated in the indictment. It is there clearly set forth that the result of the defendants' alleged methods of dealing with the 33 cash register companies named is the increase of the business of the National Cash Register Company from about 80 per cent. of the business in cash registers, early in the 20-year period named, to about 95 per cent. in the latter part of the period. One-sixth or one-seventh of the business of making and selling cash registers cannot with accuracy be called "infinitesimal," or even small.

[7] But it is said the indictment does not charge any overt act, or, if any such act is intended to be charged, it is not charged with sufficient certainty. This objection has especial weight because of the opinion of Mr. Justice Field on the circuit in *United States v. Reichert* (C. C.) 32 Fed. 142, 145, who was of opinion that section 5438 of the Revised Statutes (U. S. Comp. St. 1901, p. 3674), declaring that every person who enters into any agreement, combination, or conspiracy to defraud the government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, shall be punished without requiring any act in furtherance of the conspiracy, is modified by section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), which declares that if two or more persons conspire to commit an offense against the United States or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to the penalties specified, and that, therefore, a mere conspiracy without some overt act in execution of it is not an indictable offense.

In reaching this conclusion, Mr. Justice Field disagreed with the Circuit Judge, whose opinion to the contrary is in harmony with all of the other reported decisions on the subject—Judge Putnam, in *United States v. Patterson* (C. C.) 55 Fed. 605; Judge Holt, in *United States v. Kissel* (C. C.) 173 Fed. 823; Judges Van Devanter, Adams, and

Riner, in *Smith v. United States*, 157 Fed. 721, 85 C. C. A. 353; and Judge Noyes, in *United States v. Patten* (C. C.) 187 Fed. 664.

I agree with Judge Holt in *United States v. Kissel* (C. C.) 173 Fed. 823, 825, who expresses the opinion that:

"Under this statute (Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676]) a mere conspiracy is not an offense; but, in addition to the conspiracy, one or more of the parties to it must do some act to effect its object before a criminal prosecution can be maintained. \* \* \* This indictment is necessarily brought under these provisions of the Sherman Act. No indictment can be brought in the United States courts for the offense of conspiracy at common law, because it has not been made an offense by any United States statute. Nor could this indictment have been brought under section 5440 of the United States Revised Statutes, because there is no law of the United States making a conspiracy in restraint of trade or to monopolize trade an offense against the United States except the Sherman Act, and there cannot be a conspiracy to engage in a conspiracy. Under the Sherman Act no overt act is necessary to the commission of the offense. That provides that every person who engages in a conspiracy in restraint of trade or commerce, or to monopolize trade, is guilty of the offense."

This ground of demurrer is, therefore, held to be untenable.

[8] The defendants claim, further, that the second count in the indictment is bad, in that it charges that the defendants (page 21)—

"by drawing to said the National Cash Register Company and causing that company to grasp it, monopolized a part of the trade and commerce among the several states in cash registers, that is to say, that part of said trade and commerce which, but for their use of those means, in carrying on the business and affairs of said the National Cash Register Company in the manner in said first count specified, would, during that period, have been secured or retained, as a matter of lawful right, by the divers concerns, other than said the National Cash Register Company, mentioned in said first count as having carried on business during said three years."

The objection is twofold. The first is that the "part" of trade referred to is not a part of trade and commerce within the meaning of the Anti-Trust Act, and the *Standard Oil Case* is cited, wherein it is said (221 U. S. 61, 31 Sup. Ct. 516, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834):

"The commerce referred to by the words 'any part' construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce."

The point of the objection probably is that the whole business of making and selling cash registers, as described in the first count, would only be a part of interstate commerce, and therefore it is not sufficient to allege a monopoly by drawing to the National Cash Register Company the business of the competitors mentioned; that is to say, a monopoly of a part of the part. I am unable to follow this, nor to fit the citation to the argument; for, if it is true that these defendants have drawn into the National Cash Register Company the business in cash registers that the other concerns named would have done, and through the means described in the first count, the defendants inevitably have monopolized a part of the business of making and selling cash registers.

In the second place, it is pointed out that the monopoly charged consists of drawing to the National Cash Register Company the business which would have been secured or retained by the other divers concerns "mentioned in said first count as having carried on business during said three years," when there are no concerns named in the first count as having carried on business during three years next preceding the finding of the indictment.

It is true there is no such allegation in the first count, and the indictment is defective in this regard; but the defect is not necessarily fatal, for it is equally true that in the first count it is alleged that those divers concerns during 20 years previous to the finding of the indictment have been engaged in the business of making and selling cash registers. If they were, then they must have carried on the business during the three years preceding the finding of the indictment. Further than this, it may be said that the words "as having carried on business during said three years" following the words "mentioned in said first count" might be treated as surplusage. However that may be, the meaning of the pleader is plain; hence the manner of pleading does no injury to the defendants. In such case the court ought to conserve rather than destroy the indictment.

[9] The same point is raised among the objections to the third count, and is here dealt with in the same way. The chief specific attack on the third count is that it charges only a continuance of the result of an alleged crime and does not charge any co-operation to keep it up, and is, therefore, bad under the rule stated in *United States v. Kissel*, 218 U. S. 601, 607, 31 Sup. Ct. 124, 125 (54 L. Ed. 1168):

"The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States v. Irvine*, 98 U. S. 450 [25 L. Ed. 193]. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success."

This count charges the defendants with having, before the period of three years prior to the date of the finding of the indictment, in the manner and by the means described in the first count, engaged in the conspiracy therein described, and having monopolized that part of the interstate trade in cash registers its said 33 competitors would have secured or retained, unlawfully, with knowledge, "continued to hold, conduct, and carry on said interstate business of said the National Cash Register Company, so by said means before said period augmented, and thereby have monopolized said interstate trade and commerce in cash registers." The charge, then, is that, having monopo-



lized the trade through the conspiracy and the means set forth in the first count, the defendants are guilty of monopolizing the trade continually for the three years prior to the date of the indictment; that is to say, the conspiracy having ended and the monopoly accomplished three years prior to the date of the indictment, the defendants have, during the ensuing three years, monopolized by continuing to carry on the business of the National Cash Register Company augmented by the conspiracy and by the means charged in the first count.

Let us suppose a case in which a concern has built itself up into greatness, enormous wealth, and practically sole possession of the trade in its particular commodity by means such as described in this indictment and by the destruction or absorption of its competitors. The peace of desolation reigned in that trade, because its competitors were not, and it enjoyed the field alone. Thereupon its evil practices were abandoned, because there was no further occasion for them, and the three years within which, under the statute of limitations, a criminal action might be brought against it for its unlawful acts had elapsed. Is not such a concern, so built up, still a restraint of trade and a monopoly (which is the same thing), and will it not continue to be a restraint of trade and a monopoly so long as it exists?

The first section of the Anti-Trust Act is aimed at contracts, combinations, and conspiracies in restraint of trade. The second section reads:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. \* \* \*"

Herein are found three distinct offenses, perhaps four: Monopolizing, attempting to monopolize, and combining or conspiring to monopolize. Monopolization and attempting to monopolize are held to be distinct offenses. *United States v. American Naval Stores Co.* (C. C.) 186 Fed. 592. And the charge of monopolizing will support a verdict of attempting to monopolize. 1 U. S. Comp. St. 1901, p. 723.

A conspiracy to monopolize trade is one thing, and it is very like a conspiracy in restraint of trade; but the monopoly is the result of the conspiracy. It is the accomplished thing. But the statute makes the act of monopolizing also an offense, and the third count charges the defendants with that offense during the three years prior to the date of the indictment. In my judgment this is a good count. That there can be a continuing monopoly such as described in this count has not been decided in any reported case, but the government's claim finds ample support in many expressions in the opinions of judges in a number of cases. *Standard Oil Case*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834; *Tobacco Trust Case*, 221 U. S. 176, 185, 31 Sup. Ct. 632, 55 L. Ed. 663; *United States v. American Naval Stores Co.* (C. C.) 172 Fed. 455, 458; *United States v. Standard Oil Co.* (C. C.) 173 Fed. 177, 191; *United States v. Swift & Co.* (D. C.) 186 Fed. 1002, 1013.

But, it is said, if there was any continuing monopoly it was maintained by the National Cash Register Company and not by the defend-

ants, and, further, that if a monopoly has been established as alleged, it will continue, even though these defendants may have died or have sold their stock to others, and, further, that every employé of the company, however innocent, is guilty under the statute so long as he is connected with it.

Whether or not, the company continuing to carry on business, the heirs at law or the transferees of these defendants, or other employés than the defendants, would be liable to indictment for monopolizing under the act, is not necessary to be decided now. We are concerned with the alleged acts of these defendants. It is distinctly charged (page 10 of the indictment) that they are the persons who "controlled and directed the business and affairs of said the National Cash Register Company."

The monopoly the defendants have built up is carried on by them under the name of the National Cash Register Company, controlled by them. That is what the averments in this indictment amount to. In the view of the Anti-Trust Act, the name or form, however intricate or subtly devised or maintained, under which the evils of monopoly are carried on, is altogether immaterial. No device, however skillfully contrived, and no combination by whomsoever formed, is exempt from the operation of the law, if such device or combination by its operation directly restrains commerce among the states. *Northern Securities Case*, 193 U. S. 197, 347, 24 Sup. Ct. 436, 48 L. Ed. 679. In the *Tobacco Case*, 221 U. S. 106, at pages 180, 181, 31 Sup. Ct. 632, at page 648 (55 L. Ed. 663), Chief Justice White says:

"\* \* \* In the *Standard Oil Case* \* \* \* it was pointed out that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute."

[10] Finally, it is said the indictment is bad for duplicity. This may be dealt with briefly. The offenses charged grow out of the same transactions, are of the same class, and each count charges a separate and distinct offense. They may be joined in one indictment. *Rev. Stat. U. S. § 1024* (U. S. Comp. St. 1901, p. 720); *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; *Terry v. United States*, 120 Fed. 483, 56 C. C. A. 633; *State v. Bailey*, 50 Ohio St 636, 36 N. E. 233.

It is true that the offense of monopolizing charged in the third count is committed every day during the continuance of the monopoly, and no count may contain more than one offense; but it is the same monopoly, the continuance of which during the three years is complained of, and in reality there is but one offense, brought about through the conspiracy and illegal acts the defendants are charged with prior to the three years. But the defendants are not charged with continuing a monopoly. They are charged with monopolizing by continuing to carry on the business of the National Cash Register Company aug-

mented prior to the three years by the illegal means set forth in the first count. The illegal acts complained of have resulted in only one monopoly. A monopoly, when established, is in its very nature a continuous offense. It is here that Justice Holmes' remarks in *United States v. Kissel*, 218 U. S. 601, 607, 31 Sup. Ct. 124, 126 (54 L. Ed. 1168), are applicable. He says:

"But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one."

It is true he was speaking of conspiracies, but the reasoning which proves a continued conspiracy to be only one rather than a series of distinct conspiracies would demonstrate the unity of a continued monopoly.

For all of these reasons the indictment is held to be valid, and an order overruling the demurrer may be taken.

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LOUISVILLE & N. R. CO. v. HUGHES et al.

(District Court, S. D. Ohio, W. D. October 18, 1912.)

No. 6,817.

**1. COMMERCE (§ 12\*)—POWER OF STATES TO REGULATE—SCOPE.**

A state has exclusive power to regulate commerce wholly within its borders, and the Constitution gives exclusive power to Congress to regulate commerce between the states, each being sovereign with respect to the subjects committed to it; and, while the Constitution and the laws made pursuant thereto are the supreme law of the land, nevertheless a state may legislate in a great variety of ways so as to affect interstate commerce and persons engaged in it without constituting a regulation of it within the meaning of that instrument.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 7, 9; Dec. Dig. § 12.\*]

**2. COMMERCE (§ 12\*)—STATE REGULATION—LEGISLATION AFFECTING INTERSTATE RAILROADS.**

The dominant power of Congress over interstate commerce does not take from the states the power of legislation with respect to the instruments of such commerce so far as the legislation is within the ordinary police powers of the state, and affects interstate commerce only indirectly and incidentally, and such power may be exercised through an administrative board.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 7, 9; Dec. Dig. § 12.\*]

**3. COMMERCE (§ 12\*)—STATE REGULATION—SCOPE OF POWER—INTERSTATE COMMERCE.**

A state act, however, which necessarily by its requirements brings about a conflict with the requirements of an act of Congress on the same subject passed in the exercise of its exclusive power over interstate commerce, produces that direct interference with such commerce which is not permissible.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 7, 9; Dec. Dig. § 12.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**4. COMMERCE (§ 8\*)—INTERSTATE COMMERCE—STATE REGULATION—EFFECT OF FEDERAL LEGISLATION.**

The passage by Congress of an act regulating interstate commerce (Act Feb. 17, 1911, c. 103, 36 Stat. 913 [U. S. Comp. St. Supp. 1911, p. 1333]), thus showing its intention to exercise its constitutional power over the particular subject-matter of the act, from the date of such passage excludes the power of the states to legislate with respect to the same subject-matter and supersedes any state law then in force relating thereto, and this, although the federal act is not to take effect until a subsequent date.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.\*]

**5. COMMERCE (§ 8\*)—INTERSTATE COMMERCE—REGULATION OF LOCOMOTIVE BOILERS—LAW GOVERNING.**

Act Ohio May 20, 1910 (101 Ohio Laws, p. 328), and the regulations adopted thereunder and Act Cong. Feb. 11, 1911, c. 103, 36 Stat. 913 (U. S. Comp. St. Supp. 1911, p. 1333), and the regulations adopted thereunder contain very similar provisions and requirements for the inspection and equipment of locomotive boilers, except that the state law requires certain things to be done in addition to those required by the federal law, and that its requirements as to equipment shall be complete prior to January 1, 1912, and that a specification card for each boiler shall be made and filed by the same date, while the federal act requires the work of equipment to be completed prior to July 1, 1914, and the specification cards to be filed by July 1, 1913. The preparation of such cards in cases where no drawings of the boiler are available requires it to be largely dismembered, and, except when general repairs are being made, involves an expense of several hundred dollars, and the keeping of the engine out of service for a considerable time. Each of said acts embodies what is intended as a complete and comprehensive scheme for rendering the boilers safe in use. One applies by its terms to all locomotives used on railroads in the state and the other to all used in interstate commerce. *Held* that, while the state law was valid and enforceable prior to the enactment of the federal law, it was superseded by the latter as applied to a railroad company whose engines only entered the state from Kentucky to a terminal in Cincinnati and when being used in interstate commerce, and that such company was governed by the federal law from the time of its enactment as to the things required and the time of their completion.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.\*]

**In Equity.** Suit by the Louisville & Nashville Railroad Company against Oliver H. Hughes, Oliver P. Gothlin, and John C. Sullivan, as members of the Public Service Commission of Ohio. On motion for interlocutory injunction. Granted.

The case involves an act of the Legislature of Ohio entitled "An act to promote the safety of employes and travelers upon railroads by compelling railroad companies to equip their locomotives with suitable boilers and appurtenances thereto," passed May 10, 1910, approved May 20, 1910 (101 Ohio Laws, p. 328), and regulations adopted by the Railroad Commission of Ohio in pursuance of its provisions August 11, 1910, and an act of Congress entitled "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto," approved February 17, 1911 (1911 Supp. U. S. Comp. Stat. of 1901, p. 1333; 36 U. S. Stat. part 1, p. 913), and regulations adopted by the Interstate Commerce Commission in pursuance of its provisions June 2, 1911.

It will be sufficient to set out the substance of these laws.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



**The Ohio act:**

The operators of steam railroads wholly or in part within the state are required to make a thorough inspection of the boilers and appurtenances of their locomotives. Requirements are made affecting the material for construction, openings for water and steam, dimensions of pipes, sufficiency of spaces between and around flues, boilers, furnaces, safety valves, fusible plugs, low-water indicators, feed water apparatus, gauge cocks, steam gauges, means of removing mud and sediment from the boiler, and all other machinery, to the end that all of these in construction, shape, condition, arrangement, and material may be safely employed without peril to life or limb. The duties of the inspector are set forth, and the times within which and the persons by whom inspections are to be made. Power is given the State Railroad Commission to formulate rules and regulations for the inspection and testing of boilers and other appurtenances, and other duties are prescribed including the appointment of a competent person as inspector who shall have charge of the inspection and perform such other duties as the Commission shall direct. If the inspector approves of the boiler and appurtenances, he shall, after taking certain steps, subscribe a certificate, one copy of which shall be filed with the officer or employé of the railroad having immediate charge of the operation of the boiler, who shall place the certificate "in a conspicuous place in the cab connected with the locomotive boiler inspected, and there kept framed under glass." A penalty for each offense of omission or neglect in compliance with the provisions of the law and a further penalty of \$100 for each day of such omission or neglect are prescribed. The duty is imposed on the State Railroad Commission to enforce the provisions of the act, and September 1, 1910, was the day fixed on and after which the act should take effect.

The Public Service Commission of Ohio is the successor of the State Railroad Commission, and is invested with its predecessor's powers (102 Ohio Laws, p. 549, § 2), and section 502 of section 1 provides that the provisions of the act "shall not apply to the regulation of commerce with foreign nations, and among the several states, and with the Indian tribes." August 11, 1910, the Railroad Commission adopted elaborate regulations for "inspecting, testing and washing locomotive boilers." It is not necessary to set forth the elaborate details of these comprehensive regulations except in the instances specifically herein noted by quotations.

"(e) Telltale holes. All stay bolts shorter than eight inches applied after September 1, 1910, except flexible bolts, shall have telltale holes  $\frac{3}{16}$  inch in diameter by  $1\frac{1}{4}$  inches or more, in the outer end. These holes must be kept open at all times, and must not in any case be plugged. All stay bolts shorter than eight inches, except flexible bolts, shall be drilled when the locomotive is in the shop for heavy repairs or at other suitable opportunity, and this work must be completed prior to January 1, 1912."

"Note.—Applications from companies desiring to omit the use of telltale holes will be considered when it can be shown to the satisfaction of the Commission that unusual care is used in stay bolt testing both as to the frequency of the tests and the selection of inspectors."

"(a) Specification Card. A specification card, Form No. 17, containing the results of the calculations made in determining the working pressure and other necessary data shall be filed in the office of the Railroad Commission of Ohio for each locomotive boiler. A copy shall also be filed in the office of the chief mechanical officer having charge of the locomotive. Every specification card shall be verified by the oath of the engineer making the calculations, and shall be approved by the chief mechanical officer. These specification cards shall be filed as promptly as thorough examination and accurate calculation will permit. Where accurate drawings of boilers are available, the data for specification card, Form No. 17, may be taken from the drawings, and such specification cards must be completed and forwarded prior to March 1, 1911. Where accurate drawings are not available, the required data must be obtained at the first opportunity when general repairs are made, or when flues are removed. Specification cards must be forwarded within one month after examination has been made, and all examinations must be com-

pleted and specification cards filed prior to January 1, 1912, flues being removed, if necessary to enable the examination to be made before this date."

The act of Congress:

From and after July 1, 1911, it is unlawful for any common carrier, its officers or agents, subject to the act, to use any locomotive engine propelled by steam power in moving interstate or foreign traffic, unless the boiler of the locomotive and appurtenances are in proper condition and safe to operate in interstate commerce, without unnecessary peril to life or limb; and all boilers must be inspected in accordance with the provisions of the act, and be able to withstand such tests as may be prescribed in the rules and regulations to be promulgated by the Interstate Commerce Commission. Provision is made for the appointment of a chief inspector and assistants who shall be selected with reference to their practical knowledge and ability to carry out the provisions of the act, and who shall have superintendence of other inspectors with power to direct them in their duties, to the end that the act and the regulations are observed by the common carriers of interstate commerce. The territory of the United States is by the act divided into 50 locomotive boiler inspection districts, looking to effective service and uniformity of the work required of each inspector, one inspector being appointed to each district, and the inspectors shall be examined touching their qualifications. Each carrier is required to file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after the approval of the act, and such rules, after hearing and approval by the Interstate Commerce Commission, shall become obligatory upon the carrier. Upon failure of the carrier to so file its rules and instructions, the chief inspector shall prepare rules and instructions for the inspection of the boilers, which, when approved by the Commission, shall be obligatory. Changes may be made by the carrier to take effect when they have been approved by the Commission. Duties detailed in character are imposed on each inspector, and duties are imposed upon the carriers with respect thereto, reports are provided for, and provision is made for putting locomotives with defective boilers out of commission. The chief inspector must make an annual report to the Commission. In case of accident resulting from failure from any cause of a boiler or its appurtenances, causing injury or death, the carrier must report in writing to the chief inspector who, or one of his assistants, shall investigate. Parts of the disabled locomotives shall be preserved and reports made of the cause of the accident. The Commission may give publicity to this report, together with such recommendations as it deems proper. Failure of compliance with the act or regulations made under its provisions subject the carrier to a penalty of \$100 for each violation of the law to be recovered in a suit by the district attorney in the district court having jurisdiction. Approved February 17, 1911.

June 2, 1911, elaborate regulations were adopted by the Interstate Commerce Commission for the "inspection and testing of locomotive boilers and their appurtenances." It is recited that at the expiration of the three months after the approval of the act many common carriers had failed to file their rules and instructions for inspections as provided by the act, and thereupon the chief inspector proceeded to prepare for submission to the Commission for its approval rules and instructions for the carriers having so failed; and upon notice there was a hearing before the Commission May 29, 1911, on the rules and instructions so prepared, that such carriers as had filed their rules and instructions within the three months asked at the hearing that such rules and instructions not fulfilling the requirements of the proposed rules and instructions prepared by the chief inspector be modified to conform thereto, and that in the respects in which their rules and instructions as prescribed a higher standard than that fixed by the chief inspector might be withdrawn, and such carriers "joined in a request that such rules and regulations as had been prepared by the chief inspector and approved by the Interstate Commerce Commission be established with uniformity for them and all other carriers subject to the act." Upon submission to the Commission of the rules and instructions prepared by the chief inspector, it was ordered that they be and they were thereby approved and made obligatory

from and after July 1, 1911, "provided, that nothing herein contained shall be construed as prohibiting any carrier from enforcing additional rules and instructions not inconsistent with the foregoing, tending to a greater degree of precaution against accidents."

No detailed reference to these comprehensive regulations is necessary other than by the quotations below.

"(26) Telltale holes. All stay bolts shorter than 8 inches applied after July 1, 1911, except flexible bolts, shall have telltale holes three-sixteenths inch in diameter and not less than  $1\frac{1}{4}$  inches deep in the outer end. These holes must be kept open at all times.

"(27) All stay bolts shorter than 8 inches, except flexible bolts and rigid bolts which are behind frames and braces, shall be drilled when the locomotive is in the shop for heavy repairs and this work must be completed prior to July 1, 1914."

"(52) A monthly inspection report or quarterly inspection card properly filled out shall be placed under glass in a conspicuous place in the cab of the locomotive before the boiler inspected is put into service."

"(54) Specification Card. A specification card, size 8 by  $10\frac{1}{2}$  inches, Form No. 4, containing the results of the calculations made in determining the working pressure and other necessary data shall be filed in the office of the chief inspector of locomotive boilers, for each locomotive boiler. A copy shall be filed in the office of the chief mechanical officer having charge of the locomotive. Every specification card shall be verified by the oath of the engineer making the calculations, and shall be approved by the chief mechanical officer. These specification cards shall be filed as promptly as thorough examination and accurate calculation will permit. Where accurate drawings of boilers are available, the data for specification card, Form No. 4, may be taken from the drawings, and such specification cards must be completed and forwarded prior to July 1, 1912. Where accurate drawings are not available, the required data must be obtained at the first opportunity when general repairs are made, or when flues are removed. Specification cards must be forwarded within one month after examination has been made, and all examinations must be completed and specification cards filed prior to July 1, 1913, flues being removed if necessary to enable the examination to be made before this date."

It is not necessary to set forth the many respects in which the respective regulations are substantially the same, nor to refer to all of the differences between them. For the purposes of this case, it will be sufficient to consider in detail only those differences to which particular attention is called in the opinion.

The complainant, a corporation of Kentucky, is a common carrier whose railroad extends through 13 different states, a part of it being in the state of Ohio. Of its locomotives 75 are operated at different times in the transportation of persons and property from Cincinnati, Ohio, to points in Kentucky, and states south thereof, and from Kentucky and such states to Cincinnati. It is not otherwise engaged in the business of a common carrier, nor does it otherwise operate any railroad in Ohio, nor otherwise run any locomotive in that state, and all of its locomotives operated in Ohio are operated and used exclusively as instrumentalities of interstate commerce.

The complainant did not file any rules and instructions for inspection of their locomotives within the three months limited by the act of Congress, which action was in pursuance of a general desire of the common carriers engaged in interstate commerce for the establishment of uniform regulations. The complainant on September 30, 1910, October 12, 1910, and November 18, 1911, made application to the Railroad Commission of Ohio for exemption from the regulation requiring the use of telltale holes, having shown that unusual care was used by it in stay bolt testing, and on November 22, 1911, its application was denied by the Public Service Commission on the ground that the Commission was then opposed to the granting of exemption from the use of telltale holes in stay bolts of locomotives in any case. The telltale holes referred to are holes drilled lengthwise in stay bolts less than 8 inches in length after the stay bolts have been placed in their final position in the



boilers and riveted. Their purpose is to afford an opportunity to observe the existence of any crack or break in the stay bolts, because, if the stay bolts should break or crack, water from the boiler would ooze out through the telltale holes. The stay bolts when in position and riveted become a portion of the boiler structure, and are subjected equally with all other portions of the boiler to the pressure of steam generated within. Their number is very large and their drilling requires much time, expense, and labor; the locomotive necessarily being out of commission when so operated upon.

When accurate drawings of the boiler of a locomotive are not available, the examination required and which is necessary to be made for the filling out and filing of the specification card "consists in a dismembering of the principal parts of the locomotive boilers; that there are within each locomotive boiler, extending from the front flue sheet to the back end flue sheet, a large number of tubes known mechanically as flues; that the number of these flues varies with the size and type of the boiler, and that such number varies from something over two hundred to something over four hundred in each boiler; that the said flues are so distributed throughout the interior of the boiler as to make it impossible for an engineer or workman to enter the boiler to make the measurements necessary for calculating the various matters required to be reported in the specification cards referred to in said regulation; that the said flues are attached to the flue sheets by being forced into holes made in the flue sheets for that purpose, and that, when in position and when the boiler is in use, the said flues serve the purpose of carrying hot air, smoke, and cinders from the fire box through the boiler to the smoke chamber at the forward end of the boiler, and so furnishing the heat necessary to convert the water in the boiler into steam; that the dismembering of the boiler necessary for an examination by an engineer or workman for the purpose of ascertaining the data upon which the calculations are required to be made for said specification cards, consists in driving said flues out of the flue sheets in which they are firmly held; that, when the flues are so driven out and removed, the examiner is enabled to enter the boiler by opening the throttle box at the top of the boiler, and so make his measurements required as aforesaid; that, when the flues are driven out of the flue sheets, the ends of the flues are so injured that it is necessary that they be cut off and new ones welded upon the old flues before they can be replaced in the boiler; that the taking a locomotive out of service and so dismembering it and making such examination and then reassembling the parts removed involves an expense \* \* \* in the case of each locomotive of approximately four hundred (\$400.00) dollars; that the making of such specification cards for each locomotive by an examination of the boiler when it is so dismembered or stripped, involves an expenditure \* \* \* in each case of ten (\$10) dollars; that the making up of specification cards from accurate drawings, available for that purpose, involves in each case an expenditure \* \* \* of three (\$3) dollars."

The calculations required to be made are the same calculations, the same examinations, and involve the same work in order to comply with the regulations adopted under each law, and inconsistencies in compliance with the terms of each of the regulations referred to with reference to specification cards relate chiefly to the time at which the cards shall be completed.

It is alleged by the complainant that the defendants claim the right to enforce all of the regulations as adopted by the Public Service Commission of Ohio, and especially the claim to enforce section 5 (e), relating to telltale holes, and section 12 (a), relating to specification cards, and the right to enforce the penalties provided by the act of the General Assembly of Ohio against the complainant for its noncompliance with the regulations adopted by the Public Service Commission of Ohio, and particularly with reference to telltale holes and specification cards; and that the defendants threaten to subject complainant's locomotives to the personal examination of the inspectors of the defendants and thereby to interfere with complainant's locomotives in their use and service as instrumentalities employed in interstate commerce and subject to the regulations approved by the Interstate Commerce Commission.



The complainant complied with the regulations adopted pursuant to the Ohio act up to the time of the approval by the Interstate Commerce Commission of the regulations adopted by it, and has complied with the latter since their adoption.

The complainant claims that the Ohio act and the regulations under its provisions are, as against it, contrary to article 1, § 8, of the Constitution, particularly section 8, which gives Congress the power to regulate commerce among the several states—and are in contravention of the laws of the United States enacted in pursuance thereof; that the act of Congress and regulations thereunder supersede all state legislation and regulations upon the same subject-matter; and on the ground that it will, unless the defendants are restrained, be subjected to a multiplicity of actions for penalties and suffer irreparable injury in defending them and to repeated and irreparable injury in the attempted interference by the defendants with the operation by the complainant in the state of Ohio of its locomotives, prays that the defendants may be enjoined, etc.

The statements of fact in the bill are verified by the affidavit of Brent Arnold, G. F. A. and superintendent of terminals of complainant, and are not, in substance, denied by the defendants, except as to conclusions of fact drawn by the complainant; all conclusions of law, of course, being denied.

The defendants show by the affidavit of John J. Fox, their chief inspector of locomotive boilers, that the rules and regulations of the state of Ohio and of the Interstate Commerce Commission "are substantially the same"; that the differences existing between the two are in matters of detail, and that these differences do not interfere or conflict; that the rules and regulations of the two sovereignties are not inconsistent, conflicting, or repugnant to each other; that the requirements of the Railroad Commission of Ohio and of the Interstate Commerce Commission are the minimum requirements of safety, "and that the maintenance of a higher degree or standard of safety than is provided by either of said rules and regulations would be a compliance with both of said rules and regulations; that in every case where one or the other of such rules and regulations require a higher degree or standard of safety than the other provides a compliance with the higher standard required by one will be a compliance with the lower degree or standard of safety required by the other," and that both can be complied with without involving any great inconvenience or burdensome expenditure of money; that the greater part of any additional expense required will be on account of filing two reports instead of one; that compliance with both regulations will not lead to confusion, and will add to the efficiency and safety of the locomotives involved.

Under the authority of the act of Congress approved June 18, 1910 (36 Stat. p. 557, c. 309, § 17), application was made by the complainant to one of the judges in the Southern District of Ohio for a temporary restraining order against the defendants pending the hearing and determination of the application for an interlocutory injunction. Pursuant to the requirements of the act, the district judge immediately called to his assistance two other judges, and, pending the hearing, a temporary order was issued as prayed for.

Kinhead & Rogers, of Cincinnati, Ohio, and Henry L. Stone, of Louisville, Ky., for complainant.

Timothy S. Hogan, Atty. Gen., and John A. Deasy, Asst. Atty. Gen., for defendants.

Before WARRINGTON and KNAPPEN, Circuit Judges, and HOLLISTER, District Judge.

HOLLISTER, District Judge (after stating the facts as above). It is the urgent contention of the defendants that the act of the General Assembly of Ohio and the regulations adopted by the Railroad Commission of that state, and the act of Congress and the regulations

adopted by the Interstate Commerce Commission, present no real points of conflict with each other, that the Ohio regulations affect intrastate commerce directly and interstate commerce only indirectly, and the federal regulations affect interstate commerce directly and intrastate commerce only indirectly, and therefore the state, having the right to legislate with respect to intrastate commerce, over which Congress has no power, and Congress having the right to legislate with respect to interstate commerce, over which the state has no power, the two acts and regulations may proceed together and have concurrent operation, each being an exemplification of the power of an independent sovereignty concerning a subject-matter over which it may lawfully exercise a complete jurisdiction without direct interference with the other.

If defendants' premises were true, their conclusion might present a question for judicial inquiry, but the soundness of their logic need not be debated; for, whether their conclusion has any sanction in the law or not (of which no opinion is here expressed), it is founded upon a misapprehension of the operation of these laws and regulations upon the complainant who employs locomotives as instrumentalities of interstate commerce, and of complainant's right under the Constitution of the United States. Whether or not the fact that these locomotives are engaged solely in such commerce and not directly subject to the authority of the state under any circumstances would make a different case from one in which the locomotives were instrumentalities of both intrastate and interstate commerce need not be considered (if, indeed, there would be any difference), because the case, as made, has to do only with locomotives engaged in interstate commerce, a subject over which the state has no direct control.

While the purposes of the acts are identical and in most respects the regulations are alike, being in many instances even verbally the same, yet there are differences between them. The resemblances are many and in this discussion are important, in that they, with the differences, show the comprehensive nature of the legislation, and the elaborate detail of the regulations to effect the purposes of the acts, thereby disclosing the extent of regulation to which the respective sovereignties intended to go in order to provide for the safety of persons subject to injury from defective locomotive boilers. The resemblances are to be borne in mind, but this case emphasizes the differences; for it is upon these that complainant founds its claims of a conflict between the regulations of such character that the federal regulations do and must, under the interpretation by the Supreme Court of the commerce clause of the Constitution, necessarily supersede and displace the state regulations, so far as complainant's particular locomotives are concerned.

The complainant does not raise, and it is not thought necessary to discuss, a question suggested by the subject-matter—whether or not it is national in character and admits only of one uniform system or plan of regulation, hence a matter with which Congress alone can deal in the exercise of the exclusive jurisdiction in such cases confided to it by the Constitution (*Mobile County v. Kimball*, 102 U.

S. 691, 697, 26 L. Ed. 238; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, 574, 7 Sup. Ct. 4, 30 L. Ed. 244; *Robbins v. Shelby Taxing District*, 120 U. S. 489, 492, 493, 7 Sup. Ct. 592, 30 L. Ed. 694; *Northern Securities Case*, 193 U. S. 197, 371, 24 Sup. Ct. 436, 48 L. Ed. 679, as illustrations); for an affirmative answer to the question would not be of benefit to the defendants, and a negative conclusion would still leave the question of the conflict of these regulations open for decision. It is therefore, for the purposes of this case, assumed that the doctrine referred to in the illustrative cases does not apply to the subject-matter of this.

The power of the state of Ohio, in the absence of congressional action, to provide in the manner it has for the inspection of all locomotive boilers within the state, even though a burden may be thereby incidentally imposed on the owners of locomotives engaged solely in interstate commerce, is conceded by the complainant, which, until the federal regulations were adopted, complied with all of the state requirements, the effectiveness of the operation of which upon it as a carrier of interstate commerce it did not up to that time challenge, and does not now deny; but ever after congressional action and the adoption of the federal regulations it has asserted, and in this suit asserts, the invalidity as to it of the state requirements, claiming that its duties with respect to boiler inspection are prescribed by the Interstate Commerce Commission to whose regulations alone it is amenable, when they are in conflict with the state regulations or cover the same ground as the state legislation. Considering the case, therefore, only as one of the many involving both state and congressional legislation on the same subject, it is necessary to inquire into the relative powers of the states and of Congress under the Constitution, so far as they have been defined by the Supreme Court.

The principles involved in complainant's concession are so related to others necessarily to be discussed that some reference to them also is required.

[1] A state has exclusive power to regulate commerce wholly within its own borders (*Gibbons v. Ogden*, 9 Wheat. 1, \*195, 6 L. Ed. 23; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 295, 8 Sup. Ct. 113, 31 L. Ed. 149; *Allen v. Pullman Co.*, 191 U. S. 171, 180, 181, 24 Sup. Ct. 39, 48 L. Ed. 134; *Railway v. Larabee Mills*, 211 U. S. 612, 620, 29 Sup. Ct. 214, 53 L. Ed. 352) and the Constitution gives exclusive power to Congress to regulate commerce between the states (article 1, § 8), each being sovereign with respect to the objects committed to it (Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. \*316, \*410, 4 L. Ed. 579). While the Constitution and the laws made pursuant thereto are the supreme law of the land (Const. art. 6), nevertheless a state may legislate in a great variety of ways so as to affect interstate commerce and persons engaged in it without constituting a regulation of it within the meaning of that instrument. *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. Ed. 819.

[2] Cars, engines, and railroads are the instrumentalities by which transportation is effected between the states, and are, while so en-

gaged, within the power of Congress alone to regulate. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204, 5 Sup. Ct. 826, 29 L. Ed. 158; *Second Employers' Liability Cases*, 223 U. S. 1, 46, 47, 32 Sup. Ct. 169, 56 L. Ed. 327. The Ohio act and regulations in their operation necessarily impose a burden upon all common carriers using locomotives within the state; but the right of the states in the exercise of their police power to enact laws for the safety of their citizens has never been denied, because, as said by Justice Harlan in *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 628, 18 Sup. Ct. 488, 42 L. Ed. 878:

"They have never surrendered the power to protect the public health, the public morals, and the public safety. \* \* \*"

In cases numerous and of great variety of subject-matter the Supreme Court have reaffirmed this principle. The substance of it, as applied to railroads, is stated by Justice Brown in *Louisville & Nashville R. R. Co. v. Kentucky*, 161 U. S. 677, at page 702, 16 Sup. Ct. 714, at page 724 (40 L. Ed. 849):

"It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."

Pertinent illustrations, and there are many others, are found in *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508, in which a law of Alabama requiring railroad engineers to be examined touching their qualifications and to obtain a license was held valid, although the plaintiff in error ran an engine between Mobile, Ala., and Corinth, Miss.; *Railway v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352, in which a law of Alabama requiring of locomotive engineers the ability to distinguish between colors and to be examined relative thereto was held to be no interference with commerce between the states, although the engineers might be engaged in that service; *N. Y., N. H. & H. R. R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853, in which a statute of New York regulating the heating of steam passenger cars was sustained, although the particular train involved in the litigation was engaged in interstate commerce; *Railway Co. v. Arkansas*, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. Ed. 290, in which a statute of Arkansas regulating the number of men constituting a train crew operating trains passing within the state was held valid and applicable to trains carrying commerce between the states, and *Hennington v. Georgia*, 163 U. S. 299, 317, 318, 16 Sup. Ct. 1086, 1093 (41 L. Ed. 166), in which a law of Georgia, forbidding the running of freight trains on Sunday, neces-



sarily affected interstate commerce, but was sustained. In giving the reasons for that conclusion Justice Harlan, after discussing numerous cases, said:

"Local laws of the character mentioned have their source in the powers which the States reserved and never surrendered to Congress, of providing for the public health, the public morals and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. \* \* \* Such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the State by which it was established, and, therefore, not invalid by force alone of the Constitution of the United States."

Many of the cases are collated by Justice Brewer in *Missouri Pacific Ry. Co. v. Larabee Mills*, 211 U. S. 612, 622, 623, 29 Sup. Ct. 214, 53 L. Ed. 352.

The decisions, the principle being expressed in various ways, show that when a state law enacted in the exercise of its police power affects interstate commerce only indirectly and incidentally, is passed in good faith and is not directed against interstate commerce, is an aid to commerce, does not go beyond the necessities of the case, and does not constitute an arbitrary or unreasonable interference with commerce between the states, is appropriate to and has a real substantial relation to an object as to which the state is competent to legislate, and does not conflict with the expressed or presumed will of Congress on the subject, it is invariably sustained. *Sherlock v. Alling*, 93 U. S. 99, 102, 23 L. Ed. 819; *Smith v. Alabama*, 124 U. S. 465, 482, 8 Sup. Ct. 564, 31 L. Ed. 508; *Nashville, etc., R. R. Co. v. Alabama*, 128 U. S. 96, 101, 9 Sup. Ct. 28, 32 L. Ed. 352; *Western Union Tel. Co. v. James*, 162 U. S. 650, 656, 16 Sup. Ct. 934, 40 L. Ed. 1105; *Illinois Central R. R. Co. v. Illinois*, 163 U. S. 142, 154, 16 Sup. Ct. 1096, 41 L. Ed. 107; *Hennington v. Georgia*, 163 U. S. 299, 303, 304, 317, 16 Sup. Ct. 1086, 41 L. Ed. 166; *N. Y., N. H. & H. R. R. Co. v. New York*, 165 U. S. 628, 631, 632, 17 Sup. Ct. 418, 41 L. Ed. 853; *Railway v. Solan*, 169 U. S. 133, 137, 138, 18 Sup. Ct. 289, 42 L. Ed. 688; *M., K. & T. R. R. Co. v. Haber*, 169 U. S. 613, 626, 627, 18 Sup. Ct. 488, 42 L. Ed. 878; *Lake Shore, etc., Ry. Co. v. Ohio*, 173 U. S. 285, 296, 297, 19 Sup. Ct. 465, 43 L. Ed. 702; *Lake Shore, etc., Ry. Co. v. Smith*, 173 U. S. 684, 688, 689, 19 Sup. Ct. 565, 43 L. Ed. 858; *Cleveland, etc., Ry. Co. v. Illinois*, 177 U. S. 514, 516, 517, 20 Sup. Ct. 722, 44 L. Ed. 868; *Missouri & Pacific Ry. Co. v. Larabee Mills*, 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352; *Chicago, etc., Ry. Co. v. Arkansas*, 219 U. S. 453, 465, 466, 31 Sup. Ct. 275, 55 L. Ed. 290; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 435, 436, 32 Sup. Ct. 140, 56 L. Ed. 257; *Second Employer's Liability Cases*, 223 U. S. 1, 48, 49, 32 Sup. Ct. 169, 56 L. Ed. 327; *Savage v. Jones, Indiana State Chemist*, 225 U. S.

501, 32 Sup. Ct. 715, 56 L. Ed. 1182; *Standard Stock Food Co. v. Wright*, as *State Food and Dairy Commissioner of Iowa*, 225 U. S. 540, 32 Sup. Ct. 784, 56 L. Ed. 1197.

The Ohio law and regulations meet all of these requirements. As an inspection law also it was within the state's power to enact, although in its operation it subjected complainant's locomotive boilers to inspection (*Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 354, 18 Sup. Ct. 862, 43 L. Ed. 191; *Savage v. Jones*, *State Chemist of Indiana*, *supra*; *Standard Stock Food Co. v. Wright*, as *State Food and Dairy Commissioner of Iowa*, *supra*), and it is settled that the state's power may be exercised through an administrative board (*Atlantic Coast Line R. R. Co. v. North Carolina Commission*, 206 U. S. 1, 19, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398). Therefore, while the state law stood alone all common carriers in Ohio were bound by its provisions and the regulations adopted under it. But, when Congress chose to provide for the inspection of boilers of locomotives used in interstate commerce, a new situation arose presenting for judicial decision two subjects closely related to each other; one involving the alleged conflict between the respective regulations, and the other having to do with the intention of Congress as disclosed by its legislation and by the regulations adopted by its authority in occupying the field of boiler inspection for locomotives engaged in commerce between the states. If the regulations do conflict, or if the federal regulations do occupy the whole field, the injunction prayed for must issue, as will be shown.

[3] The underlying principle applicable to both subjects was early announced. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. \*316, \*426 (4 L. Ed. 579), said:

"This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them."

Beginning with that case and down to *Standard Stock Food Co. v. Wright*, as *State Food and Dairy Commissioner of Iowa*, *supra* (June 10, 1912) 225 U. S. 540, 32 Sup. Ct. 784, 56 L. Ed. 1197, and through all the cases that principle is so established as to have become elementary. The whole matter of the relative authority of the two sovereignties when brought into question by conflicting or repugnant legislation is covered by the statement of Justice Hughes in *Savage v. Jones*, *Indiana State Chemist* (June 7, 1912) 225 U. S. 501, 524, 525, 32 Sup. Ct. 715, 722 (56 L. Ed. 1182).

"The State cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce [citing cases]. But when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority [citing cases]."

The rule determining the nature of the conflict which shall render a state law inoperative, so far as it affects interstate commerce, de-

clared in *Sinnot v. Davenport*, 22 How. 227, 243 (16 L. Ed. 243), and never departed from in a long series of decisions, is, as in that case announced by Justice Nelson:

"We agree that, in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together. When, therefore, an act of the Legislature of a state prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way; and this without regard to the source of power whence the state Legislature derived its enactment."

Recent decisions reaffirming this principle are found in *Reid v. Colorado*, 187 U. S. 137, 146, 147, 23 Sup. Ct. 92, 47 L. Ed. 108; *Northern Pac. Ry. Co. v. Washington*, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 434, 436, 32 Sup. Ct. 140, 56 L. Ed. 257; *Second Employer's Liability Cases*, 223 U. S. 1, 55, 32 Sup. Ct. 169, 56 L. Ed. 327.

Is the state law with the state regulations in conflict with or in any way repugnant to the act of Congress and the federal regulations on the same subject? It is here that the character of the differences between the respective regulations determine whether there is a direct and positive repugnance or conflict of such character that the regulations cannot be reconciled or consistently stand together.

It will not be necessary to determine the nature of any other differences than those having to do with the drilling of telltale holes in stay bolts shorter than eight inches, and the time within which that work must be done (Ohio regulations V [e]; federal regulations 26, 27), and the time of filing and the contents of specification cards and the time of making the examinations and data required to be specified (Ohio regulations XII [a], [b]; federal regulations 54, and form for such cards), for the case may be disposed of upon a consideration of these. If the regulations on these subjects are compared, it will be seen that their respective provisions present direct conflicts. Both except entirely flexible bolts from the requirement of drilling telltale holes, and both require such drilling in other stay bolts, whether behind frames and braces or not, as are applied after September 1, 1910 (state regulation), or after July 1, 1911 (federal regulation). The state regulation provides for the drilling of telltale holes, which would include bolts applied prior to September 1, 1910, and also bolts behind frames and braces "when the locomotive is in the shop for heavy repairs or at other suitable opportunity," which work must be completed prior to January 1, 1912; while the federal regulation would include bolts applied prior to July 1, 1911, but would not include bolts behind frames and braces (these being expressly excepted) "when the locomotive is in the shop for heavy repairs," which work must be completed prior to July 1, 1914. If there is any question of importance in this case arising from the differences in time as affecting stay bolts applied after the certain respective dates specified, it is necessarily disposed of in the discussion of the effect of the difference in the dates, January 1, 1912, and July 1, 1914, to

which the necessity for completing the drilling of the holes in all bolts is postponed; but it is very clear that by the federal regulation rigid stay bolts behind frames and braces applied prior to July 1, 1911, are expressly excepted from the requirement of having the telltale holes drilled in them, thereby requiring a less degree of care, though very little less, as it appears, than the Ohio regulations. A compliance with the federal regulations would not, therefore, satisfy the Ohio regulations, and would subject the complainant to the state penalty for disobedience, even though he complied with the federal regulation. It is true that by the federal regulation there is no exception for rigid bolts behind frames and braces after July 1, 1911, but necessarily all such bolts applied to the locomotives before that date must by the state regulation have the telltale holes.

The time for making heavy repairs and the coincident drilling of the holes is not fixed, except by the Ohio regulations it must be done prior to January 1, 1912, and by the federal regulations prior to July 1, 1914. In other words, complainant has, under the federal regulation, two years and a half more time within which to prepare itself to meet the federal requirements than it had under the state regulation for doing this work. If it declines to acknowledge the state's authority, it becomes subject to penalty. The provisions for filing the specification cards containing the results of calculations made in determining the working pressure and other necessary data are substantially the same, and, where accurate drawings of boilers are available, the data may be taken from drawings, but by the Ohio regulations the cards must be completed and forwarded prior to March 1, 1911, and by the federal regulations prior to July 1, 1912. In cases in which accurate drawings are not available, the required data, by each regulation, must be obtained at the first opportunity when general repairs are made or when flues are removed, if their removal is necessary to enable the examination to be made; but the state act requires all examinations to be completed and cards filed prior to January 1, 1912, while the federal limitation of time is July 1, 1913. It appears that the examination required to be made where accurate drawings are not available involves dismembering the principal parts of the locomotive boilers, and that the operation on each locomotive requires large expense and much time, and necessarily withdraws the locomotive for as much time as may be necessary from active service. It will be observed that in neither of the regulations is any time fixed for making general repairs or removing flues; but it is clear that under the federal regulations a longer time within which to comply is granted than in the state regulations. The defendants minimize these differences, arguing that a compliance with the state regulations would be in preparation for compliance with the federal regulations, and a compliance with the former within the time limited by them would, therefore, be a compliance with the federal regulation.

This argument misses the point, for the question is not what complainant may do in order that it can, by its conduct, harmonize these regulations; but whether it must obey the state requirements when Congress has provided a different rule regulating its conduct. It is



clear that the state requirement for drilling telltale holes in the stay bolts behind frames and braces is not a requirement of the federal regulations, and is therefore additional to them. There is a class of cases in which Congress and a state have each legislated respecting the same general subject-matter, and the state law included a subject as to which the federal act was silent. In these cases the state law was sustained, because, while the federal act operated in the same general field, yet it was silent as to the particular subject-matter embraced in the state legislation; in other words, Congress had not acted upon that particular subject-matter at all, and therefore the state could do so if it were a subject within its police power and affected interstate commerce only indirectly. Thus in *Missouri, etc., Ry. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878, an act of Kansas relating to bringing diseased cattle into the state and authorizing a civil action to recover damages in favor of any person injured was held not to be overridden by the act of Congress known as the Animal Industry Act, or by certain other acts of Congress, because Congress had made no provision for a civil action, and that provision in the Kansas act was in aid of the objects Congress had in view, and was an exercise by the state of its police power to protect the people and redress their wrongs within its limits.

*Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108, is such a case. This involved a statute of Colorado making it a misdemeanor for any one to bring into the state between April 1st and November 1st any cattle or horses from a state, territory, or county south of the thirty-sixth parallel, north latitude, unless they had been held at some place north of that parallel at least 90 days prior to importation, or unless the owner or person in charge should procure from the state veterinary sanitary board a certificate of health of the cattle or horses. The Animal Industry Act of Congress made it an offense for any one knowingly to take or send from one state into another any live stock infected with an infectious or communicable disease. It was held that the act did not make it an offense against the United States to ship from one state into another live stock which the shipper did not know were diseased. The offense provided by the Colorado statute consisted in not holding the cattle at some place north of the thirty-sixth parallel, and in not having procured a certificate of health, irrespective of the offender's knowledge, or want of it, of the health of the cattle or horses. In *Savage v. Jones*, *Indiana State Chemist*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182, a citizen of Minnesota sought to restrain the state chemist of Indiana from taking proceedings to enforce an act of that state requiring a person who caused to be sold or offered for sale any concentrated commercial feeding stuff, to take the steps therein provided, particularly to file with the state chemist a statement containing, among other things, the ingredients composing the feeding stuff. This was held not to be in conflict with the national Food and Drugs Act, because, among other reasons, that act did not require any publication of the ingredients of any food or drug when a subject of interstate commerce. In holding that no ground appeared for denying the validity of the statute of Indi-

ana, Justice Hughes said (225 U. S. 539, 32 Sup. Ct. 728 [56 L. Ed. 1182]):

"That State has determined that it is necessary in order to secure proper protection from deception that purchasers of the described feeding stuffs should be suitably informed of what they are buying and has made reasonable provision for disclosure of ingredients by certificate and label, and for inspection and analysis. The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the Federal act. They may be sustained without impairing in the slightest degree its operation and effect. There is no question here of conflicting standards, or of opposition of state to Federal authority."

The test, therefore, is not whether Congress has actually legislated upon the general subject; but the question has to do rather with the effect and character of its legislation and the end sought to be attained. The question is not whether the act of Congress operates upon the same subject-matter as the state act, but whether, from the nature of the subject-matter, congressional action leaves room without a conflict for the operation of the state law in the same field.

The distinction is clear between such cases as those involving diseased cattle legislation and the case of the Indiana state chemist on the one hand, and those cases on the other in which the character of the state act is such that in carrying out its provisions a conflict must necessarily arise in determining the rights of the individual engaged in interstate commerce, who, if the state act operates imperatively upon him, becomes subject to its penalties, although as to the act complained of under the state law he has a sanction for under the act of Congress. Such a case was *Sinnot v. Davenport*, 22 How. 227, 241 (16 L. Ed. 243), which involved an act of Alabama making certain requirements of owners of steamboats navigating the waters of that state. It was held invalid so far as it was brought to bear upon a vessel which had taken out a license, and was duly enrolled under the act of Congress for carrying on the coasting trade, and plying between New Orleans and the city of Montgomery, Ala. The act of Congress regulating the coasting trade required a compliance with many conditions by the owners of vessels before obtaining enrollment or license. Concerning these, Justice Nelson said:

"These are the guards and restraints, and the only guards and restraints, which Congress has seen fit to annex to the privileges of ships and vessels engaged in the coasting trade, and upon a compliance with which, as we have seen, as full and complete authority is conferred by the license to carry on the trade as Congress is capable of conferring."

A like conclusion was reached in *Harman v. Chicago*, 147 U. S. 396, 13 Sup. Ct. 306, 37 L. Ed. 216, in which an ordinance of Chicago exacting a license fee for tugs towing vessels in the Chicago river was involved. The protesting owner of tugs engaged in interstate commerce sued to recover the license fee he had been compelled to pay. The decision against him in the state courts was reversed in the Supreme Court of the United States.

[5] The fact being established that Congress has not required the railroads to drill telltale holes in all rigid bolts shorter than eight inches wherever located, the requirement by the state that such holes shall be

drilled in rigid bolts behind frames and braces imposes a duty on the railroads engaged in interstate commerce from which they are exempted by the regulations under the federal act. Congress, as it were, licenses the railroads to use rigid bolts behind frames and braces without drilling telltale holes in them. The state requires the railroads to do something more with respect to stay bolts than Congress requires—something additional, not in the sense of an additional subject-matter, though related to the same general subject of legislation, but something additional to the very subject-matter upon which Congress has expressly legislated. It was established long ago that a state cannot legislate by way of complement of or in augmentation of the legislation of Congress with respect to the same subject-matter. *Houston v. Moore*, 5 Wheat. 1, \*21, \*22, 5 L. Ed. 19; *Prigg v. Pennsylvania*, 16 Pet. \*539, \*618, 10 L. Ed. 1060.

Here the direct effect of the state requirement is to compel the complainant to a course of conduct relative to its interstate locomotives from which it is excused by the federal requirement, and forces it to abandon the right to act in accordance with the requirements of the paramount power, or subject itself to the penalty for disobedience of the state regulations. In this respect, at least, the case differs from that class of decisions to which *Railroad Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472, and *Railroad Co. v. Siler* (C. C.) 186 Fed. 176, 197 et seq. (6 Cir.) belong. In these compliance by the carrier with requirements made by state legislation under established power affecting local conditions involved an expense or loss if the carrier chose to continue to run interstate trains in the one case, and in the other to adhere to rates theretofore fixed for that traffic. In the *Kansas* case the State Railroad Commission ordered the railroad to put passenger train service in operation on its road between Madison, Kan., and the Missouri-Kansas state line. The railroad company operated interstate trains on that road. At the state line there were no terminal facilities, these being in Missouri, some 20 miles beyond, and it would be inconvenient and expensive to build adequate facilities at the state line. The railroad's claims that the order in effect was a direct burden on interstate commerce because it required the stopping of interstate trains at the state line, and because, the expense of establishing facilities at that point being great, the railroad, in order to avoid that expense, must operate the passenger service through to its terminals beyond the state line, was held untenable, because the order did not direct the stopping of interstate trains at the state line, and because the operation of local passenger trains beyond that line was at the mere election of the railroad company. "Besides," said Justice White (216 U. S. 284, 30 Sup. Ct. 338, 54 L. Ed. 472), "even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed."

In the case in this circuit, the railroad's interstate rates filed by it with the Interstate Commerce Commission comprised the sum of its local rates in Kentucky and adjoining northern states. The Kentucky

Railroad Commission under established powers changed the local rates in Kentucky. The railroad's claim was that interstate business conditions in that part of Kentucky would not justify a reduction of the rates established for that traffic, and a compliance with the order lowering the local rates would, if they were adopted by the railroad as its interstate rate, result in a loss to the railroad in carrying interstate commerce; and adherence to the old interstate rate, to which it had the right to adhere, would necessarily result in a cessation of that kind of traffic. But it was held that the act of the Commission did not bear directly upon interstate rates; that the loss resulting from the business necessity to which the railroad was subjected of reducing its interstate rate in order to hold that business was but the remote and incidental effect of the Commission's order which in itself did not bear directly upon the subject, and was, therefore, in no sense a regulation of it; that the incidental effect of the order was to cause the carrier to reduce its interstate rates, if, for business reasons, it elected to do so, and it was shown that (186 Fed. 200):

"The logic of the company's argument would release its local rates from governmental regulation altogether; for the United States could not fix the local rates, because they are local, and the state could not change them, because it would thereby cast a direct burden on interstate commerce."

Such conclusion was held untenable, as it was also in the Kansas case in which the railroad's argument led to an escape from all regulations, state or federal.

In these cases enforced obedience to the state mandate did not involve a compulsory abandonment of a right the complainant in each had under the Constitution and laws of the United States. They could forego that right if they elected to do so, but they were not by the exercise of the state's power forced to forego it. In this case the Ohio regulations take away from the complainant the constitutional right to regulate its conduct in accordance with the command of the paramount power. In the contrasted cases a change of complainants' conduct with respect to interstate traffic, if they chose to make it, would be the direct result of their own business reasons, and not of any compulsion imposed by the requirement of state legislation passed under recognized state power. There was in them a lack of connection between the moving force and the incidental result, and there was, therefore, an absence of that "privity between the manifestation of the power and the resulting burden," of which then Associate Justice White speaks in his dissenting opinion in the Northern Securities Case, 193 U. S. 197, 395, 24 Sup. Ct. 436, 485 (48 L. Ed. 679). In this case the enforcement of the state regulations is the denial of complainant's constitutional right to be governed by the requirements of the federal regulations. In these respects the contrasted cases and this case differ radically in principle. The rule may be deduced from all of the cases that a state act necessarily by its requirements bringing about a conflict with the requirements of an act of Congress on the same subject produces that direct interference with interstate commerce which is not permissible. Since these regulations do conflict in the manner shown with respect to telltale holes in bolts behind frames and braces, the conclusion must



be that the state regulation constitutes a direct interference with interstate commerce.

[4] The difference in the time provided by the two regulations within which the carrier must comply with the requirements of each as to the drilling of telltale holes and the filing of the specification cards presents another reason why the complainant cannot be compelled to obey the state regulations. The mere fact that such obedience within the time fixed might involve inconvenience to the common carrier whose instrumentalities of commerce might be affected, even though serious in character, is not important if the state act was a proper exercise of its reserved power. *N. Y., N. H. & H. R. R. Co. v. New York*, 165 U. S. 628, 632, 633, 17 Sup. Ct. 418, 41 L. Ed. 853; *Chicago, etc., Ry. Co. v. Arkansas*, 219 U. S. 453, 464, 31 Sup. Ct. 275, 55 L. Ed. 290. But Congress and the authority constituted by its legislation have seen fit to give to the carriers a certain time within which the really serious requirements may be complied with. There may be no convenient time for general repairs of some of the complainant's locomotives before the time limited by the state regulations, whether it be the drilling of telltale holes or obtaining the necessary data by dismembering the locomotives and making the required examinations of the boilers. The federal regulations indicate what shall be a sufficient compliance with respect to time. This leaves no opportunity for the state to establish any other measure of time. Authority to the point is found in *Nor. Pac. Ry. Co. v. Washington*, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237, which involved the "Hours of Service" Act of Congress, approved March 4, 1907 (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), but not to take effect until March 4, 1908; and an act of the state of Washington of June 12, 1907 (Laws 1907, c. 20). The acts were much alike. The railroad company was engaged in hauling merchandise from points outside of the state destined to points within the state, and from points within the state to points in British Columbia, as well as in carrying merchandise which had originated outside of the state and was in transit through the state to foreign destination. The train may also have been carrying some local freight. The company permitted some of the train crew to remain on duty more than 16 consecutive hours and proceedings were instituted in the state court to recover penalties for the violation of the state law on that subject. The right to do so was sustained by the Supreme Court of that state on the sole ground that the state act preceded the congressional act in point of time of effective operation, and therefore until the act of Congress had taken effect at the date prescribed it was competent for the state to make a regulation for the hours of service of employes on railroad trains moving within the state, and to apply such regulations to a train engaged in interstate commerce. But the Supreme Court of the United States (222 U. S. 379, 380, 32 Sup. Ct. 161, 56 L. Ed. 237) took a different view, Chief Justice White saying (the court considering the issue as one requiring merely the interpretation of the statute):

" \* \* \* We are of opinion that it becomes manifest that it would cause the statute to destroy itself to give to the clause postponing its operation for

one year the meaning which must be affixed to it in order to hold that during the year of postponement state police laws applied. In the first place, no conceivable reason has been, or we think can be, suggested for the postponing provision if it was contemplated that the prohibitions of state laws should apply in the meantime. This is true because if it be that it was contemplated that the subject dealt with should be controlled during the year by state laws, the postponement of the prohibitions of the act could accomplish no possible purpose. This is well illustrated by this case, where, by the ruling below, a state regulation substantially similar to that contained in the act of Congress is made applicable. In the second place, the obvious suggestion is that the purpose of Congress in giving time was to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act, a purpose which would of course be frustrated by giving to the provision as to postponement a significance which would destroy the very reason which caused it to be enacted."

The defendants urge a distinction, however, between the "Hours of Service" case and theirs, in that in the former the federal statute was passed March 4, 1907, and was not to take effect until March 4, 1908, and the claimed violation of the law occurred about a month after the state law became effective, June 12, 1907, while in the instant case the state law, approved May 20, 1910, was to take effect September 1, 1910, and the regulations under it were adopted August 11, 1910, while the act of Congress passed February 17, 1911, was not to take effect until July 1, 1911, and the regulations under it being adopted June 2, 1911. In other words, the state law was passed and took effect before the federal law. Of course, so long as Congress was silent, the state law spoke effectively and complainant complied with its regulations, but, when the orders of Congress were given to regulate interstate commerce in a certain way, the state no longer had any voice in the matter, and complainant refused further compliance. "It is elementary, \* \* \*" says Chief Justice White, *Railway Co. v. Washington*, supra, 222 U. S. 378, 32 Sup. Ct. 161, 56 L. Ed. 237, "that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the State. To admit the fundamental principle and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute." From this it follows that Congress having given the complainant until July 1, 1914, to drill the telltale holes required, and until July 1, 1912, to file its specification cards in cases where accurate drawings

of the boilers were available, and until July 1, 1913, to make the necessary examinations when such drawings are not available, the state had no power to compel the complainant to do any of these things after the federal regulations were adopted, June 2, 1911.

This leads to a consideration of a class of cases to which the case just cited really belongs illustrative of the far-reaching power of Congress in regulating interstate commerce, and establishing the want of any power in the states to even indirectly and incidentally affect interstate commerce by their legislation, when Congress in the exercise of its power has, by the language of its enactment, or from the nature of the subject-matter, shown an intention to exercise its exclusive power over such commerce by occupying the whole field presented by the subject-matter.

Preliminary to a discussion of these cases it may be well to refer to the effect upon a state's legislation which, were it not for congressional action, would be permitted as only an indirect and incidental interference with interstate commerce, when, by such action, a conflict is precipitated between the two sovereignties. In such case the congressional legislation will "supersede" any state action on the subject (*Railway v. Alabama*, 128 U. S. 96, 99, 9 Sup. Ct. 28, 32 L. Ed. 352), or the state law will be operative until "displaced" by congressional legislation (*N. Y., N. H. & H. R. R. Co. v. New York*, 165 U. S. 628, 632, 17 Sup. Ct. 418, 41 L. Ed. 853). "Undoubtedly," says Justice Harlan, "Congress in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce." *Railway v. Arkansas*, 219 U. S. 453, 466, 31 Sup. Ct. 275, 279 (55 L. Ed. 290). And the same learned justice says that when the "entire subject" is one upon which Congress constitutionally may legislate and has legislated, and has devised a system for dealing with it, "all local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; \* \* \*" *Reid v. Colorado*, 187 U. S. 137, 146, 147, 23 Sup. Ct. 92, 96 (47 L. Ed. 108). And again, as applying to such rights as complainant acquired under the act of Congress he said (187 U. S. 151, 23 Sup. Ct. 97, 47 L. Ed. 108):

"\* \* \* The acknowledged police powers of a State cannot legitimately be exerted so as to defeat or impair a right secured by the National Constitution, any more than to defeat or impair a statute passed by Congress in pursuance of the powers granted to it."<sup>1</sup>

In *Gulf, etc., Ry. Co. v. Hefley*, 158 U. S. 98, 104, 15 Sup. Ct. 802, 804 (39 L. Ed. 910), a Texas statute making it unlawful for a railroad company to charge a greater sum for transporting freight than that specified in the bill of lading was held, when applied to freight transported into the state, to be in conflict with the Interstate Commerce

<sup>1</sup> Indeed, the question may be said to be one of individual rights under the Constitution, rather than one of conflict of powers. Justice Washington in *Houston v. Moore*, 5 Wheat. 1, \*22 (5 L. Ed. 19).

Act, making it unlawful for a railroad to charge and collect a greater or less compensation than that specified in its published schedule of rates. Justice Brewer, after referring to many cases in which state acts, local in character, had been sustained by reason of the absence of congressional legislation, said:

"Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the states, is subordinate to those in terms conferred by the Constitution upon the nation."

The language of these decisions foreshadows the specific declarations by the Supreme Court of the extent of power possessed by Congress when by its legislation it shows an intention to cover the entire field embraced by the subject-matter of its laws affecting interstate commerce. Perhaps the most far-reaching decision is *Southern Railway Co. v. United States*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72, in which it was held that the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), imposing the duty upon every common carrier "engaged in interstate commerce by railroad" of equipping all trains, locomotives, and cars used on its lines in moving interstate traffic with designated appliances calculated to promote the safety of that traffic and of employes, and forbidding "any such common carrier" to haul or permit to be hauled or used on its line of railroad any car "used in moving interstate traffic," not equipped with automatic couplers capable of being coupled and uncoupled without the necessity of a man going between the ends of the cars, embraced all locomotives, cars, and similar vehicles used on any railroad that was a highway of interstate commerce, and this was so, although three cars in a train of five cars transporting interstate commerce were loaded with local freight only. The objection that the act directly affected intrastate commerce with respect to the three cars engaged in that traffic was met by showing that the absence of the couplers on those cars was a menace to that train and to others, and because the power of Congress was not exerted to regulate intrastate commerce as such, but, as said by Justice Van Devanter (222 U. S. 27, 32 Sup. Ct. 4, 56 L. Ed. 72):

"• • • because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce."

Clearly here was a subject always held to be within the exclusive power of the states to directly regulate and yet the manifest purpose of Congress to provide for the safety of persons and property when they were the subject of interstate commerce made the law of Congress paramount to any reserved power the state might have touching the instrumentalities carrying commerce solely within its limits.



In *Southern Ry. Co. v. Reid*, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257, a statute of North Carolina required railroads to receive freight for transportation whenever tendered at a regular station and to forward the same by a route selected by the person tendering the freight under a penalty to the aggrieved party for its refusal. Upon a tender of freight to be routed as designated by the shipper from a point in North Carolina to a point in West Virginia, no through rates having as yet been made or filed with the Interstate Commerce Commission, the agent refused the freight, and, after the establishment of the rate within a few days, received and transported the freight. The freight was the subject of interstate commerce, yet under the local act the railroad must obey. On the other hand, it could make no interstate shipment under the interstate commerce act unless its through rate had been filed and published, as required by the Interstate Commerce Act, or had been fixed at the time the freight was tendered. In the opinion the inquiry was put by Justice McKenna (222 U. S. 437, 32 Sup. Ct. 143, 56 L. Ed. 257):

"Does it [the Interstate Commerce Act] \* \* \* take control of the subject-matter and impose affirmative duties upon the carriers which the State cannot even supplement? In other words, has Congress taken possession of the field?"

And he answers the question by saying (222 U. S. 440, 32 Sup. Ct. 144, 56 L. Ed. 257):

"There is scarcely a detail of regulation which is omitted to secure the purpose to which the Interstate Commerce Act is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of."

And again (222 U. S. 442, 32 Sup. Ct. 144, 56 L. Ed. 257):

"The power of Congress to so provide [fix rates for interstate commerce] cannot be doubted. If the regulation be not exclusive, this situation is presented: If the carrier obey the state law, he incurs the penalties of the Federal law. If he obey the Federal law, he incurs the penalties of the state law. Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground."

It was therefore held that the railroad company could not be compelled to receive the freight, the state laws to the contrary notwithstanding, until through rates had been established.

Second Employer's Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, involved the act of Congress providing that every common carrier by railroad while engaged in interstate commerce should be liable in damages to any person suffering injury while he was employed by such carrier in such commerce. It made provision for recovery in case of injury or death, whether the injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect of insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. The rule of contributory negligence was modified materially, and also the rule of assumption of risk. The case decides, among other things, notwithstanding the rules of the common law relative to contributory

negligence and assumption of risk and although the same end at which Congress was aiming, namely, the safety of employes engaged in interstate commerce, was the subject of legislation in the several states, that the whole field, so far as interstate commerce was concerned, was covered by the act of Congress, and it therefore superseded all rules of the common law and all the laws of all the states directed to the same end sought to be attained by the act. Justice Van Devanter said (223 U. S. 51, 32 Sup. Ct. 175, 56 L. Ed. 327):

. "We are not unmindful that that end [to impel the carriers to avoid or prevent negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines] was being measurably attained through the remedial legislation of the several States, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. *The Lottawanna*, 21 Wall. 558, 581, 582 [22 L. Ed. 654]; *Baltimore & Ohio R. R. v. Baugh*, 140 U. S. 368, 378, 379 [13 Sup. Ct. 914, 37 L. Ed. 772]."

And again (223 U. S. 54, 55, 32 Sup. Ct. 177, 56 L. Ed. 327):

"True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. *Sherlock v. Alling*, 93 U. S. 99 [23 L. Ed. 819]; *Smith v. Alabama*, 124 U. S. 465, 473, 480, 482 [8 Sup. Ct. 564, 31 L. Ed. 508]; *Nashville, etc., Ry. Co. v. Alabama*, 128 U. S. 96, 99 [9 Sup. Ct. 28, 32 L. Ed. 352]; *Reid v. Colorado*, 187 U. S. 137, 146 [23 Sup. Ct. 92, 47 L. Ed. 108]. The inaction of Congress, however, in no wise affected its power over the subject. *The Lottawanna*, 21 Wall. 558, 581 [22 L. Ed. 654]; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215 [5 Sup. Ct. 826, 29 L. Ed. 158]. And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. *Gulf, Colorado & Santa Fé Railway Co. v. Hefley*, 158 U. S. 98, 104 [15 Sup. Ct. 802, 39 L. Ed. 910]; *Southern Railway Co. v. Reid*, 222 U. S. 424 [32 Sup. Ct. 140, 56 L. Ed. 257]; *Northern Pacific Railway Co. v. Washington*, 222 U. S. 370 [32 Sup. Ct. 160, 56 L. Ed. 237]."

It will be observed that in none of these cases did the act of Congress expressly declare an intention of occupying the whole field or especially prohibit state action relative to the same subject-matter, or forbid joint occupancy in the field Congress chose to occupy. But such inhibition is not necessary. In *Southern Railway Co. v. Reid & Beam*, 222 U. S. 444, 447, 32 Sup. Ct. 145, 146 (56 L. Ed. 263), Justice McKenna, says:

"We have shown in the opinion in No. 487 [222 U. S. 424 (32 Sup. Ct. 140, 56 L. Ed. 257), *Southern Ry. Co. v. Reid*], that there need not be directly inhibitive congressional legislation, but congressional legislation which occupies the field of regulation and thereby excludes action by the state. *Northern Pacific Ry. Co. v. State of Washington* [222 U. S. 370 (32 Sup. Ct. 160, 56 L. Ed. 237)]."

When the national boiler inspection act and its title and regulations under it, and the state boiler inspection act and its title and the regulations under it, are considered, it is manifest that both Congress and

the State were providing through their legislation and authorized instrumentalities and regulations, each in its respective field, a complete and elaborately detailed scheme of equipment of locomotives with safe and suitable boilers and appurtenances thereto; and a comparison of the two shows differences in what may seem unimportant details, but the consequences of which cause the state regulations, in at least the respects discussed, to infringe the rights of the complainant as a common carrier using locomotives engaged solely in commerce between the states. But both acts and regulations show the evident purpose of the state, on the one hand, and Congress on the other, to completely cover the field embraced by the purposes of each. The federal regulations fixing minimum requirements is equivalent to a declaration to interstate carriers that no more are necessary. So far as interstate commerce is concerned, Congress has clearly asserted its undoubted power to cover the whole field of boiler inspection by appropriate legislation and regulations of uniform application in all of the States, and has by so doing superseded the legislation and regulations of the State of Ohio so far as they may affect the complainant's locomotives. To the immediate point and as controlling the question, the remarks of Justice Hughes in *Savage v. Jones*, *Indiana State Chemist*, 225 U. S. 501, 533, 32 Sup. Ct. 715, 726 (56 L. Ed. 1182), may be quoted:

"\* \* \* When the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 [27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075]; *Northern Pacific Ry. Co. v. Washington*, *supra*; *Southern Ry. Co. v. Reid*, *supra*."

The necessities of this case do not require an expression of opinion whether the Supreme Court of Ohio in *Railway Co. v. State*, 82 Ohio St. 60, 91 N. E. 869, 137 Am. St. Rep. 758, entertain views inconsistent with the views of the Supreme Court of the United States as expressed in many of their decisions.

The conclusion is, and under the decisions of the Supreme Court of the United States must necessarily be, that the Ohio act and the regulations adopted in pursuance of its provisions involved in this case are clearly in contravention of the Constitution of the United States, so far as they are applied, or are sought to be applied, to the complainant and its locomotives, and therefore that the complainant is entitled to the interlocutory injunction prayed for in its bill.

An order appropriate to that end may be taken.

**MINNESOTA & OREGON LAND & TIMBER CO. et al. v.  
HEWITT INV. CO.**

(District Court, D. Oregon. January 6, 1913.)

No. 3,125.

**1. ESCROWS (§ 1\*)—WHAT CONSTITUTES—CONDITION—NECESSITY OF WRITING—“ESCROW.”**

A deed in “escrow” is one that has been delivered to a stranger with directions that he shall deliver to the grantee on performance by the latter of some condition, which may be either oral or written or partly oral and partly written, as to the payment of a sum of money, or the observation of some obligation, or the happening of some event; the grantor reserving the right to reclaim the deed if the condition is not fulfilled, or the event does not happen.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. §§ 1-3, 5; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2464-2467.]

**2. SPECIFIC PERFORMANCE (§ 25\*)—CONTRACT TO CONVEY—EXECUTION OF DEED.**

Mere execution of a deed by a vendor to a purchaser, without delivery, unless deposited as a perfect escrow, is insufficient to constitute a contract to convey which can be made the subject of specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 56-58, 60; Dec. Dig. § 25.\*]

**3. FRAUDS, STATUTE OF (§ 103\*)—SALE OF LAND—WRITTEN CONTRACT.**

Correspondence between the parties to a sale of land, together with a deed sent by the vendor to a bank describing the land referred to, with directions for delivery to the vendee on the payment of the price, *held* to constitute an enforceable contract in writing for the sale of the land.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 192-208; Dec. Dig. § 103.\*]

**4. CORPORATIONS (§ 425\*)—OFFICERS—AUTHORITY—CONVEYANCE OF LAND—ESTOPPEL.**

The by-laws of defendant investment company authorized its president, with the approval of the other members of the finance committee, which consisted of the president and two other members of the board of directors, to buy and sell real property without further specific authority from the board. By article 7 the president was made general manager with full power to buy real estate or anything which the company was entitled to hold, buy, or sell, subject to the approval of the finance committee, and by article 11 it was made the duty of such committee to advise with and approve purchases and sales made by the president. The president was in control of the entire business of the company, and he, his son, and wife were the owners of practically the whole of the capital stock; the son acting as secretary. *Held* that, the president having conducted the business of the company as though he were vested with full power to do all things requisite to the purchase and sale of real property, the corporation was estopped to deny that he had authority to bind it by a contract for the sale of real estate, and with the secretary to execute a deed to convey the title.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1701; Dec. Dig. § 425.\*]

In Equity. Suit for specific performance by the Minnesota & Oregon Land & Timber Company and another against the Hewitt Investment Company. Decree for complainant.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



This is a suit to compel the specific performance of an alleged contract or agreement for the sale and conveyance of certain real property by the defendant, the Hewitt Investment Company, to the plaintiff Minnesota & Oregon Land & Timber Company. The plaintiff E. Z. Ferguson was the agent of the Land & Timber Company, and was authorized to contract for and to purchase timber lands for said company in his name. About December 22, 1905, the defendant Investment Company executed to Ferguson a deed to 640 acres of timber land situated in Clatsop county, Or. On that date Henry Hewitt, Jr., who was the president of the Investment Company, transmitted the deed from Tacoma, Wash., to the Astoria National Bank in Astoria, Or., with directions to the bank to deliver the deed to Ferguson for \$12,800 net to the grantor in Tacoma funds. The letter and deed were received by the bank on the following day. The \$12,800 was paid into the bank by Ferguson on January 3, 1906, with instructions to deliver the same, when the title to the land should be made perfect in him, Ferguson, to the Investment Company in Tacoma Exchange, and that, pending the perfecting of said title, the bank should hold the money and deed in its possession. Ferguson at the time specified certain defects in the title which needed correction. On January 5th the Investment Company requested of the bank a return of the deed. The deed was returned on January 9th for correction. Thereafter the Investment Company kept the deed, and finally refused to make any correction, or to return the same to the bank, or to deliver it to Ferguson. The plaintiffs allege, in effect, that the deed was deposited with the bank in escrow, so understood and treated by all the parties, and that it, together with the arrangement whereby it was so placed in escrow, and the letters passing between the parties attending the transaction, constituted a valid and binding contract, whereby the defendant agreed to sell and the plaintiffs to purchase the lands described in the deed at and for the consideration of \$12,800, and that plaintiffs are entitled to have the same specifically enforced. The defendant controverts the claim of plaintiffs, and avers that Ferguson and Henry Hewitt, Jr., had a personal understanding, but not in writing, whereby it was agreed between them that defendant should sell and convey to the plaintiff Ferguson the lands described in the deed for the consideration of the sum of \$12,800 in Tacoma funds to be paid by Ferguson to defendant, and in further consideration that Ferguson could and would procure and deliver to defendant in exchange therefor at and for an equal price based upon the estimate of timber thereon at 50 cents per thousand feet of stumpage, the title to a quantity of other timber lands containing an equal estimate or more of timber situated in Columbia county, Or., lying adjoining certain timber lands then owned by defendant. These averments are denied.

C. W. Fulton, of Portland, Or., for plaintiffs.

E. R. York, of Tacoma, Wash., for defendant.

WOLVERTON, District Judge (after stating the facts as above). That the parties, Henry Hewitt, Jr., acting on the one part and E. Z. Ferguson on the other, had an understanding that the defendant company should deed the lands in dispute to Ferguson for a consideration of \$12,800, there is no dispute. But there is a dispute as to whether Ferguson as further part consideration for the sale to him agreed to secure other lands for the defendant company adjoining some that it held in Columbia county. It is also disputed that the deed was delivered to the bank in escrow, and it is affirmed that whatever negotiations might have taken place relative to the sale of such lands by defendant company to Ferguson were not in writing, and therefore not binding or obligatory upon the defendant. There is a controversy also whether the negotiations were had with the defendant company

or with Henry Hewitt, Jr., individually and upon his own account, and whether the company or its officers were authorized to execute the deed in question.

The negotiations were attended with considerable correspondence, and it will aid us materially first to take note of that. On July 24, 1905, Ferguson wrote the Hewitt Investment Company:

"You will remember that I have corresponded with you and also had a personal interview with your Mr. Hewitt some time since, in regard to the four claims that you own in 6/6, but at that time the price that you were asking for this land, was more than our parties would pay. I notice from the plats in my office that you are the owner of quite a little bunch of land in 5/3 and 5/4, Columbia Co., and I would like to know if you would consider a proposition to trade your 4 claims in 6/6 for four claims adjoining the land that you own in Columbia Co., providing of course, that the land was as well timbered with as good a quality of timber. Our information on this subject shows the timber to be about the same in both localities."

Hewitt answered at the foot of the letter, and returned it:

"Yours received on my return. I hardly care to trade lands. I might sell the whole bunch at 20.00 per acre. It is heavily timbered, will average from 6 to 9 M per claim. One claim somewhat burnt."

Again, on August 17th, Ferguson wrote, inquiring whether the Investment Company would consider a proposition for an exchange of lands, and on September 25th as follows:

"Your letter of recent date stating that you would not care to trade your lands, but that you would sell them all for twenty dollars per acre, received, but in reply I have to say that there seems to be a very poor prospect of making a sale of this tract at the present time. Timber buying has dropped off, and there is practically no timber changing hands. It may be better after awhile. I am authorized to offer you eight thousand dollars for the four hundred acres in 6-6. As you know one of these claims is partially burned. One of them is better than the average, and the other two are just about up to the average, in that part of the country, and the price offered you is more than has been paid any one else in the township. The timber is mostly red and bastard fir; practically no yellow fir."

On December 22, 1905, Hewitt wrote the Astoria National Bank:

"Please deliver the enclosed deed of lands in 6-6 West to E. Z. Ferguson for \$12,800.00 net to us in Tacoma funds. We have notified Mr. Ferguson and he will probably call for the deed at an early date."

He also wrote Ferguson as follows:

"We have to-day sent deed for lands to Astoria N. Bk. which they will deliver to you on payment of 12,800.00. I will send you a check for commissions when money is received of 2½%. Our directors would not allow more & in fact did not like to deed the land at all. We consider this land worth 30,000. However if you can find us the land you promised, will send my son or another good cruiser to look over lands & in some way make good my promise to you. Now hustle & find the other land. It must be come-at-able & good logging chance finally."

By a coincidence Ferguson wrote Hewitt on the same day:

"I have just completed the abstracts for your land, but have not yet given them to the attorney. I have however looked them over myself and find one matter that needs attention. There are four deeds to the Hewitt Investment Co. and each is signed Lester B. Lockwood, Hattie M. Lockwood by Herbert S. Griggs her attorney in fact, and we do not find any power of

attorney of record from Hattie M. Lockwood. It will be necessary to have this or else a deed from Hattie M. Lockwood. Please inform me if you have the P of A, and if so send it with your deed to the Bank; if not, can you get a deed from her? If the attorney finds anything else will let you know, but I do not think there is anything else. Of course you are aware that in Oregon the wife has a dower and her signature is more important than in Washington. Up to this time I have been too busy to send you the map of the other lands, but will do so soon. There is quite a little work to make it up. When can I expect the deed?"

On December 23d J. E. Higgins for the bank acknowledged receipt of Hewitt's letter with inclosure.

On January 3, 1906, Ferguson wrote the bank:

"Relating to the deed from the Hewitt Investment Co. to E. Z. Ferguson, the undersigned, said deed being in your possession to be delivered to me upon the payment of \$12,800 and purporting to convey the following described land, to wit: [Description of land.] I have to say that the following matters in connection with the title to said land need to be corrected. In the said deed the description reads T. 6 S., whereas it should read T. 6 N., also there is lacking in the title to said land a power of attorney from Hattie M. Lockwood to Herbert S. Griggs, which said power of attorney should be furnished by the Hewitt Investment Co. and placed of record. It also appears that the Hewitt Investment Co. has not complied with the Oregon laws governing foreign corporations. I therefore deposit with you herewith the sum of \$12,800.00 in gold coin of the United States, made payable to the said Hewitt Investment Co. with instructions that you shall, when the title to the said land shall have been made perfect in me, deliver to the said Hewitt Invest. Co. the said \$12,800 in Tacoma Exchange, and that pending the making of said title perfect in me, you shall hold this money and deed in your possession."

On the same day Ferguson wrote Hewitt Investment Company:

"On Dec. 26th I wrote you in regard to the title of your land which I am purchasing, stating that there was lacking in the title, a power of attorney from Harriet M. Lockwood to Herbert S. Griggs, but up to this time, have no reply. My attorney has examined the abstract in regard to this title, but in addition to the power of attorney which is lacking, he finds two other matters which need attention. In the deed, which you sent here, the description reads T. 6 S. instead of T. 6 N., also it does not appear that the Hewitt Investment Company has complied with the Oregon laws governing foreign corporations. I think for your own protection, that you would wish to straighten up this last matter on account of your other land in Oregon. I do not know how seriously this affects the title, but think it would be better if it was straightened up. I have to-day deposited in the Astoria National Bank, the sum of \$12,800, the sum to be sent to you in Tacoma Exchange when the title to this land is made perfect in me. I do this so that you will understand that I am not endeavoring to gain time, but am ready and willing to take over the deal whenever it is in shape for delivery."

He also wrote Henry Hewitt, Jr., as follows:

"This morning I wrote to the Hewitt Investment Co., which letter you will undoubtedly receive about the same time that you receive this, and at noon to-day, I received your letter of the 2nd, to which I hasten to reply. I think, in order to get this matter straightened up with the greatest possible speed, it would be best for you to prepare a new deed making it just the same as the former deed, excepting to state that the land is all in T. 6 N. R. 6 W., W. M., instead of T. 6 S. as it now reads. It is evident from the deed in the bank that you have a copy and can see how this mistake occurred. This deed you can send to the bank to be substituted for the one that is now in their hands. If at the same time, you have an original power of attorney

to Mr. Griggs from Harriet M. Lockwood, it could be sent over and recorded in this county; if you haven't the original, you can have a certified copy made from the records there which will answer the same purpose, but before doing this, I would suggest that you examine the power of attorney carefully and see if it conveys sufficient power to enable Mr. Griggs as her attorney to convey land in Oregon, otherwise, it would be of no use and it would be necessary to obtain a deed direct from Mrs. Lockwood. Under the Oregon laws, the wife's interest is absolutely necessary to have. We are very particular in regard to our titles, because we expect to sell this land some day and do not wish to have any trouble when the time comes. In regard to the Hewitt Investment Company's having failed to comply with the Oregon laws governing foreign corporations, we will not let this delay the deal, but will take it for granted that you will straighten it up at your leisure, but would like to know, when you write me, the exact amount of the Company's incorporated capital."

On January 5th the Hewitt Investment Company wrote the bank requesting a return of the deed, as follows:

"The Hewitt Investment Co. or Henry Hewitt, Jr., sent you some time ago deeds to deliver to E. Z. Ferguson on payment of 12800 I think. The deeds it seems are faulty & Mr. Ferguson wants them changed. You will please return them & oblige."

On the same day Hewitt wrote Ferguson:

"Your favor Jan. 3 received. I have written Astoria Nat. Bank to return deeds & as you suggest will make out new deeds. Mr. Griggs has the old Hattie Lockwood deeds signed by him as power of attorney & will send new deed for her to sign. It may take some little time. About the commission, the Co. some time ago passed resolutions to only allow 2½ commissions for sales of lands, of which I was not informed, & besides this when I brought the matter up the directors all but myself were against selling & would not have consented at all only to accommodate me. I should have brought the matter up. Of course you know what any officer promises is only good for his best endeavors to carry out his promise. You are mighty lucky to get the land at all. \* \* \* Advise bank to return deeds."

On January 8th Ferguson wrote Hewitt:

"Replying to your favor of the 5th, I have to say that the bank has informed me that they would return the deeds to you by to-night's mail. I suppose it will take two or three weeks for you to get them straightened out. In any event, the money will be left at the bank for you as soon as the title is completed. \* \* \* Some time this week, I will send you a plat of Columbia County, showing your lands there, as well as the surrounding timber, and statement of what I believe would be possible in adding to your holdings in that locality."

And on January 25th Ferguson again wrote Hewitt:

"If it can be arranged satisfactory to all of us, I would rather pay the money over to you. In case we would pay the \$12,800 to the Hewitt Investment Company and take its warranty deed to the land, would you and the company be willing to give me an agreement and assurance that you would perfect the title, say within a year, or longer, if need be? I see no reason why we cannot fix this up without difficulty; the power of attorney may turn up, or in any event, Mrs. Strong will get through her honeymoon some time and come home. Do you know when she procured her divorce? It may be that this would straighten the matter; in any event, it seems to me that if you get the money and we know the title to the land is going to be perfected, that is all that is necessary and we can all sleep the sleep of the just. At your rate of interest, the money in the bank is losing nearly \$100 a month and I hope we can get it into your hands with the greatest possible speed and would therefore request an early reply."



This comprises practically the whole correspondence found in the record bearing upon the dealings of the parties respecting the land in controversy. Somewhat is said touching the amount of the commission Ferguson was to get for making sale of the land. This is not now a matter of dispute. And much is said respecting other lands looking to some further negotiations, but it does not elucidate the transactions of the parties with reference to the particular land here in controversy.

As will be noted from the correspondence, Ferguson made inquiry of the Hewitt Investment Company looking towards the exchange of certain lands in Columbia county for those in dispute, designated as the claims in 6—6. The exchange of lands was declined, but Hewitt indicated that he might sell "the whole bunch" for \$20 per acre, saying the land was heavily timbered, and would average from 6,000,000 to 9,000,000 feet per acre. Then by Ferguson's letter of September 25, 1905, he offered \$8,000 for the "four hundred acres in 6—6." Nothing seems to have come of this offer. The parties talked with each other on occasion, and finally it was agreed between them, but not by specific note or memorandum in writing, that the defendant company would sell and Ferguson would purchase the 640 acres of land in controversy. Looking to a consummation of the agreement, the defendant sent its deed purporting to be executed and acknowledged in favor of Ferguson to the Astoria National Bank to be delivered to Ferguson on his payment into the bank for the defendant of the sum of \$12,800. To this point the contestants are agreed, except that the defendant claims that Ferguson agreed, as part of the same transaction, that he would procure for defendant other lands in Columbia county containing an equal estimate or more of timber at a price equivalent to 50 cents per thousand feet in the stump. Ferguson denies that any agreement was reached between them touching these other lands. There was much conversation between them, and much was said in the correspondence respecting other lands situated in Columbia county, and lands adjoining lands belonging to the defendant in such county, whereby it appears that Ferguson was endeavoring to find for the defendant lands which the latter desired to purchase if the timber was suitable and the price satisfactory. But the strong preponderance of the evidence is against the conclusion of any definite agreement, either oral or written, as claimed by defendant. It is enough, it seems to me, to set this matter at rest that the parties agreed that the \$12,800 consideration for the lands in dispute was to be paid through the bank directly to the defendant company. No part of this money was to be used by Ferguson for the purchase of other lands, and there was to be no direct exchange of the lands in question for those other lands spoken of. Had it not been for the irregularities found in the title, the agreement touching the lands in dispute would have been fully closed and executed by the final passing of the deed through the bank and the payment of the consideration therefor. It is unlikely that the parties would be willing thus to close up the matter in that respect if the dealings as to the other lands were of such importance as is claimed for them. The defendant desired to, no

doubt, and would have purchased other lands as a further investment, and Ferguson busied himself to a greater or less extent in endeavoring to find such lands. When found, the timber thereon was to be subject to the cruise of the defendant, and the price depended upon what they could have been purchased for in the market, so I conclude on this subject that, while the parties canvassed the matter respecting the purchase by defendant through Ferguson of other lands, there was no definite agreement arrived at as to this, nor did any agreement of the kind form or constitute a part of the agreement to sell and convey the lands in dispute.

The essential controversy hinges about the contract to convey. The defendant insists that it was verbal only, and, being concerning land, was a nullity; while, on the other hand, it is contended that considering the correspondence between the parties, together with the deed and the manner of its treatment and disposal, the contract was in writing, or of such a character as to preclude the application of the statute of frauds. This includes the suggestion that the deed was by agreement of the parties placed with the bank in escrow, to be held by it subject to the payment by Ferguson of the consideration to be accounted for to the defendant. The Hewitt Investment Company denies that there was any understanding or agreement that such deed should go to the bank in escrow, and claims that the deed was only sent to the bank as the agent of the defendant to carry out its instructions respecting the same.

Ferguson testifies that on a particular trip he made to Tacoma, where Hewitt lived, he and Hewitt, who was acting for the defendant company, agreed upon a deal whereby the defendant would sell the four claims to plaintiff for the consideration of \$20 per acre, or the aggregate sum of \$12,800, and that Hewitt "would send the deed over to the Astoria National Bank." "He," continues the witness, "told me that he would have the deed executed, and would send it over, and I was to go home, which I did, and pay the money." At the close of his examination he further testifies respecting the same subject:

"Q. Mr. Ferguson, I wish you would explain to the court how it happened that the deed was sent over to the Astoria National Bank by Mr. Hewitt. A. Why, I think I requested him to send it to the Astoria National Bank.

"Q. What did he say in regard to doing that? A. Why, he said that he would have it fixed up; said he would have to have a meeting of the board of directors, and that he would fix it up; and that is when I asked him about the board of directors, and he told me that he was practically the whole thing; that he and his son owned all the stock.

"Q. So you suggested to him to send it to the Astoria National Bank, and what were you to do when he sent it to the Astoria National Bank? A. Why, of course, I told him the abstracts would have to be made; and, if we found the title was all right, we would pay the money. That was the general understanding with things of that kind.

#### Cross-examination:

"Q. Mr. Ferguson, that was just a matter of detail between you and Mr. Hewitt? A. Yes.

"Q. But that was not any special matter of agreement at all, was it? A. Well, I suppose it would be just as much an agreement as all our talk was at that time.

"Q. But did you have any special agreement as to the conditions under which the deed was to be sent to the bank? A. Nothing. I don't think anything special.

"Q. Or any as to the conditions under which the money was to be paid into the bank by you? A. Well, of course, I don't know—

"Q. I mean, was there any special agreement at that time on the subject? A. I don't know as there was any special agreement. I don't remember just what was said between us on that subject at that time.

"Q. Mr. Hewitt was to go ahead and have the deed executed, and send it down? A. Send it over, and we would have an abstract of title made, and, when the title was perfect, we would pay the money and take the deed. That would be the usual method of procedure.

"Q. (Redirect) That was the custom, was it? A. Yes."

[1] A deed in escrow is one that has been delivered to a stranger, with directions that he shall deliver to the grantee upon performance by the latter of some condition, as the payment of a sum of money, or the observance of some obligation, or the happening of some event, the grantor reserving the right to reclaim the deed if the condition is not fulfilled, or the event does not happen. *Wier v. Batdorf*, 24 Neb. 83, 38 N. W. 22, 23; 16 Cyc. 561. And it would seem that it is not essential that the condition upon which the instrument is delivered in escrow be evidenced by writing. It may rest in parol, or it may be partly oral and partly in writing, and may be established by oral testimony. 11 Am. & Eng. Enc. of Law (2d Ed.) 343; *Gaston v. City of Portland*, 16 Or. 255, 19 Pac. 127; *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315. But it is not essential here to inquire strictly as to these matters. I have concluded that what was done and what was written relative to the transaction, including the deed that was sent to the bank, constituted a valid contract in writing for the sale of these lands by the defendant to plaintiff Ferguson. The earlier correspondence shows that Ferguson was desirous of making an exchange of lands. All proffers on this basis were declined by the defendant. After some further correspondence and negotiation, the parties agreed verbally upon the sale of four claims at the price of \$20 per acre, or \$12,800. The deed was executed. It contained a description of the land to be sold, and expressed the consideration, and was in apt form of conveyance by a corporation.

[2] Standing alone without delivery, unless deposited as a perfect escrow, it would not be sufficient as a contract to convey, and specific performance could not be predicated upon it.

[3] But there is more here, and the parties have practically confirmed in writing what they agreed to orally. On the same day the deed was sent to the bank Hewitt, who was acting for defendant, wrote Ferguson:

"We have to-day sent deed for lands to Astoria National Bank, which they will deliver to you on payment of \$12,800."

It would seem from the letter written by Ferguson to Hewitt on the same day, without knowledge that Hewitt had written, that Ferguson had previously had in his possession the abstract of title to the land, for he points out an irregularity in such title. He requests of Hewitt, furthermore, if he has in his possession a certain power of attorney, the instrument upon which the irregularity depends, that he send it

along with the deed to the bank. On January 3, 1906, Ferguson wrote again to the Hewitt Investment Company, stating that his attorney had examined the title, and had found two other matters which needed attention. One was that the description of the deed designated the land as in township 6 S., instead of 6 N., as it should be, and the other that the Investment Company had not complied with the Oregon laws governing foreign corporations. It should be said in this connection that the deed described the lands as lying in Clatsop county, Or., which cured the defect to which attention was called as to description. The letter also stated that Ferguson had on that day deposited in the bank \$12,800 to be sent to the defendant when the title was made perfect. On the same day, January 3d, Ferguson also wrote to Hewitt, suggesting that, in order to get the matter straightened up speedily, it would be best for Hewitt to prepare a new deed making it just the same as the former deed, the one in the bank, excepting to state that the land was in township 6 N., instead of township 6 S., "as it now reads," and further suggesting: "This deed you can send to the bank to be substituted for the one that is now in their hands." Other suggestions were made relative to the power of attorney, and Ferguson advised Hewitt that he would not let the noncompliance on the part of the company with the Oregon laws "delay the deal." On January 5th the Hewitt Investment Company requested the bank to return the deed. On the same day Hewitt wrote Ferguson that he had written the bank for the return of the deed, and that, as suggested by Ferguson, he would make out a new deed. He also requested Ferguson to advise the bank to return the deed. Ferguson had previously, to wit, on January 3d, deposited the \$12,800 with the bank, and written it to deliver the said sum in Tacoma exchange to the Hewitt Investment Company when the title to the land had been made perfect in him, Ferguson, and that, pending the making of said title perfect, it should hold the money and deed in its possession. On January 8th Ferguson wrote Hewitt that he had been informed by the bank that it would return the deed, and further stated:

"I suppose it will take two or three weeks for you to get them straightened out. In any event, the money will be left at the bank for you as soon as the title is completed."

Now, taking this correspondence together, including the deed and the treatment thereof by the parties, I am of the opinion that it constitutes an agreement in writing in effect such as is required by the statute of frauds respecting sales of land. The deed, while deposited with the bank, was not withdrawn except by the consent of Ferguson, and, when withdrawn, it was understood that another would be substituted in its stead, with the corrected description, when the title could be straightened out. The deed, treated as a memorandum, expressed the consideration, described the property to be conveyed, and was subscribed by the party to be charged. This was to be replaced by a new deed with an amendment in the description—an amendment not altogether material to a valid conveyance of the land. The correspondence, aside from the deed, comes near if not quite fulfilling the like requirements of a contract for the sale of lands. But the deed, under



the agreement by which it was withdrawn from the bank, must be considered as subsisting, even though in the hands of the Investment Company, until a new deed is produced to take its place. It was not canceled nor ultimately surrendered. It was allowed to be returned until a new one should be produced to take its place, the money remaining ready at all times to be paid over when the arrangement was consummated. Without else, the contract is valid, and one that a court of equity would require to be specifically performed. In support of this view, see *Flegel v. Dowling*, 54 Or. 40, 102 Pac. 178, 135 Am. St. Rep. 812, 19 Ann. Cas. 1159; *Alexander v. Vandercook*, 136 Mich. 642, 99 N. W. 858; *Regan v. Howe*, 121 Mass. 424. The irregularity as to compliance with the Oregon laws by the Hewitt Investment Company was waived by the letter which has been noted. As to the power of attorney, Ferguson testifies that he remembers finding one in the records at Tacoma, and that he told Hewitt he would be satisfied with a certified transcript of it, as far as the title was concerned, and requested the deed of him, but that he has not delivered it nor surrendered the corrected deed. It seems, therefore, that Ferguson did not further insist upon the title being corrected as first requested, and was willing to take the title as it was under the warranty of title, thus relieving the transaction of the objections first made as to the title. No further obstacle remaining, the Hewitt Investment Company should have redelivered the old deed or executed and delivered a new deed to take its place.

[4] I am not favorably impressed with the defense as elucidated by the testimony that the Investment Company was not authorized to execute the deed. Henry Hewitt, Jr., was in control of the entire business of the company, and he and his son, J. J. Hewitt, and perhaps his wife, were the owners of practically the whole of the capital stock. J. J. Hewitt, the son, was secretary. The by-laws of the company would seem to authorize the president, with the approval of the other members of the finance committee—such committee consisting of the president and two other members of the board of directors—to buy and sell real property without further specific authority from the board. By article 7 he is made general manager, “with full power to buy real estate \* \* \* or anything which the company is entitled to hold, buy and sell, subject to the approval of the finance committee,” and by article 11 it is made the duty of the finance committee “to advise with and approve the purchases and sales made by the president.” Evidently Henry Hewitt, Jr., has conducted the business of the company as though he were vested with full power to do the things requisite to the purchase and sale of real property, all in the name of the company, and his conduct in connection with the transaction now in controversy was in accord with such practice. Under such conditions and practice, the Hewitt Investment Company ought to be and is estopped to deny the authority of Hewitt to enter into the contract or agreement in question to execute with the secretary the deed necessary to convey the title. The plaintiffs are therefore entitled to a decree requiring the defendant Hewitt Investment Company to execute and deliver to Ferguson a deed in form as executed and

placed in the bank to the premises in question. The defendant, however, is entitled to the fund deposited in the bank as consideration for the land, and, having paid the taxes on the land since the deed was first executed, should have a decree for the repayment to it by plaintiffs of such taxes, with interest at the rate of 6 per cent. per annum from the time of payment, amounting in the aggregate to \$1,716.

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**BUELL v. KANAWHA LUMBER CORPORATION. Ex parte WILLCOX & WILLCOX. Ex parte McCULLOUGH.**

(District Court, E. D. South Carolina. December 31, 1912.)

**1. ATTORNEY AND CLIENT (§ 155\*)—FEES OF ATTORNEY—ALLOWANCE FROM FUND IN COURT—PRINCIPLES GOVERNING.**

The general equitable principle on which American courts act in allowing counsel fees from a fund in court for distribution is that where one has gone into a court of equity, and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to complainant's counsel; but, to warrant such allowance, the fund so created or preserved must be one applicable to the claims of the complainant and those interested with him, and a fund on which others have liens superior to complainant's claim cannot be subjected to such payments to the displacement of such liens.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 316; Dec. Dig. § 155.\*]

**2. ATTORNEY AND CLIENT (§ 155\*)—INSOLVENCY AND RECEIVERS—DISTRIBUTION OF ASSETS—ALLOWANCE OF COUNSEL FEES.**

Where an officer and stockholder of an industrial corporation, who was also a small unsecured creditor, for the benefit of the corporation and its stockholders and not of its creditors, procured the appointment of receivers for the corporation and an order authorizing them to issue receivers' certificates, which were made a first lien on its property, and the proceeds of the property when subsequently sold, after paying necessary charges, were insufficient to pay such receivers' certificates, the court had no authority to pay fees to counsel who acted for complainant, and also, without specific appointment, for the receivers out of such fund.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 316; Dec. Dig. § 155.\*]

**3. EQUITY (§ 394\*)—INSOLVENCY AND RECEIVERS—DISTRIBUTION OF ASSETS—PRIORITY OF CLAIMS—FEES OF MASTER.**

Nor in such case is the fund applicable to payment of the fees of a special master, appointed after the receivers' certificates were issued and sold to hear and determine issues in a contest for the removal of the receivers, but such fees are taxable as costs to the unsuccessful party to such contest.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 857-859; Dec. Dig. § 394.\*]

In Equity. Suit by George F. Buell against the Kanawha Lumber Corporation. On applications by Willcox & Willcox, counsel for complainant, and by Joseph A. McCullough, special master, for allowance of fees from fund in court. Petitions denied.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

F. Barron Grier, of Greenwood, S. C., and E. M. Blythe, of Greenville, S. C., for petitioners.

Iredell Meares and A. G. Ricaud, both of Wilmington, N. C., for intervening petitioners.

SMITH, District Judge. This cause came on to be heard upon the application of Messrs. Willcox & Willcox for fees as counsel for the plaintiff herein and for the receivers, and also upon the application for fees of Joseph A. McCullough, Esq., heretofore appointed special master, and was heard upon these applications, the report of the standing master thereon, the testimony taken on these applications, and generally the record in the cause.

The facts appear to be as follows:

On the 7th day of March, 1908, George F. Buell presented his bill of complaint in this cause to Hon. J. C. Pritchard, United States Circuit Judge, against the Kanawha Lumber Corporation. In that he set out that he was the secretary of the defendant corporation, which owed him the sum of \$187.50 on account of unpaid salary, and was also a stockholder in the corporation, being the owner of 100 shares of its capital stock, that the total liabilities of the corporation were about \$133,000, and that the value of its assets was about \$531,000. The bill stated that the company was involved, and could not get funds to carry on its business, and that the only way in which it could proceed and be saved as a property for the corporation and stockholders would be by the carrying on the business by receivers appointed by this court, who could conduct its business at a profit and prevent its disintegration by being subjected to numerous actions and suits and the claims of creditors under levy and sale, and prayed that the court would appoint receivers to take charge of the assets and property of the corporation and conduct its business. On the same day the defendant, the Kanawha Lumber Corporation, presented its answer, admitting the allegations of the bill, and joining with the complainant in its prayer for relief. The attorneys for the complainant, George F. Buell, were Messrs. Willcox & Willcox, and the attorney for the Kanawha Lumber Corporation was Mr. Henry E. Davis. On presentation of the bill of complaint and the answer the Honorable J. C. Pritchard, United States Circuit Judge, made an order dated the 7th March, 1908, appointing three receivers to take possession of all the assets of the Kanawha Lumber Corporation, with power to carry on and continue its business. The bill and order were filed on March 9, 1908. A few days afterwards, on the 10th March, 1908, Messrs. Willcox & Willcox, signing themselves as attorneys for the receivers, gave notice to Mr. Davis as attorney for the defendant that they would apply to Judge Pritchard at his chambers for an order authorizing the receivers, among other things, to issue receivers' certificates to an amount not exceeding \$30,000. It appears that a bill of complaint and answer of the same tenor as those in the Circuit Court for this district had been filed in the District Court of the United States for the Eastern District of Virginia, and that the notice

of application to issue receivers' certificates, together with the petition of the receivers for the purpose of having that issue authorized, was made in the United States Circuit Court for the Eastern District of Virginia, although the assets of the defendant mentioned in the bill were in the district of South Carolina. On the 14th March, 1908, Judge Pritchard by an order made upon this application in the cause in the Circuit Court of the United States for the Eastern District of Virginia ordered, among other things, that the receivers should issue certificates not to exceed the sum of \$30,000, with interest at 6 per cent. per annum, payable quarterly, which should be by their terms a first lien upon all the assets of the Kanawha Lumber Corporation, except such of its assets as are now subject to lien, and should be by their terms a lien on such assets as are now subject to lien, second only to existing liens.

A certified copy of this order was by direction of the court in the order sent from the Circuit Court of the United States for the Eastern District of Virginia to, and filed in the proceedings in this court on 20th March, 1908. On the 28th July, 1908, the receivers appointed by Judge Pritchard filed a statement in the form of a balance sheet as of March 9, 1908, showing the total assets of the Kanawha Lumber Corporation to be according to the book entries filed by them, \$427,016.57. The receivers, in pursuance of the order authorizing them, issued the certificates up to the full amount of \$30,000, and these certificates, with interest according to their terms to an amount aggregating for the same some \$35,000, are all still due and unpaid. In September, 1908, certain petitioners, viz., D. C. Boyce, F. M. Boyce, Bettie Boyce, the Murchison National Bank, and the Charleston National Bank, filed an intervening petition in the cause to have the court direct the receivers to stop all operation, and also that the receivers appointed by the court should be removed. This petition was afterwards also joined in by the Bank of Horry, the Burroughs & Collins Company, and the Horry Hardware Company. Another petition was filed on September 19, 1908, on behalf of George F. Buell, the complainant, W. C. Lewis, Laura Lewis, and W. S. Lewis, also asking that the receivers be removed. The receivers filed their answers to the petition, and it was ordered by an order made by Judge Pritchard on September 19, 1908, that all matters and things referred to in the petition and the answer of the receivers and all issues arising thereon be referred to the Honorable Joseph A. McCullough of Greenville, S. C., as special master, to take the testimony and report the evidence with his findings of fact thereon to the United States Circuit Court for this district. The special master took the testimony and made his report, and, the cause coming on to be heard upon the same, Judge Pritchard by an order dated April 21, 1909, allowed the receivers to continue to operate for a limited time, and refused to remove the receivers, but allowed the receiver, J. C. Causey, Jr., to resign, and appointed J. J. Britt in his place, and referred the cause back to the special master to take proof of claim and report. Later, by an order dated July 6, 1909, Judge Pritchard allowed James J. Britt to resign,



and appointed William H. Chadbourn in his place. The cause having come on to be heard before Judge Pritchard on December 28, 1911, he made a decree wherein he adjudged the certificates issued under the order of the court to be valid obligations of the court, and entitled to be paid by the receivers from the funds in their hands, and next that the claims of the Russell Wheel & Foundry Company and the Climax Manufactory Company were entitled to liens upon the same funds to the extent of their debts, and the receivers were directed to pay them.

By interim orders the sale of all the property had been ordered, which has been made, and it appears that there are now in the hands of the receivers remaining after the payments and disbursements made by them as a total result remaining of all the sales in cash and notes respectively, \$38,240.94, representing the entire assets to be administered at this date. This is subject to the payment of whatever may be the incidental and necessary costs of the court, to be paid out of this fund the claim of the Russell Wheel & Foundry Company, amounting to some \$3,719, with some four years interest to be added, and the claim of the Climax Manufactory Company, amounting to some \$1,050, with four years interest. It is also stated, although the record does not show, that there is some \$2,000 still due upon unpaid bills of the receivers. From the fund in court, therefore, there must be first deducted in any event the total of the claims due to the Russell Wheel & Foundry Company, and the Climax Manufactory Company, viz., at least \$5,000, leaving applicable to the payment of receivers' certificates the sum of not more than \$33,240.94, while the total amount due upon the receivers' certificates with interest to date is stated to be not less than \$35,000. So that, in any event, there will not be enough to pay off these certificates, with interest in full.

There is now presented to the court claims on behalf of Messrs. Willcox & Willcox, attorneys, for \$7,500, and of the special master, J. A. McCullough, Esq., for compensation of \$1,000, making a total of \$8,500 to be deducted from this fund, which, if taken from the fund, would leave only applicable to the receivers' certificates the sum of \$26,000, irrespective of any other incidental costs of court to be paid out of the same. The question for the court to decide now is whether these applications of Messrs. Willcox & Willcox and Joseph A. McCullough, Esq., should be allowed as payments to be made out of this fund ahead of the certificates.

The issuing of receivers' certificates is the exercising of an extraordinary power by a court of equity, and is done for the purpose of saving and preserving property whose destruction or loss or impairment is threatened. Their issue for purposes of business operations began apparently in the issuance of receivers' certificates for the purposes of public service corporations so as to permit them to perform their duties to the public by continuing their operation; the court holding that the performance of these public duties came before all other demands upon a public service corporation. It was therefore held by the court that in the case of a public service corporation re-

ceivers' certificates could properly be issued by the court for the purpose of enabling that corporation to go on and perform its functions, as well as preserve its property for the benefit of its stockholders and creditors. The use of receivers' certificates by issuing them for the purposes of industrial corporations has also been allowed. In such cases, however, it has usually been restricted very strictly to the purposes of saving and preserving the property from threatened loss or destruction, and it has been questioned whether they could be issued to take precedence over existing liens without the consent of the lienholders. The power to issue these certificates and permit loans upon them is a very important and salutary one to courts of equity. By the use of them property can be saved in this way from destruction, and it is exceedingly important that their validity and lien should in no wise be impaired. If it should be understood that in the case of receivers' certificates issued by a court for the extraordinary purposes above mentioned, and purporting to be a first lien upon all the assets and property of the corporation, they are not so, but subject to the payment of subsequently accruing debts for administration or otherwise, their negotiability and value will be much impaired, and the power of the court to use them for most pressing occasions would be much lessened. In the present case the order directing the issue of these certificates expressly directed and ordered that they should be a first lien upon all the assets of the corporation, assets at that time which by the allegations of the complaint and the statements of the receivers appeared to aggregate over \$400,000. A case is now presented before the court where upon the actual net results realized from these assets applicable thereto they are insufficient to pay these certificates, whether the fund for the payment of the certificates shall be still further reduced by the payment in priority to them of the claims now before the court.

1. *As to the claim of Messrs. Willcox & Willcox.*

It appears from the testimony that the bill of complaint was filed for the purpose, not of enforcing claims against the corporation, but for the benefit of the corporation, by enabling receivers, if appointed for its benefit, to obtain money through the machinery of the court whereby to keep the corporation a going concern. The whole proceedings were initiated with the knowledge and consent of the officers of the corporation, and, in fact, by its officers and other stockholders for the benefit of the corporation. The testimony shows that the complainant, Buell, was the secretary of the corporation, that he was a creditor for a very inconsiderable amount for unpaid salary, and that in filing this bill initiating these proceedings he was acting really under the authority and by the instruction of the corporation so as to obtain the appointment of receivers to hold the property and carry on the concern. By the appointment of these receivers the corporation and its stockholders obtained the position of having the corporation kept as a going concern out of the reach of creditors who might be inclined to enforce their debts at law, and thus enabled to use its assets to raise funds having precedence in payment over other

claims, for the purpose of its operation, by an order of court allowing receivers' certificates to be issued as a first lien upon its assets. It was not the case of a bill filed bona fide by a creditor to enforce claims, or by a stockholder to enforce his rights against contesting stockholders, but a bill filed in reality by the defendant corporation itself through the procured agency of its secretary for the purpose of enabling the corporation to fence off the claims of creditors, and to borrow money as a first lien on its assets to carry on its operations for the benefit of its stockholders. Messrs. Willcox & Willcox were the attorneys for the complainant, and the attorney for the defendant was Mr. H. E. Davis, a young man who was at that time employed in the office of Willcox & Willcox, and the terms of the answer show that he represented no really antagonistic interest. The notice to him, therefore, of the proposed application for an order for the issue of receivers' certificates, was in reality no service of a notice upon any substantially antagonistic interest. Messrs. Willcox & Willcox, thus having obtained the receivers and filed the bill as solicitors for the complainant, were presumably aware of all the circumstances of the case when they made the application for the issue of these certificates, and obtained the order for the issue, in which order they were advised that these certificates when authorized to be issued were to be a first lien on all the assets of the corporation. They subsequently acted as counsel for the receivers, but there is no order taking them away from their position as solicitors for the complainant. Subsequently the complainant joined in a petition to have these receivers who had been appointed on the motion of his own attorneys, or the attorneys who were acting for him, removed, which placed him in an antagonistic position to the receivers and to Messrs. Willcox & Willcox, who were acting as counsel for the receivers, but, so far as the record shows, there is no order relieving Messrs. Willcox & Willcox from their position as complainants' counsel, nor any order appointing them as receivers' counsel, and the inference to be drawn from their action on behalf of the receivers in carrying out the plan agreed upon when these proceedings were instituted would be that they were still continuing to act for the interests they represented at the time of the institution of these proceedings. They did represent the receivers in the apparently very hot and contested controversy which arose upon the attempt of the intervening petitioners, including the complainant himself, to remove the receivers from their position, and they did also represent the receivers in a number of incidental matters that came up during the operation of the receivership.

The court has gone carefully over the question and the circumstances of the cases in which the allowance of fees to counsel is made in equity causes, and has consulted the following cases among others: *Lynch v. De Bernal*, 9 Wall. 315, 19 L. Ed. 714; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Central R. R. v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915; *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940; *Thompson v. Phenix Ins. Co.*, 136

U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Fowler v. Equitable Trust Co.*, 141 U. S. 411, 12 Sup. Ct. 8, 35 L. Ed. 794; *Harrison v. Perea*, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. Ed. 478; *Randolph v. Scruggs*, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165; *Hand v. Railroad*, 21 S. C. 162; *Hubbard v. Camperdown Mills*, 25 S. C. 496, 1 S. E. 5; *Lawton v. Perry*, 45 S. C. 319, 23 S. E. 53; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C.)* 23 Fed. 675; *Adams v. Kehlor Milling Co. (C. C.)* 38 Fed. 281; *Claffin v. Bennett (C. C.)* 51 Fed. 693; *Blair v. Harrison*, 57 Fed. 257, 6 C. C. A. 326; *Farmers' Trust Co. v. Green*, 79 Fed. 222, 24 C. C. A. 506; *U. S. v. Boyd (C. C.)* 79 Fed. 858; *Burden Co. v. Ferris Co.*, 87 Fed. 810, 31 C. C. A. 233; *In re Scholtz (D. C.)* 106 Fed. 834; *Glidden v. Cowen*, 123 Fed. 148, 59 C. C. A. 172; *Lamar v. Hall & Wimberly*, 129 Fed. 79, 63 C. C. A. 521; *Firth Co. v. Millen Cotton Mills (C. C.)* 129 Fed. 141; *Page v. Rogers*, 149 Fed. 194, 79 C. C. A. 153; *Re Waterloo Organ Co.*, 154 Fed. 657, 83 C. C. A. 481; *Gilmore v. McBride*, 156 Fed. 464, 84 C. C. A. 274; *Re Williams' Estate*, 156 Fed. 934, 84 C. C. A. 434; *McIntosh v. Ward*, 159 Fed. 66, 86 C. C. A. 256; *Re Franklin (D. C.)* 151 Fed. 642; *Haight & Frees Co. v. Weiss*, 165 Fed. 430, 91 C. C. A. 380; *Miers v. Columbia Mut. Bldg. Ass'n (C. C.)* 166 Fed. 781; *Jefferson Hotel Co. v. Brumbaugh*, 168 Fed. 867, 94 C. C. A. 279; *Dunlap Hardware Co. v. Huddleston*, 167 Fed. 433, 93 C. C. A. 69; *Edwards v. Bay State Gas Co. (C. C.)* 172 Fed. 971; *Doddridge County Oil & Gas Co. v. Smith (C. C.)* 173 Fed. 386; *Pusey & Jones v. Penn Paper Mills (C. C.)* 173 Fed. 629; *In re Allert (D. C.)* 173 Fed. 691; *In re E. I. Fidler & Son (D. C.)* 172 Fed. 632; *Bowker v. Haight Co.*, 170 Fed. 67, 95 C. C. A. 343; *Gillespie v. Piles Co.*, 178 Fed. 886, 102 C. C. A. 120; *Bray v. Staples*, 180 Fed. 321, 103 C. C. A. 451; *Ely v. Van Kannel Revolving Door Co. (C. C.)* 184 Fed. 459; *Guaranty Trust Co. v. Chicago*, 185 Fed. 411, 109 C. C. A. 18; *In re Gillaspie (D. C.)* 190 Fed. 88; *In re Freeman (D. C.)* 190 Fed. 48; *Buckwalter v. Whipple*, 115 Ga. 484, 41 S. E. 1010.

The custom of allowing compensation to solicitors out of a fund in court originated as it appears in England in courts of equity, where costs as between solicitor and client would be allowed out of the fund to the solicitors of the complainant in the proceeding upon the theory that where one litigant had proceeded, and at his own expense had either created or preserved or protected a fund, and others were entitled to claim and did claim in the results of his labors, it was not fair that the person who had taken the risk and cost and expenses of litigation should bear all the costs, but that those who shared in the fruits of it should bear their fair pro rata share. This rule was eminently fair and proper. It simply went to the extent that, where meritorious results were actually achieved, that those who lay by in inaction should not be allowed to await the result, escape all expenses if the case be lost, but, if successful, share the actual benefits by receiving their portion of this success, without contributing their share of the expenses. As it would have been futile and unnecessary to subject the successful plaintiff to a suit at law against each that



availed himself of the result, the court of equity, having the fund in its hands, did equity by allowing to the complainant who took all the risk of loss in this way to recover his costs as between solicitor and client out of the fund before the payment of the pro rata shares to those who shared with him in the success of his labors. In England this seems to have been confined to the costs as between solicitor and client, and not to have been extended to the fees of counsel; that is, fees of the barristers.

[1] In America no distinction as between solicitors and barristers existing, the doctrine has been extended so as to include all the fees and expenses reasonably due by the successful litigant to his counsel, and the rule is established that where one goes into a court of equity, and takes the risk of litigation on himself, and successfully creates or preserves or protects a fund to a share in which others are entitled, those others will not be allowed to lie back and share the results of these successful labors without contributing their due share, and a court of equity by an equitable extension of the English principle has required the payment out of the fund (before distribution) of the reasonable costs and expenses, including the reasonable counsel fees of the complainant whose diligence created or preserved the fund for distribution. If the complainant had been unsuccessful, and no fund had been created, he would have had to undergo the fate of the unsuccessful litigant in any other proceeding; that is, to pay the costs and expenses himself. That is the burden and risk that every litigant takes when he enters a court of justice. If unsuccessful, he must pay the costs of the court and also his own counsel fees. No man will be compelled to pay that which he did not expressly or impliedly contract under such circumstances to pay, and, if the complainant be unsuccessful, he cannot call upon others who did not believe in the merit of the claim, or did not care to undertake the risk of litigation, to pay any part of these expenses. He must bear them all himself. So, in any court of equity in the United States, where the complainant fails in his application, he has to pay all the costs of court, including the fees of the officers of the court, and of the masters and examiners as well as his own counsel fees. If successful, and through his efforts a fund has been created and protected or preserved, the court will under the principle of requiring equity to be done by those who share in these results require payment of all proper expenses out of the fund, if any fund there be within the court applicable to them. But it must be a fund applicable to the claims of the complainant and those interested with him, as, for instance, if the complainant filed a bill to liquidate and marshal the assets of a corporation and he be a general creditor, he has no right to subject to the payment of his costs and expenses and counsel fees any funds arising from the proceeds of the sale of property upon which there were mortgages or other liens, save and except in proper cases such portion of those expenses as in the court's opinion the mortgagees would have been put to had they themselves foreclosed and liquidated the specific property subject to their liens.

[2] In the present case, if the Kanawha Lumber Corporation had had mortgages upon any of its property and a stockholder had chosen to file a bill similar to the one at present before the court, he took the risk of paying all the expenses entailed by the filing of that bill. Inasmuch as he filed it to protect his own equities, so to say, he could not call upon the mortgagees to pay any part of these expenses, for it would not be the mortgagees who came into court, but the person who was postponed to them who brought them there. To allow a simple contract creditor or stockholder to have the assets of a corporation upon which there are mortgages or other liens placed in court for the purposes of advancing or protecting his own interests, and then sell the property and subject the proceeds of the sale of the mortgaged property to the payment of his costs and counsel fees incurred at his instance, and not for the benefit of the mortgagees, would be to subject the mortgagees to an injustice which a court of equity will not countenance. In the present case we have a bill filed by a small unsecured creditor and stockholder for the benefit of the corporation. At his solicitation, through the receivers procured by him, he has an order made by the court for the borrowing of money upon the faith of what is declared to be a first mortgage of the highest possible character, viz., upon receivers' certificates, which by order of the court are declared to be a first lien upon all the assets in the receivers' hands. It is patent, therefore, that he under no circumstances would be entitled to have his costs and fees and expenses paid out of this property which at his instance is pledged for the payment of an innocent third party, to wit, the bank or other party who might lend money upon these certificates upon the faith of the court's assurance made on his motion as to their being a first lien. So much, therefore, of the application of Messrs. Willcox & Willcox as is based upon their having acted as counsel for the complainant is necessarily not entitled to any payment out of this fund, or in fact out of any fund in court, as there does not appear to have been any fund created or preserved in this cause through the litigation instituted by their client in which he or any other party who has availed himself of his bill of complaint is entitled to share.

Next, as to the compensation for the services claimed by them to have been performed for the receivers appointed under the order of court. In this case, it would not appear that they were in any different position essentially than that of any lawyer who acts as counsel for a man whose property is mortgaged. A man owning real estate and who has all his property mortgaged cannot give the attorneys acting for him a lien upon the proceeds of that real estate ahead of the mortgagee. The expenses of receivers, including their counsel fees, are presumed in the first instance to be paid out of the income from property in their hands. This is more especially so where they are allowed to operate the property, and carry on the business as in the present case. They will be allowed to be paid out of the principal in special cases where the services of the receiver, including those of his counsel, were procured by, or actually protected or preserved the property for, the lienholders. But, where a receiver is procured by

a stockholder or creditor for the purpose of protecting an interest or equity in property over existing liens, the court will not ordinarily permit the cost of this receivership to be charged against the fund applicable to prior liens. Where the fund applicable to the expenses of the receivership proves insufficient, the court may in the exercise of its equity powers compel the party who procured the receiver to be appointed to pay the expenses of the receivership. *McIntosh v. Ward*, 159 Fed. 66, 86 C. C. A. 256. In this case it does not appear from the record that Messrs. Willcox & Willcox have ever distinctly ceased acting in this litigation for the benefit of the corporation. The bill was filed by them for the benefit of the corporation, and the receivers were appointed for the benefit of the corporation and its stockholders, and the services to the receivers were for the benefit of the corporation or its stockholders, and not for the benefit of the first lienholders, to wit, the holders of receivers' certificates. They were not specifically appointed counsel for the receivers; and, while receivers like any other trustees have the right to employ counsel and to pay counsel out of the trust assets, yet in this case there is no trust asset applicable to the payment of their claims, or to the compensation of the receivers themselves. The only trust asset that would have existed in this matter would have been any funds over and above the amount necessary to pay the debts which the court had pledged all these assets to pay. If any such fund was before the court the claims of receivers or receivers' counsel might be entertained; but in the present case it does not appear to be a case in which as such they are entitled to any claim out of this fund. The party to whom they may be entitled to look is the complainant, who employed them to bring these proceedings. Inasmuch as the result of the proceedings instituted by him is such as to leave unpaid the costs of court and other expenses properly to be paid, the complainant and those who acted with him should be responsible for all services they procured to be performed, and the fees of counsel for the receivers in this case may stand in that category. It does not appear, however, that Messrs. Willcox & Willcox are entitled to be paid out of the fund now in the court, and it will be so decreed, but without any prejudice to any right they may have to a proceeding in this cause to which the complainant is directly a party to recover their fees for services to the receivers to be paid as part of the costs and expenses of the case by the complainant, or to an action at law against the complainant or others associated with him to recover the full amount due for their services as counsel for complainant. Inasmuch as there is no fund out of which the court can pay these services, it will not be necessary for the court now to pass upon their value as to whether their claim is in amount well founded or not.

The complainant having come into this court and sought its relief is liable to all such costs and expenses as such complainant is by law required to pay.

Upon a proper petition or application to that effect, with which the complainant is duly served according to the practice of this court in such intervening applications, the court will be in a position to determine whether the complainant should not be decreed to pay the reasonable value of the services of Messrs. Willcox & Willcox to the re-

ceivers to be taxed against the complainant as part of the costs, expenses, and disbursements of the cause to be paid by him. But Messrs. Willcox & Willcox may also, if they see fit, institute proceedings at law against the complainant and any others for whom they acted to recover such compensation as such parties may have impliedly or expressly contracted to pay to them as complainant's solicitors.

[3] 2. *As to the claim of Joseph A. McCullough, Esq., special master.*

This claim stands upon a very different basis from the other, inasmuch as the special master is presumed to act under the appointment of the court and for the benefit of the court in assisting it in forwarding the cause and arriving at a decree. The special master in this case was appointed after these receivers' certificates had been authorized to be issued, pledging all the assets for their payment. He was appointed by the court originally to assist it under the issues in an intervening petition brought by D. C. Boyce and others. He was not appointed at the instance or for the benefit in any way of the holders of these receivers' certificates. The fact is he was appointed in a manner wholly independent of the rights of the innocent holders of these certificates. He was appointed by reason of the proceedings instituted by certain stockholders of the corporation to have the receivers who had been appointed at the instance and the solicitation of the complainant removed from office. The principal service of the special master was to take the testimony and report upon the issues involved in this application under the contest made by the receivers not to be removed. Under these circumstances, he stands in the same position as any other officer of the court entitled to fees as costs in a cause. The officers of the court are entitled to require the prepayment of costs and compensation before they perform their services. If they do not require payment in advance, they are entitled to have their legal costs taxed and enter up judgment against the party responsible, or, if there is a fund in court applicable to the payment thereof, to have the court pay them direct out of the fund applicable. It does not appear to the court that there is any fund in the court applicable to the payment of the fees of Mr. McCullough as special master in this case. The fund in court is by the decrees made in this court pledged to the payment of, first, the claims of the Climax Manufactory Company and the Russell Wheel & Foundry Company, and, next, of the holders of the receivers' certificates. From this fund can be deducted only such fees and compensation to officers of the court as are proper to be deducted as arising out of some matter germane to or affecting the issuance and liquidation and settlement of these claims and certificates as procured by the holders or by which they have been protected or benefited. The compensation of Mr. McCullough would not appear to fall within any of these categories. His services were procured for purposes with which the holders of these certificates had nothing to do. His services were performed. The question then is, Who is responsible for his compensation? Under ordinary circumstances, the complainant is responsible for such fees and costs as are incurred through matters arising out of the litigation initiated by him.

But the issues under which Mr. McCullough was appointed were



no part of the original bill, but arose upon the petition filed by the intervening petitioners to remove the receivers. These intervening petitioners would thus appear to have been the actors in a special proceeding under which the services of Mr. McCullough were procured to be performed, and, having lost their cause, should now as the losers pay the costs. The practice of this court heretofore has been to allow special masters the compensation that would be allowed to a standing master, plus an additional amount due in extraordinary cases for extraordinary services performed, and for the reason that the special master is one who performed the service not as part of his usual vocation. Upon inspecting the record, the court is of opinion that a proper compensation to Mr. McCullough for the services performed by him will be \$600, to which shall be added his cash disbursements, amounting to \$44.76, and it will be so decreed in the formal decree to be entered on the conclusions of law and fact hereinbefore found

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### THE LACKAWANNA.

(District Court, W. D. New York. January 2, 1913.)

**1. COLLISION (§ 41\*)—ACTION FOR COLLISION—INEVITABLE ACCIDENT—BURDEN OF PROOF.**

The burden of proof rests upon a vessel which, by a sudden sheer, brought about a collision with a passing vessel to establish the defense of unavoidable accident by showing the cause of the sheer, and that it was unavoidable, or all the possible causes, and that none of them could have been avoided.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 41; Dec. Dig. § 41.\*]

**2. COLLISION (§ 39\*)—SHEERING OF PASSING VESSEL—INEVITABLE ACCIDENT.**

When the steamer Lackawanna, downbound through the St. Clair river, was passing a meeting steamer with a barge in tow she suddenly sheered and came into collision with the barge. The sheer was caused by the disablement of her steering gear, due to the loss or breakage of two bolts. The bolts could not afterward be found, so the cause of their loss was not ascertainable; but the steering apparatus was of a type in general use, and it was shown that it had been overhauled three years before, and inspected by both the captain and chief engineer within a month, and found apparently in good condition. *Held*, that on such evidence there was no failure to exercise ordinary skill and care which rendered the vessel liable for the collision, but that it must be attributed to unavoidable accident for which she was not liable.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 39; Dec. Dig. § 39.\*]

In Admiralty. Suit by the Davidson Steamship Company, owner of the barge Chieftain, against the steamer Lackawanna, the Buffalo Transit Company, claimant. Decree for respondent.

Goulder, Day, White, Garry & Duncan, of Cleveland, Ohio (Harvey D. Goulder, of Cleveland, Ohio, and O. D. Duncan, of counsel), for libellant.

Brown, Ely & Richards, of Buffalo, N. Y., for claimant and respondent.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HAZEL, District Judge. On September 18, 1909, shortly after 11 o'clock in the forenoon, the freight steamer Lackawanna, 270 feet in length, beam 40 feet, laden with flour and copper, collided in St. Clair river with the barge Chieftain, which, with another barge in her wake, was being towed by the steamer Shenandoah, upbound, on a voyage from Lake Erie to Duluth. The steamer Lackawanna was downbound. Near the rapids at the upper end of the river, she blew a passing signal to the Shenandoah, which was promptly answered; both steamers continuing on their courses and passing starboard to starboard at a distance of from 100 to 200 feet. As the Lackawanna was passing the afterpart of the Shenandoah, she suddenly deviated from her straight course and sheered into the steel cable, 600 to 700 feet in length, by which the Chieftain was being hauled, and, after breaking it, struck her at a point about 90 feet from the steamer's stem. The day was clear and bright, and there was no wind. The Lackawanna's wheel, preceding the collision, was slightly to port, and on the instant the order was given the wheelsman to starboard a little the steering gear broke, and she rapidly sheered to starboard and into the Chieftain.

The libelant attributes to the Lackawanna the entire fault for the collision, claiming that the steering gear was insufficient and improper, a condition which was known to the respondent, and one for which it must be held solely to blame. The respondent denies the commission of any negligent act, claims that the defect in the steering gear could not have been foreseen, and charges that the Chieftain was not wholly impeccable for the disaster. But the evidence establishes that there was nothing that the Chieftain could have done to avoid the accident, as there was not sufficient time between the time of the departure of the Lackawanna from her course and the collision for the former to let go her hawser; indeed, there was barely time for the seamen standing by to save themselves. It is not shown that the barge, when the unexpected sheer of the Lackawanna was first observed, did not exercise reasonable care to avoid the disaster, or to mitigate it. Even if she were accusable of some lack of promptness or failure to exercise accurate judgment, she could not in so unexpected an emergency become such a contributor to the collision as to justify holding her liable for damages (*The Ohio*, 91 Fed. 547, 33 C. C. A. 667); and hence it is thought unnecessary to further consider the testimony introduced to show fault on her part.

[1] The principal questions presented at the bar as to whether the divergence of the Lackawanna from her course owing to the jamming of the steering engine was attributable to her negligence, or whether her plea that the accident was inevitable is sustained within the rule enunciated by prior adjudications under substantially similar circumstances, may now be taken up. The sheering of the Lackawanna from her course was *prima facie* an omission of a plain duty, after exchange of passing signals, to properly navigate, and a heavy obligation rests upon her to explain and excuse her conduct. In *The Edmund Moran*, 180 Fed. 700, 104 C. C. A. 552, the Circuit Court of Appeals for the Second Circuit approved the doctrine announced by Justice Fry in the case of *The Merchant Prince*, 1 Prob. Div. 179 (1892), wherein it was

substantially held that the burden rests upon the respondent to show unavoidable accident, and that to sustain such burden all possible causes must be shown which could have produced the effect, and as to all such possible causes it must be shown that the result could not have been avoided. The important questions then are: Has the respondent in its plea of unavoidable accident shown the causes of the accident? Has it shown that the result or the cause was unavoidable, and has the burden resting upon it been met by showing all the possible causes that could produce the effect, and as to each that it was impossible to avoid the result by the exercise of ordinary care?

[2] The respondent has proven that the Lackawanna suddenly and without warning deviated from her course because the journal caps, which held the idler shaft and sheave in place, dropped down owing to a loosening thereof, and that from each iron strap one of two bolts had fallen, or had been removed, causing the dislodgment of the idler shaft, which dropped down and disabled the steering gear. Was the failure to see that such an act might happen an act of negligence on the part of the Lackawanna? If, by the exercise of ordinary care, the occurrence could have been anticipated, it was her duty to take such precaution to prevent the accident as the situation warranted. *The Olympia* (D. C.) 52 Fed. 990; *The Grace Girdler*, 7 Wall. 196, 19 L. Ed. 113; *The European*, 54 Law J. Adm. 61.

The libellant contends that, as it is extremely unusual for a steering gear to break, the cause of the accident has not sufficiently been shown by respondent to excuse it from responsibility on that ground; nor have the possible causes which produced the effect been shown or excused, nor has it been shown that such causes, by the exercise of reasonable care, could not have been avoided. The proofs show that the Williamson steering engine, which was used on board the Lackawanna, was about 20 years old, but was of a type extensively used by the older steamers plying the Great Lakes. In such type of steering engines the bed-plates are ordinarily constructed in such a way as to support, under the deck, the fair leader and stationary shaft; while the chains usually run to the deck and extend to the wheel. Though the steering engine in controversy had had considerable use prior to the accident, there had been no previous trouble, nor any indication of defect in the engine or in the caps or bolts. Three years before the disaster the steering engine was taken off the steamer into a machine shop, where it was overhauled, and then replaced and refitted. Whether new plates and bolts were put in is not positively shown; but it is quite presumable that either new bolts were used, or that the old ones were examined and found to be without weakness or flaw.

The libellant does not believe that the mishap occurred through the unavoidable dropping out or breaking of the two bolts which practically held the idler shaft in its socket, and points to respondent's failure to produce such bolts for examination and inspection. It is argued that inspection of these end bolts would doubtless have disclosed the improbability of the occurrence of an unavoidable accident

through any such medium. To this contention the respondent rejoins that the nonproduction of the bolts was entirely due to the fact that they were not in place at the time of the mishap; that they had previously dropped out and were missing; and that in some unaccountable way their displacement had not been discovered. It is pointed out that the master of the steamer Lackawanna and her chief engineer looked over the steering engine an hour after the accident, not deeming it advisable to change the position of the bedplates save in the presence of the owner or underwriter; that neither the first mate, the engineer, nor the oiler saw the bolts, though a search was afterwards made for them around on the deck and underneath, where the bracket was placed. While the testimony relating to the failure to produce the bolts is not entirely satisfactory, yet it is thought impossible to impute negligence to the respondent upon the mere absence of the bolts, especially as the two bolts were not only missing, but were not afterwards found or seen by any of the witnesses interrogated in relation to their absence. It is true the missing bolts may have been in a state of crystallization, or they may have been incrustated with rust, or they may have had their usefulness impaired in some other way, yet such condition is not to be assumed upon surmise or conjecture based merely on their nonproduction, in the absence of evidence indicating a designed or intentional concealment thereof.

The next possible cause of the accident in relation to which evidence was produced is the asserted failure to properly inspect the steering gear. Captain Rolseng of the Lackawanna testified that he went aboard the steamer on August 21, 1909, and at Gladstone took a quarter turn out of the chain on the drum; that he returned to Buffalo and afterwards proceeded to Duluth; and that on the return trip the accident occurred. At Duluth he examined the chains to find whether or not they were taut, and tested them by turning the wheel hard over both ways. It was his custom, he testified, to take frequent notice of the chains to ascertain their condition. Before leaving Buffalo, he had rigged the chains from a cross-chain to a straight-chain steerer, and to such change reference will hereinafter be made. It is shown that Chief Engineer Stone made an inspection of the steering gear in the latter part of August, and, observing that the iron straps at the end were down about one-sixteenth of an inch, examined the heads of the bolts, not only with his fingers, but applied a monkey-wrench thereto, and found them solid. Nothing at the time of the inspection caused him to believe that injury would result to the bolts from his method of inspection; but assuming that while lying on his stomach to turn the bolts to bring the straps closer to the frame he, without being aware of it, by the use of such force did impair their usefulness, his acts in that regard would not be deemed acts for which the respondent is liable. His competency as an engineer is not questioned, though his unfamiliarity with the construction of this particular steering gear is claimed to have rendered him incapable of giving proper supervision. But of this I am not convinced. He carefully and painstakingly inspected the caps and bolts, and the fact that he



was surprised at not finding the bolts holding the caps snug to the frame does not militate against his competency. The engineer swore also that at every watch he examined the steering gear, and satisfied himself that everything pertaining thereto was in order; while the oiler twice each day, in compliance with his duty, oiled the same, including the shaft. Nothing was detected on any of these occasions to give warning of any defect or flaw. It is true that at such times the bedplates and bolts were not tried by striking or testing; but such inspection was not demanded, as the bolts and idler shaft were in a place where they could not be easily observed. In *Van Eyken v. Erie R. R. Co.* (D. C.) 117 Fed. 712, the evidence showed that there had never been an inspection of the set screw which loosened and disorganized the steering gear; while in this case, as already stated, the bolts and journal caps were inspected three weeks before the accident. Again, it is true that the shaft was found bent after the collision, yet, on the other hand, the evidence is susceptible of the inference that its bent condition was due to its precipitation or jamming into the engine, and not to the fact that the shaft was in a bent condition prior thereto.

Next, it is urged that Captain Rolseng negligently rigged the vessel from a cross-chain steerer to a straight-chain steerer, and in navigating her thereby caused an undue strain to be put upon the journal caps and bolts, which resulted in loosening them. Much testimony was adduced on this asserted possible cause of the occurrence, and in libellant's brief the utmost importance is attached thereto; it being contended that the resultant thrust of a cross-chain steerer is 30 degrees from horizontal, while that of a straight-chain steerer is 45 degrees, accompanied by a lateral strain which would probably loosen the journal caps or brackets. After a careful examination of the testimony of the expert witness Williamson and the other testimony relating to this phase of the case, I conclude that the method of positioning the steering engine in the Lackawanna was not defective or impracticable, and that the steering engine was intended and designed for use on said steamer with either straight or cross chains. According to the evidence it made no material difference whether the steering was by straight or cross chains; and that there was a difference in the degrees of thrust was likewise unimportant, and did not contribute to the loosening of the journal caps which held the shaft in place. Upon this point the evidence also shows that Captain Rolseng had himself crossed the chains between the drum and sheave for straight steering; that he had had extensive experience in adjusting such chains; and, furthermore, that every Williamson steering gear with which he was familiar used the straight chains for steering.

It is finally urged that loose rudder chains and the consequent shock or jolting possibly caused a gradual loosening of the caps and bolts, causing the shaft to drop down and affect the steering; but it is sufficient to state that there is nothing in the record to justify the conclusion that the accident was the result of such a cause. Taking the evidence in its entirety, I think the sole cause which produced the

collision was the dropping out of one of the bolts from each strap (each strap having two bolts), as a result of which the idler shaft jammed into the engine. What caused the release of the bolts it is impossible to state. While it may be surmised that the engineer in testing them wrenched them too hard, or that they were not flawless, still, in any event, there is nothing to justify holding that the accident happened because of the negligence of those having charge of the navigation of the Lackawanna. There was no impairment in the vessel's construction or equipment. Her method of carrying the steering engine in these modern days, perhaps, would not receive the approval of builders and designers of the larger vessels for the lake carrying trade, but her steering engine and the position thereof compared favorably with that of other vessels of her type. Such being the fact, the happening of an accident on account of a defect which, by reason of her construction and equipment, was latent, and which could not by reasonable inspection be discovered, comes within the category of inevitable accidents for which there is no liability on the part of the owners of the vessel for injury sustained by another vessel. *The Lizzie Frank* (D. C.) 31 Fed. 477; *The Olympia*, 61 Fed. 121, 9 C. C. A. 393.

As to each possible cause suggested at the hearing, the respondent has fairly shown, I think, that the effect could not have been avoided by the use of such ordinary care, skill, and diligence as the admiralty law requires. Hence as to each such cause the effect was unavoidable and the collision inevitable. While it must be admitted that this disposition of the controversy leaves the libellant, a noncontributor to the disaster, to bear alone the heavy consequences of the accident, and also holds the steamer which caused the damage blameless, yet, as such mishap was unavoidable, there can be no recovery. The rule was well stated by District Judge Swan, in *The Olympia* (D. C.) 52 Fed. 990, as follows:

"The civil law, the common law, the maritime law, and the law of Great Britain and the United States agree that where a collision takes place by unavoidable accident, without blame being imputable to either party, the consequences of the misfortune must be borne by the party upon whom it happens to fall."

For the foregoing reasons the libel is dismissed, but without costs.

## In re JAYSEE CORSET CO.

(District Court, S. D. New York. November 9, 1911.)

**1. TRADE-MARKS AND TRADE-NAMES (§ 33\*)—CONVEYANCE APART FROM BUSINESS RIGHTS OF ASSIGNEE.**

Conveyance of a trade-mark, unaccompanied by any business to which it had been previously attached, conferred no title on the assignee.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 37; Dec. Dig. § 33.\*]

**2. BANKRUPTCY (§ 257\*)—GOOD WILL—SALE.**

Where the trustee of a bankrupt corporation, owning certain trade-marks and trade-names, sold the corporation's goods and chattels without any attempt to sell the good will of the bankrupt's business, such sale operated to destroy both the good will and the trade-marks, so that neither the good will nor the trade-marks could be thereafter a proper subject of sale by the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 356, 357; Dec. Dig. § 257.\*]

**3. BANKRUPTCY (§ 257\*)—GOOD WILL—SALE BY TRUSTEE—WORTHLESS ASSETS—FORBIDDING SALE.**

Where a bankrupt's trustee sold the assets of the bankrupt, without the good will and trade-marks, which had been a part of the business, and thereby killed the good will, the bankruptcy court had authority to prevent him from thereafter attempting to make a sale of the trade-marks and good will, on the ground that he was attempting to sell something that was worthless.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 356, 357; Dec. Dig. § 257.\*]

In Bankruptcy. In the matter of bankruptcy proceedings against the Jaysee Corset Company. On motion to prevent the bankrupt's trustee from selling the trustee's right, title, and interest in and to the good will of the bankrupt, and in the trade-names "Jaysee" and "J. C." and the trade-marks "Jaysee" and "J. C." Granted.

J. J. Lesser, of New York City, for the motion.

C. L. Greenhall, of New York City, opposed.

HOUGH, District Judge. One Joseph Cohen was in business before the bankrupt corporation was organized. He owned a registered trade-mark, which he placed upon goods apparently manufactured and sold by himself. He turned over his business to the bankrupt corporation, which apparently took his assets and assumed his liabilities. He became the president of the corporation, but he did not formally assign to the corporation the registered trade-mark aforesaid.

The corporation so formed became bankrupt, and a trustee was duly appointed. Such trustee did not obtain possession of the certificate of registration of trade-mark. Shortly before the bankruptcy of the corporation, Cohen transferred to a third person the trade-mark, consisting of the letters "J. C.," and "the good will of the business in which the trade-mark is used." That third person in turn conveyed the trade-mark and good will to a new corporation (in which Cohen was interested), which now desires to prevent the trustee from making the sale above referred to.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The trade-mark in question, although standing in Cohen's name, was evidently used, and used only, in the business of the bankrupt corporation. Cohen had no business of his own in which the trade-mark was used.

[1] It may be true (as the trustee contends) that the transfer of Cohen's business to the bankrupt corporation, and the use by that corporation of the trade-mark (obviously with Cohen's consent), worked by operation of law a transfer of the trade-mark itself. However this may be, it is more obviously true that Cohen's conveyance of the trade-mark, unaccompanied by any business whatever, gave no title to his assignee, and therefore none in any subsequent grantee. It is to me clear (on the papers submitted) that whatever rights the present petitioner may have in the trade-mark "J. C." do not in any way depend upon Cohen's assignment, but only upon the continued use thereof in the petitioner's business. Petitioner may well have established by this time a (so-called) common-law trade-mark, but that is all.

[2] The assignment by Cohen of the paper trade-mark was made in May, 1910. In due course of time the trustee sold the goods and chattels of the bankrupt, but made no attempt to sell the good will of the bankrupt's business, nor the trade-mark; nor did he sell the business as a going concern. The effect of these proceedings by the trustee was to kill the good will and destroy the trade-mark; for it is admitted that this particular kind of trade-mark cannot pass, except in conjunction with the good will of a business. What has become of the bankrupt's business? It stopped by bankruptcy, was killed by the trustee's sale, and the present intended action on the part of the trustee is an attempt to galvanize it into life again, something which cannot be done.

It results from the foregoing considerations that, while the present petitioner has nothing of legal value by reason of any assignment from Cohen, neither has the trustee anything to sell. Even if he ever owned the paper trade-mark, he only got it as legally appurtenant to the good will of the business of the bankrupt; but such good will could not survive the sale of the bankrupt's chattels and the destruction of its business, for exactly the same kind of reason that made Cohen's transfer invalid for lack of a good will to accompany it. The final situation is therefore this: The trustee wishes to sell something that he does not own, and, indeed, something that no longer exists; i. e., the good will of the bankrupt's defunct business. And the party who seeks to prevent the sale rests his right to do so upon a worthless assignment from Cohen.

[3] It is difficult to say that there is any equity in such a situation; but this court has a duty to perform in preventing trustees from inadvertently making unwarranted representations. It is an error to suppose that the trustee, because he never sold the good will of the business of the bankrupt corporation, still owns it. He cannot own that which does not exist. If there be no good will to sell, then an assignment or transfer of the trade-mark, or any right or title therein or thereto, is worthless.

The trustee is therefore forbidden to make this sale.



PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.  
(and three other causes).

(District Court, S. D. New York. January 13, 1913.)

Nos. 2—9, 2—33, 2—149, 3—37.

STREET RAILROADS (§ 58\*)—INSOLVENCY—CLAIMS—FILING—TIME—ORDER—AMENDMENT.

Where, in proceedings for the administration of the assets of a street railroad company in insolvency, certain claims had not been filed within the time fixed therefor, but the court, on cause shown, granted an order for their subsequent filing, but, by mistake, neglected to include in the order, a provision that the claims when filed should have the same force and effect as if filed on or before the last day advertised for the filing of claims, the court had power to permit the amendment of such order so as contain such provision.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.\*]

In Equity. Bill by the Pennsylvania Steel Company and another against the New York City Railway Company and another, and three other causes, for the administration of the railway company's property in insolvency. Application for modification of orders permitting the filing of certain claims out of time. Granted.

See, also, 176 Fed. 469.

Theodore W. Morris, Jr., and Matthew C. Fleming, both of New York City, for City receiver.

A. H. Masten and Wm. M. Chadbourne, both of New York City, for Metropolitan receiver.

James Byrne, of New York City, for Pennsylvania Steel Co.

Brainard Tolles, of New York City, for Guaranty Trust Co.

Bronson Winthrop, of New York City, for Farmers' Loan & Trust Co.

Richard R. Rogers, of New York City, for New York Rys. Co.

Benj. S. Catchings, of New York City, for tort creditors.

LACOMBE, Circuit Judge. The two orders sought to be amended allowed the filing of claims against the Metropolitan and New York City Railway Companies.

1. The first is dated and filed February 21, 1910. It refers to claims of the Second Avenue Railroad Company, Guaranty Trust Company, trustee under a mortgage of that railroad company, and George W. Linch, as its receiver.

2. The other order is dated March 20, 1909, and amended August 3, 1911. It refers to a claim of the Central Trust Company as trustee under a mortgage of the Twenty-Eighth & Twenty-Ninth Street Railroad. The petition avers that these orders "allowed claim to be filed." The order of March 20, 1909, contains no such allowance, it makes provision as to liquidation of the claim which for aught that appears on its face might have been already filed. Presumably it was the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

amending order, which has not been submitted, which provided for the filing of the claim.

The present application is to amend these orders by inserting the words "with some force and effect as if filed on or before the last day advertised for the filing of claims," or similar words.

During the entire proceeding in the Circuit Court from its outset it was supposed by the court, and apparently by every one else, that the status of all claims would be determined as of the date of the appointment of receivers. Therefore when the last dates for filing claims against the two roads were fixed as December 10, 1907, and January 15, 1908, respectively, the court did not supplement such fixation by an order that such dates would be the dates as of which the status of all claims would be determined. This it could have done with entire propriety (see footnote to opinion of Court of Appeals), and it would have done so had it not supposed the dates of status were already fixed beyond any power of the court to change. It was felt from the outset that the earliest day possible should be fixed for finding out exactly what claims there were to be liquidated, and it was also believed that there should be a common date for all to avoid any possible inequalities.

It was, of course, understood that all claims would not be actually filed by the named dates. They never are. But, upon any reasonable excuse being offered for delay, a special order was made in the case of each claim allowing it to be filed later. The important thing to be considered in making these orders was to be sure that claimant was put in just as good a position as if he had filed his claim within the time. Therefore the special order provided that the claim be filed "nunc pro tunc as of," etc., or "with the same force and effect as if filed prior to." Hundreds of these orders were made dealing with claims of every sort and description. How essential a part of such orders these quoted words were considered may be indicated by memorandum filed January 12, 1910 ([C. C.] 176 Fed. 469).

It now appears that in three instances only were they omitted, the two orders subject of this application, and the order in reference to claim of Hemphill bondholders' committee which was before the Court of Appeals. That the words were omitted from these orders through sheer inadvertence on the part of the court is too manifest even to need the present statement that it was never intended in these orders to give a different measure of relief from that given to all others. Surely no one supposes that the court intentionally favored the Second Avenue bondholders' committee by giving them an unusual form of order which would enable them to prove a large sum of money, while at the same time it required the Metropolitan stockholders' committee to accept the usual form which cut them off from proving a large sum of money, as they might have done if both committees had been treated alike.

Three courses may be open:

(1) To leave things as they are. That course leads to so much inequality that it does not commend itself.

(2) To change all orders by striking out the *nunc pro tunc* clause. The accountants are not yet figuring on the amount of dividends, and under the practice outlined by the Court of Appeals claims could still be filed. But I am satisfied that this would produce further interminable delays. Moreover, there are certainly more than a hundred claimants whose orders, even *nunc pro tunc*, were refused because of their gross delay. No one knows who these are. They took away their proposed orders with denial indorsed, and left no name or trace behind them. There is no way to secure to them the benefit of so radical a change.

(3) The easiest and most natural course is to make these two orders conform to all the others. To make them such as the court would have made them if at the time they were signed it had been asked the question, "As of what date are these to be considered filed?"

Respondents contend that to do so would interfere with and deny them substantial equities; that it is not a mere question of practice. If this be so, the order amending will not be a mere matter of discretion. It can be reviewed by the Court of Appeals, which may determine, if their contention is correct, that the momentary inadvertence of the court has secured them equities which it is powerless to disturb. Of course, this petition being opposed, there can be no suggestion that the qualifying words are included with their assent.

#### Guaranty Trust Company Petition.

This is a request that a certain amended and supplemental bill of petition be taken and deemed to be a claim against the estates of Metropolitan and City Railway Company as of the time of the actual filing of said bill, or that petitioner be authorized to file separate claims against these estates. The latter seems to be the better practice. Orders will be made allowing filing of such claims, but they must be in the usual form.

#### Application of Metropolitan Receiver.

It seems counsel for this receiver understood that the memorandum of January 12, 1910, authorized the filing of claim against the City Company without further order. The master seems to question this. He may take the usual form of order.

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### THE DUCHESS.

(District Court, E. D. New York. December 31, 1912.)

#### ADMIRALTY (§ 101\*)—SALE OF VESSEL—SURPLUS—DISTRIBUTION.

Where the price of a yacht was represented by notes falling due at times past, and no default had been declared by the seller prior to condemnation and sale of the yacht by a United States marshal, the seller was then not entitled to take the entire surplus in place of the boat, the buyer having been ready and willing to meet the notes out of the proceeds of sale as they matured, but the surplus should be divided to the seller

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the amount remaining unpaid on the notes, and the balance awarded to the buyer.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 684-708; Dec. Dig. § 101.\*]

Petition of the Brooklyn Trust Company, as one of the executors of the estate of L. J. Busby, for payment over of the surplus of the proceeds of the sale of the yacht *Duchess*, and cross-petition of Rudi De Graff, praying payment of the same fund to him. On motion to confirm report on orders of reference to take proof of the facts of the petitions and to report thereon. Part of surplus, to the amount due on certain notes, awarded to the Trust Company, and the balance to De Graff.

Franklin Grier, of New York City, for petitioner De Graff.

Dykman, Oeland & Kuhn, of Brooklyn, N. Y., for petitioner Brooklyn Trust Co.

CHATFIELD, District Judge. The exceptions to the report of the special commissioner seem to be well taken, in so far as they are based upon the lack of any order of reference to take proof and report upon any issue or question of law. But the report, in so far as it reports facts, will be confirmed, and the question of priority or ownership, having been presented on the merits, will be disposed of by the court.

The yacht was to be paid for by notes falling due at times now past. If the contract of sale be treated as a conditional bill of sale, it had to be acted upon; that is, a default had to be declared according to its terms. This was not done until after sale by the United States marshal. The vendee has been ready and willing to meet the notes, and now consents to their payment, with the costs, of the proceeding, out of the fund. The vendor seeks to elect to take the entire fund in the place of the boat. Such a forfeiture, as the result of an election made after the conditions have been waived, and after it has appeared that no loss will result to the vendor if the contract be carried out, would be contrary to the equitable principles governing a court of admiralty.

The petitioner, Brooklyn Trust Company, may have a decree awarding to it the amount due upon the notes held by it and its costs herein. The balance of the remnants and surplus will be paid to Rudi De Graff.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



## FREEMAN v. FALCONER et al.

(Circuit Court of Appeals, Sixth Circuit. January 17, 1913.)

No. 2,264.

**1. PLEADING (§ 214\*)—DEMURRER—CONSTRUCTION.**

As against a demurrer, the facts well pleaded in the petition must be taken as true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

**2. VENDOR AND PURCHASER (§ 47\*)—CONTRACT OF SALE—BREACH—WHAT LAW GOVERNS.**

The law of the state where land contracted to be sold is situated governs controversies growing out of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 79; Dec. Dig. § 47.\*]

**3. VENDOR AND PURCHASER (§ 351\*)—CONTRACT OF SALE—BREACH—VENDOR'S LIABILITY.**

Under the Kentucky law, a vendor, in the absence of fraud or bad faith, failing to convey, is liable to the vendee for the difference between the contract price and the value of the land at the making of the contract, instead of at the time for conveyance, and also for such expense as the vendee might reasonably and properly have incurred under the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1017, 1047-1058; Dec. Dig. § 351.\*]

**4. VENDOR AND PURCHASER (§ 349\*)—REMEDY OF VENDEE—DAMAGES—PETITION.**

Where a vendor of land in Kentucky, without fraud or bad faith, failed to convey because of a failure of title, a complaint by the vendee for breach of contract, failing to allege that at the time the contract was made the land was worth more than the contract price, and failing to show that expenses alleged to have been incurred by him in connection with the contract were reasonable, and such as he was authorized to incur before maps and abstracts had been delivered, was demurrable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1039-1042; Dec. Dig. § 349.\*]

In Error to the Circuit Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Action by Edward R. Freeman against D. G. Falconer and others. Judgment for defendants, and plaintiff brings error. Affirmed.

James N. Sharp and C. N. Smith, both of Williamsburg, Ky., for plaintiff in error.

Allen & Duncan and Falconer & Falconer, all of Lexington, Ky., and O. H. Waddle, of Somerset, Ky., for defendants in error.

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

McCALL, District Judge. This case arises out of a written contract entered into between the appellant, Edward R. Freeman, a citizen of Tennessee (hereinafter called the plaintiff), and the appellees, John A. Geary and others, citizens of Kentucky (hereinafter called

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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the defendants). It witnesseth on the 12th day of October, 1906, the defendants agreed to sell to the plaintiff all the lands that they owned, within certain boundaries, situated in Pulaski county, Ky., and estimated to be 25,000 acres, for \$4 per acre. The land is described by boundaries, and generally as tracts Nos. A, B, and C. It is provided that tracts A and B may contain not less than 8,500 acres, and that tract C may contain not less than 12,750 acres, making the minimum amount of land to be conveyed 21,250 acres.

The defendants were to deliver to the plaintiff a complete map of the lands, giving metes and bounds, and also a complete abstract of title, showing a perfect title in the defendants, and no adverse possession. The plaintiff was to have a reasonable time after the receipt of the map and abstract of title, etc., to investigate the title and to close the transaction, by the defendants executing to plaintiff, or such other grantee as he might name, a general warranty deed, conveying a perfect title to the land, on the compliance by the plaintiff with the terms of payment provided for in the contract. The defendants failed to execute the warranty deed within reasonable time, and the plaintiff filed the petition in this case, wherein are alleged the execution of the contract, and the breach thereof by the defendants, in that they failed and refused to convey or attempt to convey the lands to the plaintiff, for the reason, as is charged, that the defendants—

“have not the fee-simple or any title, or the possession of any material portion of the 8,500 acres, or more, which they undertook to convey to him in tracts A and B, and they have not the fee-simple title to, or the possession of, any but a very small portion of the 11,500 acres which they undertook to convey to him in tract C, and he says that what little land the defendants have in tracts A, B, and C is so cut up into small parcels and so surrounded by other lands, owned and in the adverse possession of other parties, that the same is wholly worthless for any purpose.”

It is alleged that the measure of damages is the difference between the value of the land at the date when defendants refused or failed to convey and the price to be paid for it, which difference is alleged to be \$3.50 per acre, and, further, that after making the contract the plaintiff, in his efforts to obtain the land from the defendants, and while he was looking to them to do and perform their contract as respects the land, was necessarily compelled to expend in such efforts the sum of \$2,000, all of which was lost to the plaintiff. Wherefore suit was brought for \$74,375, that being the amount of the difference between the value of the minimum number of acres to have been conveyed and the contract price, and, in addition, for \$2,000 as expenses, totaling the sum of \$76,375.

The defendants seasonably entered a motion to strike out that portion of the petition wherein it is sought to recover \$2,000 for expenses alleged to have been incurred by the plaintiff, and also filed a general demurrer, upon the ground that the petition “failed to state facts sufficiently to constitute a cause of action against them or either of them.” The court below sustained both the motion to strike out and the demurrer, with leave to the plaintiff to amend his petition.

This he did not do, and an order was entered dismissing the petition. To this action the plaintiff excepted, and prosecuted a writ of error to this court, and has assigned errors.

We shall not consider the action of the court in sustaining the motion to strike out, but treat the general demurrer as going to the entire petition. The four errors assigned may be treated under one general head, to wit: That the court erred in deciding that the petition did not state facts sufficient to constitute a cause of action against the defendants, or any of them, and in rendering judgment against the plaintiff.

[1] The point raised and presented by the demurrer is whether or not the petition should allege that the defendants had title to the land and refused to convey it, or that they knew they did not have title to any substantial part of said land at the time the contract was made, or bad faith, fraud, or misrepresentation on the part of the defendants which induced plaintiff to enter the contract. As against a demurrer, the facts stated in the petition, that are well pleaded, must be taken as true.

[2] It appears that the land which is the subject-matter of the contract is situated in the state of Kentucky, and we think it is well settled that controversies arising out of contracts for the sale of land must be determined by the law of the state wherein the land is situated (*Title Guaranty & Surety Co. v. Witmire* [C. C. A. 6th Circuit] 195 Fed. 41, 115 C. C. A. 43; *Union Trust Co. v. Bulkeley*, 150 Fed. 510, 80 C. C. A. 328; *Home Land & Cattle Co. v. McNamara et al.*, 145 Fed. 17, 76 C. C. A. 47; *Kirby Carpenter Co. v. Burnett*, 144 Fed. 635, 75 C. C. A. 437; *Meylink v. Rhea*, 123 Iowa, 310, 98 N. W. 779; *Dal v. Fischer*, 20 S. D. 426, 107 N. W. 534; *Dalton v. Taliaferro*, 101 Ill. App. 592; *Breckinridge v. Moore*, 3 B. Mon. [Ky.] 629); and the rights of the parties to this suit must, therefore, be determined under the laws of the state of Kentucky.

There is no allegation of fraud or bad faith on the part of the defendants, but the allegation, in substance, is that the vendors did not convey because, at the date of their contract, they had title only to a very small part of the land which they contracted to sell.

[3] We understand the rule in Kentucky to be that in contracts for the sale of land situated in that state, and in cases not involving his fraud or bad faith, the vendor, in the event of his failure to convey, is liable to the vendee on the basis of the value of the land at the date of making the contract, rather than such value at some later date contemplated for conveyance, and is liable, also, for such expense as the vendee may reasonably and properly incur under the contract. In the case of *Cox's Heirs v. Strode*, 2 Bibb (Ky.) 273, 278 (5 Am. Dec. 603), the court said:

"Where there has been no fraud in the transactions, and none is alleged in this case, both parties are equally innocent; and as the purchaser is contending *de lucro captando*, and the seller *de damno evitando*, to compel the latter to respond to the former for the rise of value would be directly contrary to the maxim of moral equity which prohibits one man being enriched to the prejudice of another."

And again, in *Rutledge v. Lawrence*, 1 A. K. Marsh. (Ky.) 396:

"It has been settled by a current of decisions in this court (that where one contracts to convey land, and is, without fraud, unable to make a title, the measure of damages to which the vendee is entitled is the value of the land at the time of the sale, to be ascertained by the consideration fixed, or other evidence. Where the inability of the vendor has been produced by fraud on his part, a different rule has prevailed; but a failure to convey has never been adjudged to be evidence of a fraudulent inability, and we think ought not to be so adjudged. For an inability to convey may, and frequently does, happen without fraud, and fraud is odious in law, and ought never to be presumed."

To the same effect: *Allen v. Anderson*, 2 Bibb (Ky.) 415; *Davis v. Lewis*, 4 Bibb (Ky.) 456; *Goff v. Hawks*, 5 J. J. Marsh. (Ky.) 341; *Young's Ex'rs v. Singleton*, 6 J. J. Marsh. (Ky.) 316, 320; *Grundy v. Edwards*, 7 J. J. Marsh. (Ky.) 368; *McMillan v. Ritchie*, 3 T. B. Mon. (Ky.) 348, 16 Am. Dec. 107; *Combs v. Tarlton's Adm'rs*, 2 Dana (Ky.) 465, 468.

[4] Some of these cases seem to say that the consideration paid is the maximum measure of damages—i. e., conclusive evidence of the land value at that date. Others suggest that further evidence might be received to show the value of the land at the date of the contract, and that the excess of this value above the agreed price is the true measure. All of them are dependent upon the idea that the breach occurs when the contract is made. If there is any difference in the Kentucky cases in this respect, it is immaterial to the present case which rule is adopted. If the consideration paid is the measure, the demurrer was good, because it appears that no part of the consideration had been paid. If the value of the land at the date of the contract of sale in excess of the consideration price is the measure, the same result follows, because the declaration does not allege that the land at that time was of any greater value than the price agreed to be paid. The allegation of a greater value refers to a date considerably later, when the defendants refused to convey. The declaration here does not indicate any intent that defendants were to go out and buy land to make up the required amount, but that the contract had reference only to lands then owned by defendants, and accordingly it is thought to be broken when made, and not at the later date, when a conveyance was refused. Without indicating that we would be satisfied with this view of the matter on its merits, we see no other reason upon which can be maintained the distinction of the Kentucky rule between a fraudulent contract or an arbitrary refusal and a contract involving only a good-faith failure of title; and we are bound by the Kentucky decisions.

It is insisted that this line of decisions has been recently overruled by the Kentucky Court of Appeals in *Whitworth v. Pool*, 96 S. W. 880. This case does not appear in the published volumes of the opinions of the Kentucky Court of Appeals. Indeed, at the hearing, it was agreed that it was by that court marked "not for publication." In this circumstance, conceding for the moment that the court in that case went as far as is insisted by appellant's counsel, we should



be reluctant to follow it, in the face of the many published opinions of that court holding a contrary rule, and in the absence of a declaration by the court in the Pool Case that its decisions in former cases, beginning with *Cox's Heirs v. Strode*, *supra*, were overruled.

But the case of *Whitworth v. Pool* is, we think, clearly distinguishable from the instant case. There the land in question was owned by R. J. Whitworth and his wife, Mary Whitworth, each owning an undivided one-half interest, and they arbitrarily (and so, necessarily, in bad faith) refused to convey it. In the instant case, the defendants did not own the land, and it was for that reason, as is alleged in the petition, they did not convey it. We see no inconsistency in the holdings in *Whitworth v. Pool* with the former holdings by the Court of Appeals of Kentucky.

*Harten v. Löffler*, 212 U. S. 397, 29 Sup. Ct. 351, 53 L. Ed. 568, is not applicable under the averments of this declaration and the Kentucky rule as settled by the decisions of that state. Moreover, the measure of damages, as settled in the state of Kentucky, in cases of the character here considered, is sustained by many English authorities, beginning with *Flureau v. Thornhill*, *Blackstone's Reports*, vol. 2, and also by courts of the several states, as well as text-writers. *Bitner v. Brough*, 11 Pa. (1 Jones) 127, 139; *Dumars v. Miller*, 34 Pa. (10 Casey) 319; *Gerbert v. Trustees*, 59 N. J. Law, 160, 35 Atl. 1121, 69 L. R. A. 764, 59 Am. St. Rep. 578; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490 (Judge Cooley); *Kent's Commentaries*, vol. 4, 479; *Field's Law of Damages*, § 481.

The further question of the plaintiff's right to recover expenses which it is alleged he was necessarily compelled to incur in his efforts to have said land conveyed to him remains to be considered. The contract provides that the defendants were to furnish the plaintiff with maps and abstracts of title, etc., and that he should have a reasonable time after their receipt to investigate the title to the land, and close the transaction.

The expense the plaintiff incurred is not itemized, nor does he state what he did to incur any expense, further than to say that it was incurred in his efforts to have the land conveyed to him. In the absence of a specific allegation, it is difficult to determine from the contract just what expense he could have properly incurred, for which the defendants would be liable, until after they had furnished to him the maps and abstracts of title, which was not done. It would seem that any expense incurred by him prior to that time was unauthorized and voluntary, and that for such expense defendants would not be liable.

Without pursuing the subject further, we are satisfied with the action of the court below in sustaining the demurrer and dismissing the petition, and it is accordingly affirmed, with costs.

**CITY OF DENVER et al. v. MERCANTILE TRUST CO. OF NEW YORK.  
MERCANTILE TRUST CO. OF NEW YORK v. CITY AND COUNTY  
OF DENVER.**

(Circuit Court of Appeals, Eighth Circuit. November 11, 1912.)

Nos. 3,009, 3,010.

**1. COURTS (§ 310\*)—JURISDICTION OF FEDERAL COURTS—INDISPENSABLE PARTIES.**

The trustee in a street railroad mortgage covering all of the property, franchises, and contract rights of the mortgagor may maintain a suit in equity in a federal court in its own right to enjoin the repeal of a franchise of the mortgagor which would seriously affect the value of its bonds, and under equity rule 39 (198 Fed. xxx, 115 C. C. A. xxx) is not required to join the mortgagor as a party, where it would defeat the jurisdiction of the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 857; Dec. Dig. § 310.\*]

**2. COURTS (§ 282\*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.**

A federal court also has jurisdiction of such suit as one involving a constitutional question; the franchise, if valid, constituting a contract which would be impaired by its repeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.\*]

Jurisdiction in cases involving federal questions, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Mining Co.*, 35 C. C. A. 7; *Earnhart v. Switzler*, 105 C. C. A. 262.]

**3. MUNICIPAL CORPORATIONS (§ 71\*)—LEGISLATIVE CONTROL—GRANT OF FRANCHISE IN STREETS.**

Const. Colo. art. 15, § 11, which provides that "no street railroad shall be constructed within any city, town or incorporated village without the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad," does not take away from the Legislature the power to prohibit municipalities from granting to such companies the right to use the streets except on such terms as it may by law prescribe, but merely requires the additional consent of the municipality, and gives it the right to impose additional terms and conditions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 175; Dec. Dig. § 71.\*]

**4. MUNICIPAL CORPORATIONS (§ 689\*)—GRANT OF FRANCHISE TO STREET RAILROAD COMPANY—WANT OF POWER—ESTOPPEL BY RATIFICATION.**

Where, at the time of the granting by a city of a franchise to an electric street railroad company, it was expressly authorized by its charter to make such grants only to horse or dummy roads, but after an amendment of its charter, expressly extending its power to electric lines, it passed other ordinances recognizing the validity of the grant, it thereby ratified the same, and, if the charter amendment did not operate as a curative act in itself, the city was estopped to deny its power to make the grant after the grantee had expended large sums in building and equipping its line in good faith.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1477, 1478, 1480; Dec. Dig. § 689.\*]

**5. STREET RAILROADS (§ 24\*)—MUNICIPAL GRANT OF FRANCHISE—VALIDITY.**

Under a city charter authorizing the granting of the right to use the streets for street railroad purposes "upon the written consent of the own-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ers of the land representing more than one-half of the frontage of the street or so much thereof as is sought to be used for railroad purposes," the obtaining of such consent is not a prerequisite to the granting of the franchise, and an ordinance was valid which required the consent of the property owners to be obtained and filed before the grant became effective on any particular street.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 34-38, 43, 50-55, 69-76; Dec. Dig. § 24.\*]

**6. STREET RAILROADS (§ 28\*)—CHANGE OF FORM—SUCCESSION TO PRE-EXISTING RIGHTS AND LIABILITIES.**

Const. Colo. 1902, art. 20, which created the city and county of Denver from the city of Denver, with some added territory, to "succeed to all the rights and liabilities" of the city, etc., did not have the effect of terminating a franchise which had been previously granted to a street railroad company for an indefinite term, and under which the company had constructed its lines.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 39-42, 44, 45, 56, 61, 63-65; Dec. Dig. § 28.\*]

**7. STREET RAILROADS (§ 24\*)—FRANCHISE—VALIDITY.**

A grant by a city to a street railroad company of the right generally to construct its lines on any of the streets of the city as it may desire from time to time, without any limit as to time, is unreasonable and invalid in the absence of express legislative authority; but such provision does not render the grant void as to streets which are actually occupied or were at the time in contemplation of occupancy in the immediate future.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 34-38, 43, 50-55, 69-76; Dec. Dig. § 24.\*]

**8. EQUITY (§ 427\*)—SCOPE OF RELIEF—MATTERS PRESENTED BY ANSWER.**

A court of equity may grant relief as to matters occurring subsequent to the filing of the bill, without a supplemental bill, if within the scope of the original bill, when such subsequent matters are presented by defendant in the answer and proofs.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1001-1014; Dec. Dig. § 427.\*]

**9. STREET RAILROADS (§ 2\*)—"CABLE RAILROAD."**

The term "cable railroad," as used in Denver City Charter (Laws Col. 1885, p. 85) art. II, § 20, par. 46, implies a street railroad.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 2-4; Dec. Dig. § 2.\*]

Carland, Circuit Judge, dissenting.

Appeals from the Circuit Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit in equity by the Mercantile Trust Company of New York against the City of Denver and others and the City and County of Denver. Decree for complainant, and both parties appeal. Modified and affirmed.

For opinion below, see 161 Fed. 769.

W. H. Bryant, of Denver, Colo. (Thomas R. Woodrow, J. A. Marsh, Paul Knowles, William A. Bryans, W. R. Kennedy, H. A. Lindsley, F. W. Sanborn, and N. Walter Dixon, all of Denver, Colo., on the brief), for City and County of Denver.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Gerald Hughes, of Denver, Colo. (Clayton C. Dorsey and Howard S. Robertson, both of Denver, Colo., on the brief), for Mercantile Trust Co. of New York.

Before SANBORN and CARLAND, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. In 1885 the city of Denver was a municipal corporation, one of the subdivisions of the state of Colorado. On February 5, 1885, the Denver Electric & Cable Railway Company incorporated under the general laws of the state of Colorado. The objects for which it was formed were stated in the articles of incorporation as follows:

"To construct, equip, maintain, operate and own electric and cable railways in the state of Colorado; to deal in patent and other rights therefor, and to do any and all things necessary to carry out such objects."

The life of the corporation was stated to be 50 years from that date.

On February 5, 1885, the city council of the city of Denver passed an ordinance known and designated as "No. 3, 1885." Said ordinance contained 10 sections.

The first section was in the following words:

"That the right of way be, and the same is hereby granted to the Denver Electric & Cable Railway Company, its successors and assigns, to build, operate, and maintain a single or double track railway, with switches, turn-outs, side tracks, and other appliances necessary for the operation of the same, in, along and across the streets of the city of Denver, said railway to be operated by power transmitted by use of electricity or by cable."

The second section related to the grade of the tracks.

The third required the company to execute and file a bond to hold the city harmless from all damages it might sustain by reason of the location, construction, or operation of its railway within the city.

The fourth related to the gauge of track and required certain paving or planking to be done.

The fifth section required that, before entering upon the occupancy of any street, the company should "obtain and file with the city clerk the written permission for such occupancy of the owners of more than one-half of the frontage upon so much of said street as said company proposes to occupy."

The sixth section related to the rate of fare to be charged.

The seventh related to the time within which the company should begin the construction of said railroad, and requiring two miles of railroad to be in operation within two years.

The eighth related to the maximum speed at which the cars should be moved.

The ninth section was as follows:

"That the city council reserve the right to pass any ordinance with reference to the operating of said railway which the comfort of the inhabitants of this city or the safety of the passengers of the said railway may require, reserving, also, all legislative and police powers and functions with respect to



the streets that may be used and occupied by said company that it had before the passage of this ordinance."

The tenth section related to the construction and maintenance of culverts.

This ordinance was approved by the mayor the following day, February 6, 1885. Thereafter the Railway Company filed the bond required by the ordinance and entered upon the construction of its road upon some of the streets of the city. For that purpose, it filed in the office of the city clerk on various dates between April 28 and July 10, 1885, the written consent of the owners of more than one-half of the frontage for the occupancy by its road of portions of certain of the streets in the city.

Several subsequent ordinances were passed amendatory of said Ordinance No. 3. The Denver Electric & Cable Company subsequently became merged into the Denver Tramway Company, the Denver Tramway Company succeeding to all the rights of the Denver Electric & Cable Company. The Denver Tramway Company was subsequently merged into the Denver Consolidated Tramway Company, which succeeded to all the rights of the Denver Tramway Company, and the Denver Consolidated Tramway Company subsequently was consolidated into the Denver City Tramway Company, which latter company now owns and operates the street railway system in said city. On July 28, 1888, the Denver Tramway Company executed its mortgage or trust deed to the Mercantile Trust Company upon all of its railway property rights and franchises within the city of Denver to secure bonds in the sum of \$1,000,000. On January 1, 1890, it executed and delivered a second mortgage to the Mercantile Trust Company, covering the same property, to secure bonds in the sum of \$2,000,000. On October 11, 1893, the Denver Consolidated Tramway Company executed and delivered a mortgage or trust deed to said Mercantile Trust Company upon all of its railway, franchise rights, etc., in the city of Denver, to secure bonds in the sum of \$4,000,000. On the 4th day of May, 1899, an ordinance was introduced in the board of aldermen of the city of Denver, repealing said Ordinance No. 3 of 1885, and on the 9th day of May the same was passed as Ordinance No. 65, and thereupon went for consideration and passage or rejection to the board of supervisors of said city, and was by the board of supervisors referred to the appropriate committee for consideration and a report thereon. While said ordinance was pending before said board of supervisors, and before any action thereon, excepting to refer the same to a committee, and while the same was being considered by the committee, complainant, to wit, on the 24th day of May, 1899, filed a bill in the Circuit Court of the United States for the District of Colorado, alleging the passage of Ordinance No. 3 of 1885, its acceptance by the Denver Electric & Cable Railway Company, the construction of a system of railways thereunder, the expenditure of several million dollars in the construction and operation of such railways, the transfer of all rights acquired by the Denver Electric & Cable Railway Company under said ordinance to the Denver Tramway Company, by the Denver Tramway Company to the Denver Consolidated Tramway

Company, and by the Denver Consolidated Tramway Company to the Denver City Tramway Company, the execution of the mortgages from the Denver Tramway Company and the Denver Consolidated Tramway Company to the complainant; alleged that in December, 1889, the officers and employes of the Railway Company were interfered with and prevented from constructing additional portions of its line of railway within the city by certain officers and employes of the city; that the Railway Company, to protect its rights claimed under said Ordinance No. 3, instituted a suit in the district court of the county to enjoin such officers from interfering with its construction of the work; that the district court refused an injunction, holding that said Ordinance No. 3 was void; that thereupon the Railway Company appealed to the Supreme Court of the state, where a final judgment was entered, reversing the judgment of the district court, the Supreme Court holding that, whether said Ordinance No. 3 was valid or not, it was unnecessary to determine in that action; that, inasmuch as the Railway Company had acted in pursuance thereof, had constructed and operated an extensive system of railway upon the streets of the city, which had been acquiesced in by the city, and its inhabitants, the officials of the city were not authorized to determine for themselves that the ordinance was invalid, and obstruct the Railway Company in its operations, without a declaration from the legislative body of the city, disaffirming said ordinance. No further action was taken on behalf of the city contesting or challenging the rights of the Railway Company under said Ordinance No. 3 until the introduction of the repealing Ordinance No. 65.

Complainant in its bill further alleged that the validity of Ordinance No. 3, and the right of the Railway Company to occupy the streets of the city under its provisions, was publicly and extensively discussed through the newspapers and by the public, to such an extent that if repealing Ordinance No. 65 should be passed and adopted, notwithstanding its invalidity, it would impair the value of the securities of the Railway Company which had been issued to complainant as trustee; that the action of the board of aldermen and board of supervisors in passing such repealing ordinance would be void as impairing the obligation of a contract, and prayed that the board of aldermen and board of supervisors be enjoined from the passage of such repealing ordinance, or passing any ordinance, or taking any action, to impair the obligation of the contract between the city and the railway company embraced in said Ordinance No. 3 of 1885, and for general equitable relief. The Circuit Court granted a temporary order of injunction, from which an appeal was taken to this court, and the judgment of the Circuit Court affirmed (102 Fed. 1001, 41 C. C. A. 676), this court not passing upon the question of the validity of Ordinance No. 3, or the proposed repealing Ordinance No. 65, but simply deciding that the discretion of the Circuit Court, in granting the temporary injunction, was not improperly exercised under the particular state of facts. The respondents answered the bill, admitting many of the allegations, but insisted that Ordinance No. 3 of 1885 was invalid for various stated reasons. At the hearing in the trial court defend-

ants, by leave of court, filed a supplemental answer, among other things setting up the passage and approval July 15, 1899, of an ordinance, No. 76, repealing Ordinance No. 3 of 1885, and certain subsequent ordinances amendatory thereof, said repealing ordinance, however, providing:

"That this ordinance shall not apply to or in any manner affect any rights which the Denver Electric & Cable Railway Company, its successors and assigns, may now have in relation to any electric street railway lines at present constructed and now in actual operation in said city of Denver."

It further set up the adoption of an amendment to the Constitution of the state, being article 20, by which the city of Denver, with some adjacent outlying territory, became incorporated as the city and county of Denver, and duly authorized to adopt its own charter; that on the 27th day of April, 1906, Ordinance No. 74 was passed, approved, and published, submitted to the electors of said city and county for approval at an election held on the 15th day of May, 1906, and the same was at such election duly adopted. In the preamble to said ordinance it was recited, among other things:

"Whereas, the Denver City Tramway Company, under and by virtue of certain ordinances, franchises, grants, and rights of way, now maintains and operates a system of street railways over, along and across certain streets, alleys, viaducts, bridges, public ways and places in the now city and county of Denver, hereinafter described and enumerated; and

"Whereas, the needs of the city and county of Denver and its inhabitants require and will, in the future require, certain extensions, betterments, new construction, and improvements of said street railway system, and all of which is desired by the city and county of Denver and its duly qualified tax-paying electors to be undertaken by the Denver City Tramway Company, wholly at the expense of the Denver City Tramway Company, and without any unnecessary delay; and

"Whereas, The Denver City Tramway Company is willing to undertake such extensions, betterments, new construction and improvements on the terms hereinafter set forth; and • • •

"Whereas, a contention and litigation has arisen concerning the validity, extent, scope and duration of the ordinances, franchises, grants, rights of way and privileges claimed by the Denver City Tramway Company, and a portion of which litigation is now pending and unsettled; and

"Whereas, it is desired that such extensions, improvements, new construction and expenditures shall be undertaken and made forthwith without awaiting the outcome of the various contentions and litigation between the Denver City Tramway Company and the city and county of Denver, concerning the ordinances, franchises, grants, rights of way and privileges belonging to the Denver City Tramway Company, and the scope, extent and duration thereof. • • •"

Said ordinance granted the right of way to the Denver City Tramway Company to construct, operate, and maintain its railway upon a large number of streets therein enumerated, comprising the streets already occupied by the Tramway Company, and other streets, for a period of 20 years. The eleventh section of the ordinance, however, was as follows:

"Neither this franchise or grant or any provision herein, or the proposal thereof, shall be a waiver of any right, claim, grant, license, or franchise or right of way belonging to or claimed to belong to the Denver City Tramway Company, or any of its assignor, predecessor or consolidating companies,



nor shall this franchise in any manner be considered as a waiver in any way of any litigation or contention, by either the city and county of Denver or the Denver City Tramway Company or any of its predecessor or constituent companies to the prejudice of either party as to the validity, scope or duration of any franchise, grant or right of way, but the rights of both parties and their positions and contentions in any and all litigation, and concerning such ordinances, franchises, grants, licenses, and rights of way, shall remain entirely unaffected by this ordinance."

The trial court, upon the issues joined, found the facts and entered its decree as follows:

"That since the enactment and passage of Ordinance No. 3 of the series of 1885 of the city of Denver and down to the present time all the terms, provisions, and conditions thereof prescribed to be kept by the Denver Electric & Cable Railway Company, its successors or assigns, have been fully kept, performed, and observed by the said company, the Denver City Tramway Company, and its grantor and predecessor companies, and that large sums of money for permanent improvements and for establishing an extensive and connected system of street car lines has been expended, and that such expenditures have been made and such system of street car lines built and operated in good faith and in reliance upon said Ordinance No. 3 of the series of 1885 of the city of Denver, and that bonds have been issued and sold by the companies, successors in interest to the Denver Electric & Cable Railway Company in reliance upon the validity of said ordinance, and that said bonds were secured by mortgage upon the property of each of said companies and the rights and estates thereof, including the contract and franchise evidenced by Ordinance No. 3 of the series of 1885 of the city of Denver. That at the time of the introduction and passage and enactment of Ordinance No. 76 of the series of 1899 there existed no cause under the terms of Ordinance No. 3 of the series of 1885 of the city of Denver for the repeal thereof or of any portion thereof, and that said Ordinance No. 76 of the series of 1899 was enacted without authority on the part of the defendants so to do and at a time when Ordinance No. 3 of the series of 1885 was in full force and effect, and had, as to all its terms and provisions been kept. That the acts, claims, threats, and performances of the defendants, including the introduction and threat to enact as an ordinance of the city of Denver, Aldermanic Bill No. 65 of the series of 1899, on May 4, 1899, and the introduction and enactment of Ordinance No. 76 of the series of 1899, and the assertion by the defendant and their predecessors and successors in office of a right to repeal and invalidate Ordinance No. 3 of the series of 1885 of the city of Denver, constituted and does constitute a cloud upon the title of the complainant, the Denver City Tramway Company, and of its grantor and predecessor companies, from which the complainant is entitled in equity to be relieved by a proper decree of this court.

"Therefore the court doth order, adjudge, and decree: That Ordinance No. 3 of the series of 1885 of the city of Denver is a valid and binding contract between the city of Denver, the city and county of Denver, and the complainant the Denver City Tramway Company, its successors and assigns, of a duration of at least 50 years from the date of its passage and enactment, and that it is unnecessary in this suit and now for the court to determine the duration of said ordinance, if any, beyond said period of 50 years, or as to whether or not it is unlimited in time, such questions not being determined by this suit or decree; that repealing Ordinance No. 76 of the series of 1899 was at and ever since the time of its passage, and is now, illegal, unauthorized, and invalid and of no force or effect whatsoever, and is for naught held, and the defendants herein, the city and county of Denver, the supervisors and aldermen thereof, together with all persons, attorneys, and agents of the city and county of Denver, are hereby forever enjoined and restrained from maintaining or asserting the validity of Ordinance No. 76 of the series of 1899, or from asserting any rights thereunder, or any claims or contentions thereunder against the complainant herein, the Denver City Tramway Company, its successors or assigns."



From the decree so entered, the respondents have appealed to this court, such appeal being No. 3,009, and complainant has filed a cross-appeal, No. 3,010, asserting that the court below erred in not finding that the Denver City Tramway Company had a perpetual franchise to occupy the streets of the city. The questions discussed will be in No. 3,009. No question was raised in the court below nor in the briefs first filed in this court as to the jurisdiction of the trial court. A supplemental brief, however, has been filed, challenging that jurisdiction. As the question of jurisdiction may be raised at any stage of the case, we first proceed to a consideration of that subject.

[1] It is claimed by appellants that jurisdiction is based entirely upon diversity of citizenship; that the Denver City Tramway Company, the present owner, and in possession of the street railway was an indispensable party to the action, and if made a party, its interests being entirely with that of complainant and diverse to that of respondents, it should be classed as a complainant, and hence diversity of citizenship defeated. The Denver City Tramway Company was not, however, made a party to the action, and we think it was not an indispensable party. Complainant was the trustee in the mortgage or trust deed given to secure bonds issued by the street railway company. Its mortgages covered, not only the physical properties of the Tramway Company, but its franchise and contract rights, and it certainly had a standing in a court of equity to protect such rights from any unlawful invasion. *Old Colony Trust Co. v. City of Wichita* (C. C.) 123 Fed. 162; affirmed, 132 Fed. 641, 66 C. C. A. 19; *Clapp v. City of Spokane* (C. C.) 53 Fed. 515; *Knickerbocker Trust Co. v. City of Kalamazoo* (C. C.) 182 Fed. 865; *City & County of Denver v. New York Trust Co.*, 187 Fed. 890-902, 110 C. C. A. 24.

Again, equity rule No. 39 (198 Fed. xxix, 115 C. C. A. xxix), which reads as follows:

"In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to a suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties, and in such case the decree shall be without prejudice to the rights of the absent parties"

—expressly authorized the maintenance of the suit without making the Tramway Company a party. *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.*, 82 Fed. 124, 27 C. C. A. 73; *Hunter v. Robbins* (C. C.) 117 Fed. 920. If it is true, as claimed by the respondents, that the joinder of the Tramway Company would defeat the jurisdiction of the court, then, under rule 39, complainant was authorized to omit making it a party. So that, for the reason that complainant, as trustee of the mortgages mentioned, could maintain the action in its own right (the Tramway Company not being an indispensable party, although it would have been a proper party), as well as for the reason stated in equity rule No. 39, we think the court had jurisdiction upon the ground of diversity of citizenship.

[2] We also think that if, as claimed by complainant, and alleged in the bill, Ordinance No. 3 of 1885, constituted a contract between the city and the Denver Electric & Cable Railway Company and its assigns, such contract right was covered by complainant's mortgage, and, as it was sought to enjoin the city from impairing the obligation of such contract, the bill presented a case of jurisdiction based upon the existence of a federal question. It is also insisted that the court, as a court of equity, did not have jurisdiction of the case. This has been discussed on behalf of the city largely upon the ground that, under the pleadings and evidence, a case has not been made which entitles complainant to equitable relief. That, however, does not affect the question of the jurisdiction of the court, as a court of equity, to determine such fact.

The bill being framed upon the theory that the city was threatening and attempting to impair a valid contract right, and the object of the bill being to restrain such unlawful attempt, it clearly presented a case of equitable jurisdiction, although the court might, in the exercise of that jurisdiction, find and determine that the ultimate facts would not justify granting to complainant any relief. Jurisdiction to inquire into and determine is an entirely different proposition from the ultimate determination in the exercise of such jurisdiction, whether parties are entitled to equitable relief. *Venner v. Great Northern Ry. Co.*, 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666; *Riverside & A. Ry. Co. v. City of Riverside (C. C.)* 118 Fed. 736; *City Ry. Co. v. Citizens' St. Ry. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; *Ill. Central Ry. Co. v. Chicago*, 176 U. S. 646-656, 20 Sup. Ct. 509, 44 L. Ed. 622; *Siler v. Louisville & Nashville R. R. Co.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753.

The court then having full jurisdiction, we proceed to a consideration of the merits of the case, which involves, first, the validity of Ordinance No. 3 of 1885.

[3] It is said upon the part of the city that the ordinance is invalid, for the reason that it was not within the authority possessed by the city under its charter, for various reasons which will hereafter be considered. In answer to this, however, it is claimed, on behalf of the complainant, that the power of the city to pass the ordinance in question was not derived from the charter but from section 11 of article 15 of the Constitution, which is as follows:

"No street railroad shall be constructed within any city, town or incorporated village, without the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad."

This provision of the Constitution, it is claimed on the part of the complainant, was a direct grant of authority to municipalities, and withheld from the Legislature any authority or control over street railroads within any city, town, or incorporated village. We do not so interpret this provision. It is to be borne in mind that, in the absence of constitutional restraint, the Legislature of the state could have granted directly the authority to construct, maintain, and operate street railroads within cities, towns, or incorporated villages, upon such

terms as the Legislature might impose, without reference to the wish or consent of the inhabitants of such city, town, or incorporated village. This section of the Constitution was intended simply as a restraint upon the power of the Legislature in this respect, that the Legislature could not directly grant authority for the construction, maintenance, or operation of a street railroad in such municipalities, without the consent of the municipality. It did not, however, withhold from the Legislature the power to prohibit municipalities from granting to street railroads authority to occupy the public streets of the municipality except on terms which the Legislature should see fit to impose, but it gave to municipalities authority to impose other and additional terms from those prescribed by the Legislature, or to withhold consent entirely.

For a construction of similar constitutional provisions, our attention has been called to the cases of *Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co.*, 79 Ala. 465, 58 Am. Rep. 615, and *City of Allegheny v. Millville E. & S. St. Ry. Co.*, 159 Pa. 411, 28 Atl. 202.

In the former case, the court said:

"The equity of the complainant's bill in this case depends, in our judgment, upon a single inquiry, and that is whether the municipal authorities of the city of Birmingham were invested by law with the power to make to the appellee, the Birmingham Street Railway Company, an irrevocable grant of the exclusive privilege to construct and operate a street railway over and through certain streets and avenues of that city. \* \* \* The power to make this exclusive grant, which though not strictly a monopoly is certainly in the nature of one, must be derived either from some clause in the charter of the city, from the laws of the state under which the appellee railway company was organized, or from the Constitution of Alabama, which is the organic law of the state.

"The only section of the present Constitution of 1875, bearing on the question of street railways is section 24 of article 14, which provides that 'no street passenger railway shall be constructed within the limits of any city or town without the consent of its local authorities.' This is peremptory and not permissive in its nature, and confers no franchise or right of any kind upon any person or corporation much less one of an exclusive character. This is not denied, and is too obvious for argument."

The court then discussed the charter powers of the city and the applicable state laws to determine the authority of the city of Birmingham in respect to the matter involved in the suit.

In the second case the question involved was whether the city of Allegheny could require as a condition upon which a street railway could occupy any of the streets of the city, that it should perform certain acts and make certain payments to the city. The court said:

"By section 9, art. 17, of the Constitution 'no street passenger railway shall be constructed within the limits of any city, borough, or township, without the consent of its local authorities.' \* \* \* The public history of the time, of which the court may take judicial notice, shows that one of the prime objects of the people in calling a constitutional convention was to do with special legislation which interfered with local affairs or granted privileges to particular bodies and withheld them from others, with a semblance of partiality rather than of equal favor to all. That object was carried out in the Constitution adopted so broadly that it is a matter of grave doubt whether the object itself has not sometimes been defeated by tying the hands of

the Legislature too closely to permit it to help special localities with special needs by legislation which they really want and ought to have. But, however that may be in other matters, the provision now under consideration, as already said, is peremptory and without express limitations of any kind. It is a gift directly from the Constitution to the local bodies, and needs no help or permits any interference from the Legislature. If any limitations are to be implied by the courts, the implication must arise from clear necessity as absolute, as peremptory, as unavoidable as the constitutional mandate itself. The burden is therefore upon the party affirming that the exercise of the local authority is not valid. \* \* \* It is conceded that the local authorities may impose some conditions such as those relative to the police power. But where is the grant to any other body to supervise and limit the conditions or say what they shall be? The Legislature clearly cannot do it. The very purpose of the provision was to put an end to the Legislature's interference. Nor can the courts trespass upon the discretion given absolutely by the Constitution to the local bodies."

Had the opinion stopped here, it might well be claimed that it was an authority to the effect that the constitutional provision was an affirmative grant to the municipality, and that the Legislature of the state could exercise no restraining powers in respect thereof. But the court further said:

"It is not illegal or unreasonable that the public, or the city which represents it, should have a consideration for the privilege which it confers. If it were a right of passage over private property, there would be no question about it, and the right could not be got in any other way. We see no reason why the public interests should not be promoted by requiring special privileges in the public property to be paid for in some way. It is a matter of general knowledge that the street railways in the city of Baltimore pay part of the fare of every passenger into the city for the development and care of Druid Hill Park, and we learn from the report of *People v. Barnard*, 110 N. Y. 548, 18 N. E. 354, that by an act of 1886 (Laws 1886, c. 65 as amended by Laws 1886, c. 642) in New York municipalities are obliged to put up their consent to the construction of street railways within their limits at auction, and award it to 'the bidder who will agree to give the largest percentage per annum of the gross receipts.' The constitutional provision in New York is closely similar to our own. Whether the legislation could prescribe that the consent of the local authorities in this state could only be given on such condition we express no opinion about, as it is not before us. But it would certainly be no cause of complaint if our own legislators, general or local, should look as closely after the pecuniary interests of the public involved in the grant of franchises."

So it will be observed that the question as to whether or not the constitutional provision was such a grant of power to the municipality that the Legislature in granting to the city a charter could not impose some restrictions upon the exercise by the municipality of the constitutional grant was not before the court, and it was a question which the court expressly said it did not pass upon. The only question before the court, and the one passed upon, was the power of the municipality to prescribe conditions of its own other and different from those, if any, imposed by the Legislature. See, also, 3 *Dillon on Municipal Corporations* (5th Ed.) § 1228; *Missouri River Tel. Co. v. City of Mitchell*, 22 S. D. 191, 116 N. W. 67.

[4] The city claims that Ordinance No. 3 of 1885 is invalid, first, for the reason that, under its charter, it was limited to granting the use of its streets for railways to such as operated its cars by horse power



or dummy engines; second, that the city council was without jurisdiction to pass the ordinance without the consent being first obtained of a majority of the property owners upon the streets to be occupied by the railway company; third, that as the ordinance did not designate the streets upon which the Denver Electric & Cable Railway Company might construct and operate its road, but was a blanket ordinance, covering all the streets, leaving it to the Railway Company to select from time to time in the future, as it should see fit, the streets which it should occupy, it was an unlawful delegation of authority to the railway company in that respect; fourth, that, as the ordinance did not contain any limitation of time, the grant was perpetual, and the city had no authority to grant a perpetual franchise.

The charter of the city of Denver, as it existed at the time of the passage of Ordinance No. 3 of 1885, contained the following provisions:

"41. To permit and regulate the running of horse railway cars or cars propelled by dummy engines, the laying down tracks for the same, the transportation of passengers thereon, and the form of rail to be used, upon the written consent of the owners of the land, representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes."

"43. To regulate and prohibit the use of locomotive engines, and require railroad cars to be propelled by other power than that of steam, to direct and control the location of the railroad tracks. \* \* \* Session Laws of 1883, pp. 64, 65.

The question is then presented: Was the power of the city of Denver by its charter limited to the granting of authority for the use of the streets of the city by railroads to those in which the motive power was horse or dummy engine? In other words, was the term "horse and dummy engine" used as a limitation upon the motive power to be used, or was it merely an illustration of power other than steam. Upon this point the authorities are not in harmony, and we think it unnecessary to decide the question, for, whether or not the city, under its charter, had authority to grant the right to operate cars upon the streets propelled by electricity, we think Ordinance No. 3, in this respect, was subsequently ratified. On March 16, 1885, 10 days after the approval of Ordinance No. 3, the Legislature of the state granted a new charter to the city, which contained the following provisions:

"44. To permit and regulate the running of horse railway cars or cars propelled by dummy engines, the laying down tracks for the same, the transportation of passengers thereon, and the form of rail to be used."

"46. To regulate the use of locomotive engines, to direct and control the location of cable and other railroad tracks." \* \* \* Session Laws 1885, pp. 74-85.

[0] It is to be observed that section 46, above quoted, was an enlargement upon the powers of the city, in that it gave the power to direct and control the location of cable and other railroad tracks. This of necessity empowered the city to authorize the construction and operation of cable and other railroad tracks within the city, and may be said to be a construction of section 44, that the term "horse railway cars or cars propelled by dummy engines" was merely used as illus-

trative of the power with which the cars upon the street should be operated. The term "cable railroad" clearly, and we think necessarily, implied a street railroad, as cable railroads were known and in use in the operation of railroads in the streets of municipalities, but not in general use as motive power outside of the streets of municipalities. Be that as it may, however, in 1889, the charter of the city was again modified, section 44 reading:

"To permit and regulate the running of horse railway cars or cars propelled by dummy engines, cable or electricity, the laying down tracks for the same, the transportation of passengers thereon, and the form and kind of rail to be used. \* \* \* Session Laws of 1889, p. 124.

Subsequent to the passage of the act of 1885 and the act of 1889, the city council passed various ordinances expressly ratifying Ordinance No. 3 of 1885, and such was substantially the holding of the Supreme Court of the state, in *Denver Tramway Co. v. Londoner*, 20 Colo. 150-153, 37 Pac. 723. That was an action brought by the Denver Tramway Company to enjoin the mayor and chief of police of the city from interfering with the company in its work of constructing its electric lines. The court said:

"The actual question now presented for determination is simply this: Were the employes of the plaintiff company, in prosecuting the work of constructing the electric railway lines of said company through the streets of the city of Denver in December, 1889, guilty of such misconduct as to render them liable to be interfered with and treated as trespassers by the executive officers of the city? The determination of this question involves the consideration of the laws of the state, and also the ordinances of said city as they existed prior to and at that date. The Constitution of Colorado has always contained the following provision: [Quoting section 11, art. 15, supra.] The charter of the city of Denver as amended in 1883 provided, among other things, that the city council should have power by ordinance as follows, to wit: [Quoting sections 41, 43, Session Laws 1883, supra.] While the foregoing charter provision was in force the city of Denver passed an ordinance containing the following: [Quoting section 1, of Ordinance No. 3, 1885, supra.] The charter of the city of Denver as amended in 1885 among other things authorized the city: "To regulate the use of locomotive engines, to direct and control the location of cable and other railroad tracks." Article 2, § 20, Session Laws 1885, p. 85. Under the charter thus amended, the city council passed an ordinance expressly recognizing Ordinance No. 3, of February 6, 1885, as valid, and providing for its enjoyment to a certain extent by the plaintiff company. See Ordinances 28 and 29, adopted May 2, and 3, 1888. The charter of the city, as amended in March, 1889, authorized the city council by ordinance: [Quoting section 44, Session Laws 1889, supra.] Subsequent to the passage of this amendment, the city council passed an ordinance (No. 27, adopted May 13, 1889) recognizing rights of way theretofore granted for the use and occupation of the streets and avenues of the city by street railway cars propelled by electricity as well as by horse power, dummy engines, cable and steam. Such ordinance provided for the issuance of permits by the city engineer to any company or corporation constructing such railways to excavate the streets for that purpose, and also contained specific regulations concerning the manner in which the streets and avenues should be used and occupied for such purposes. \* \* \*

"It is true the charter of 1883 did not specifically authorize the city of Denver to permit the operation of street railways by electricity. But, as we have seen, the various amendments to the charter of the city of Denver bear ample proof of the policy of our legislation in the matter of the location and operation of street railways. As by the progress of science, discovery, and

invention new kinds of motive power have been found useful for propelling street railway cars, so the charter has been amended expressly authorizing the use of cable power in 1885, and electric power in 1889 for that purpose, in addition to horse power and dummy engines theretofore authorized to be used. It is true that in advance of specific legislative authority, but nevertheless in pursuance of the general legislative policy of the state, the city council of Denver did pass an ordinance authorizing the company (of which the plaintiff company is the successor) to construct and operate street railway cars by electricity. It is also true that by a charter provision subsequently enacted by the state Legislature the city was expressly authorized to permit the running of railway cars by electricity; and this charter provision was shortly followed by a city ordinance expressly recognizing such grants of authority as had theretofore been given to use and occupy the streets of the city for the purpose of constructing and operating railway cars by electricity, as well as by other kinds of motive power.

"Conceding that the city was without authority to adopt Ordinance No. 3 on February 6, 1885, it is nevertheless urged with much force and reason that the charter amendments of 1885 and 1889 as above stated and the ordinances adopted thereunder are to be regarded as curative statutes, thus legalizing the subsequent use of electric power by the plaintiff company. A standard author says: 'The rule in regard to curative statutes is that if the thing omitted or failed to be done, and which constitutes the defect sought to be removed or made harmless, is something which the Legislature might have dispensed with by a previous statute, it may do so by a subsequent one. If the irregularity consists in doing some act, or doing it in the mode which the Legislature might have made immaterial by a prior law, it may do so by a subsequent one. On this principle the Legislature may validate contracts made ultra vires by municipal corporations. It may thus ratify a contract of a municipal corporation for a public purpose.' Sutherland on Statutory Construction, § 483. In any event, it is clear that the mere executive officers of the city could not as late as December 11, 1889, be heard to question the plaintiff company's right to complete its electric lines already commenced."

Again, in the matter of granting authority to street railways to operate lines of roads in the streets of the city, the city of Denver was exercising its proprietary, as distinguished from legislative or governmental, authority, and in respect to the exercise of its proprietary powers the city is bound by the same rule of equitable estoppel as individuals, and where, as in this case, several millions of dollars have been expended and invested by the company in good faith in reliance upon the validity of the ordinance in question, and for the public benefit and welfare of the inhabitants of the city, good faith and honest dealing, in view of these considerations as well as the subsequent ordinances and legislative modifications of the city charter, should estop the city from now asserting that the Tramway Company acquired no rights under said ordinance. *Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316; *City Ry. Co. v. Citizens' Railroad Co.*, 166 U. S. 557-566, 17 Sup. Ct. 653, 41 L. Ed. 1114; *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; *City of Des Moines v. Street Lighting Co.*, 188 Fed. 906, 110 C. C. A. 540.

[5] It is urged that the written consent of the owners of the land, representing more than one-half of the frontage of the street, or so much thereof as was sought to be used for railroad purposes, was necessary to be first obtained before the city council had jurisdiction to pass the ordinance in question. The provision of the charter, in this

respect, as heretofore quoted, authorized the city to permit the running of horse railway cars or cars propelled by dummy engines, the laying down tracks for the same, upon the written consent of the owners of the land, representing more than one-half of the frontage of the street, or so much thereof as was sought to be used for railroad purposes. Ordinance No. 3 expressly required, before the company should operate its road upon the streets, that written consent of the owners of the land, as required in the provision of the charter, should be obtained, and the direct question is presented: Was it essential, under the charter, that this consent of the landowners should be obtained before an ordinance could be passed, or was it sufficient if the ordinance provided that the authority therein given should not be exercised until such consent was obtained? The provision in the charter did not expressly require that the consent of the property owners should be obtained before the passing of the ordinance. It was simply a prohibition against permitting the running of cars upon the streets without the consent of the abutting property owners, and it would seem most natural for the council to first pass the ordinance, and then the consent of the property owners obtained, as they would then know, in giving their consent, the kind and character of road to be constructed and the terms and conditions upon which it was to be operated.

In *Paterson & Passaic H. R. R. Co. v. Mayor, etc., of Paterson*, 24 N. J. Eq. 158-166, it was said:

"Nor can the effect of the action on the part of the city be avoided by the claim that by the true construction of the act the consent of the city was to be based on, and therefore preceded by, that of a majority of the property owners. Such is not the true construction. The consents are independent of each other. The act confers the power on the company to lay the track and operate the road, on condition that the permission of the city (representing the public at large), and of the majority of the owners of property on the street (representing the private interest to be affected), be first obtained. If the consent of the city had first been obtained, it, of course, would not of itself have been sufficient; but it cannot be doubted that, if that being had, the consent of the property owners had been afterwards obtained, the condition precedent to the exercise of the power to lay the rails and operate the road would have been complied with."

The construction thus given to the act in question we think directly applicable to the case under consideration. The charter empowered the city to authorize the construction and operation of the road in the streets of the city, but required the consent of a majority of the landowners to be given thereto. In other words, before any company could operate a road in the streets of the city, it was necessary to obtain the consent of the city, through its duly constituted authorities, and the consent of a majority of the landowners. The consent of the city alone would not authorize the construction and operation of the road upon the streets, neither would the consent of a majority of the landowners alone authorize the same. It required the action of both the city and the landowners. The act did not require that the consent of one should necessarily precede the consent of the other. It was sufficient if, before the road was constructed, the consent of both were



obtained, the city by a duly enacted ordinance, and the landowners by consent in writing. So we think that the ordinance in question, requiring that the consent of the landowners should be obtained before the construction of the road, was a sufficient compliance with the provisions of the charter.

We are cited to some cases which it is claimed announce a contrary doctrine, among them the case of *Metropolitan City Ry. Co. v. Chicago*, 96 Ill. 620. The act under consideration in that case provided that consent to construct and operate a horse railway in its streets might be granted upon petition of the company, no such consent to be granted, however, unless 10 days' public notice of the time and place of presenting such petition should first be given by publication in some newspaper published in the city or county in which such road is to be constructed. In that case no such notice was given, and it was held that the giving of the notice was jurisdictional to the city giving its consent. The court said:

"The statute intended to give every person interested opportunity for a fair and impartial hearing, that he might appear and be heard at the outset with reference to the committee to which the petition may be referred and before such committee."

It will be seen that the act under consideration in that case expressly provided that the giving of the ten days public notice of the time and place of presenting the petition should precede action by the city. Hence, of course, such notice was jurisdictional.

No case has been called to our attention holding, under language similar to that in the charter of Denver, that the consent is a prerequisite to the authority of the city to pass the ordinance.

[6] On the 1st day of December, 1902, article 20 of the Constitution of the state went into effect. By that article the city of Denver, with a portion of the adjacent outlying territory, became a corporation known as the city and county of Denver, and the inhabitants thereof were empowered to make and adopt their own charter. Appellants say:

"Whenever a municipal corporation enters into a contract silent as to duration with a public utility company for the use of streets, and the consideration of the contract moving from the company embraces, not only the service to be rendered to the general public, but also general obligations to be discharged to the municipality itself, as such, all rights under such contract terminate when the municipal corporation ceases to exist"

—and cite in support thereof *People v. Chicago Telephone Co.*, 220 Ill. 238, 77 N. E. 245; *Venner v. Chicago St. Ry. Co.*, 236 Ill. 349, 86 N. E. 266; *Blair v. Chicago*, 201 U. S. 400-488, 26 Sup. Ct. 427, 50 L. Ed. 801; *People v. Adams*, 31 Colo. 476, 73 Pac. 866; *Uzzell v. Anderson*, 38 Colo. 32, 89 Pac. 785, 1056.

Those cases, while sustaining the proposition as stated by counsel, are not applicable here. The first of the above-cited cases was one where several minor municipalities had granted to a telephone company the right to occupy their streets for its purpose without fixing any limit as to time. After such grants had been made, the minor municipalities were annexed to the city of Chicago. After such an-

nexation, the city passed an ordinance limiting the charges for telephone service. It was held that the minor municipalities, upon becoming annexed to, and made a part of the city of Chicago, ceased to exist as minor municipalities; that grants to the telephone company were not to be construed as perpetual, but terminated upon the life of the corporation granting them.

*Blair v. Chicago* was a case where the municipality of Lakeview had granted to a street car company certain rights in its streets. Subsequently Lakeview became incorporated into the city of Chicago, and ceased to exist as a municipality. The court said:

"We think in such case that the terms granted would not extend beyond the life of the corporation conferring them, where there was no attempt to confer definite term."

*People v. Adams* involved the question as to whether or not the fire and police board of the city of Denver continued as the fire and police board of the city and county of Denver, upon the going into effect of article 20 of the Constitution. Section 3 of article 20 provided:

"The terms of office of all officers of the city of Denver and all included municipalities, and of the county of Arapahoe, shall terminate, except that the \* \* \* fire and police boards of the city of Denver shall become respectively said officers of the city and county of Denver, and shall hold the said offices, as above specified only until their successors are duly elected and qualified, as herein provided for."

Section 4 provided:

"The charters and ordinances of the city of Denver, as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver."

It was held that the fire and police board of the city of Denver continued as the fire and police board of the city and county of Denver.

A more applicable case is *Vilas v. City of Manila*, 220 U. S. 345, 31 Sup. Ct. 416, 55 L. Ed. 491. That was an action brought by certain creditors of the city of Manila as it existed before the cession of the Philippine Islands to the United States, upon the theory that the city, under its present charter from the government of the Philippine Islands, was the same juristic person and liable upon the obligations of the old city. The Supreme Court of the Philippine Islands denied relief, holding the present city of Manila to be a wholly different corporate entity, and in no way liable for the debts of the Spanish municipality. Mr. Justice Lurton, writing the opinion, said:

"The contention that the liability of the city upon said obligation was destroyed by a mere change of sovereignty is obviously one which is without a shadow of moral force, and, if true, must result from settled principles of rigid law. \* \* \* If we understand the argument against the liability here asserted, it proceeds mainly upon the theory that inasmuch as the predecessor of the present city, the ayuntamiento of Manila, was a corporate entity created by the Spanish government, when the sovereignty of Spain in the islands was terminated by the treaty of cession, if not by the capitulation of August 13, 1908, the municipality ipso facto disappeared for all purposes.

This conclusion is reached upon the supposed analogy to the doctrine of principal and agent, the death of the principal ending the agency. \* \* \* We are unable to agree with the argument. It loses sight of the dual character of municipal corporations. They exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a government subdivision, and for that purpose exercises by delegation a part of the sovereignty of the state. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred. \* \* \*

"Was corporate identity and corporate liability extinguished as a necessary legal result of the new charter granted in 1901 by the Philippine commission? The inhabitants of the old city are the incorporators of the new. There is substantially identity of area. There are some changes in the form of government and some changes in corporate powers and methods of administration. The new corporation is endowed with all of the property and property rights of the old. It has the same power to sue and be sued which the former corporation had. There is not the slightest suggestion that the new corporation shall not succeed to the contracts and obligations of the old corporation. Laying out of view any question of the constitutional guarantee against impairment of the obligation of contracts, there is, in the absence of express legislative declaration of a contrary purpose, no reason for supposing that the reincorporation of an old municipality is intended to permit an escape from the obligations of the old, to whose property and rights it has succeeded. The juristic identity of the corporation has been in no wise affected, and, in law, the present city is in every legal sense the successor of the old. As such it is entitled to the property and property rights of the predecessor corporation, and is, in law, subject to all of its liabilities.

"In *Shapleigh v. San Angelo*, 167 U. S. 646-654 [17 Sup. Ct. 957, 959 (42 L. Ed. 310)], this court said in a similar case: 'The state's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether is not restricted by contracts entered into by the municipality with its creditors or with private parties. An absolute repeal of a municipal charter is therefore effectual so far as it abolishes the old corporate organization; but, when the same or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights, and subject to its liabilities.'

So here the city and county of Denver was but a reincorporation of the city of Denver, with some extended territory. The first section of said article 20 provided:

"The municipal corporation known as the city of Denver, and all municipal corporations, and that part of the quasi corporation known as the county of Arapahoe, in the state of Colorado, included within the exterior boundaries of the city of Denver, as the same shall be bounded when this amendment takes effect, are hereby consolidated and are hereby declared to be a single body politic, and corporate, by the name of the city and county of Denver. By that name said corporation \* \* \* shall succeed to all the rights and liabilities, and shall acquire all benefits, and shall assume and pay all bonds, obligations and indebtedness of the city of Denver and of said included corporations, and of the county of Arapahoe. \* \* \*

After said article went into effect, the city and county of Denver adopted a charter. Section 348 contained, among other things, the following provision:

"All rights, liabilities, obligations, suits, actions, prosecutions, claims and contracts of the city of Denver, the former county of Arapahoe, the included municipalities, and the city and county of Denver, shall remain and continue

in full force and effect, as if the form of government had not been changed and this charter adopted."

In view of these constitutional and charter provisions, we do not think it admits of doubt that the city and county of Denver was a change only in governmental form under a new name, and succeeded to all the rights and assumed all the liabilities, of the old city of Denver.

The question of the duration of the grant to the Denver Electric & Cable Railway Company, its successors and assigns, under said Ordinance No. 3 of 1885, has been extensively argued. On the part of complainant it is urged that the grant is one in perpetuity. On the part of the city, it is insisted that it was not a grant in perpetuity, as such grant the city could not validly bestow, and the rights of the Denver Electric & Cable Railway Company under Ordinance No. 3, 1885, were those only of a licensee.

A similar question was before this court in *Omaha Electric Light & Power Co. v. City of Omaha*, 179 Fed. 455, 102 C. C. A. 601. In that case it was held that, there being no time limit for the existence of the grant mentioned in the ordinance, it was not intended to grant a perpetual franchise, but was a grant during the life of the corporation grantee; that its assigns or successors thereafter would hold and enjoy the same at the will of the city only. By adhering to that decision we should be required to hold that the grant acquired under Ordinance No. 3 of 1885 continued until 1935, the corporate life of the Denver Electric & Cable Railway Company. But, as that case is now pending in the Supreme Court of the United States, and the rights of the complainant are fully protected by Ordinance No. 74 of 1906 until 1926, it is unnecessary for the protection of claimant's rights, and we think inexpedient, that that question be determined at this time. So the duration of the grant under said Ordinance No. 3 we leave without determination.

[7] Again it is said on the part of the city that the ordinance being a blanket one, granting to the railway company the right to construct its road upon any and all of the streets of the city as it might in the future elect or choose to do, is void. A consideration of this question leads us to the conclusion that every grant of the character in question must be reasonable with respect to future public rights; that a grant that is exclusive in its character, or a grant in perpetuity to all of the streets which the grantee may from time to time in the future see fit to occupy, is unreasonable and unenforceable in the absence of express legislative authority. See, as bearing upon this subject, *Citizens' St. Ry. Co. v. Jones* (C. C.) 34 Fed. 579; *Knoxville v. Africa*, 77 Fed. 501, 23 C. C. A. 252; *Logansport Ry. Co. v. City of Logansport* (C. C.) 114 Fed. 688; *Citizens' St. Ry. Co. v. City of Memphis* (C. C.) 53 Fed. 715; *Indianapolis Cable Ry. Co. v. Citizens' St. R. R. Co.*, 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539; *Citizens' St. R. Co. v. City Ry. Co.* (C. C.) 64 Fed. 647; s. c., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; *City of Houston v. Houston St. Ry. Co.*, 83 Tex. 548, 19 S. W. 127.

Such provision, however, does not render the entire grant void. It



is a valid contract as to all streets which are actually occupied or in contemplation of occupancy, pursuant to a system adopted with a view of completion in the immediate future. As the term or duration of the franchise is not determined at this time, for reasons before given, and as we think the provision in the ordinance granting the right to all of the streets of the city is dependent for its validity largely upon the duration of the franchise, we refrain from now passing upon the scope of the grant.

It is said, however, that no decree should have been entered in favor of complainant, for the reason that the bill filed by complainant only sought to enjoin the passage of an ordinance, and that the courts are powerless to prevent legislative action. As a general proposition, courts are not authorized to interfere with legislative discretion, and municipal corporations when in the exercise of legislative powers, relative to subjects over which the municipality has jurisdiction, cannot be restrained in the exercise of such power in advance of its completed exercise.

In *Chicago, R. I. & P. Ry. Co. v. City of Lincoln*, 85 Neb. 733, 124 N. W. 142, 19 Ann. Cas. 207, the above rule was fully recognized, but it was said:

"To this general rule, however, there are the following exceptions. Where the mere passage of the ordinance would ordinarily occasion or would be followed by some irreparable loss or injury, beyond power of redress by subsequent judicial proceedings, or when it would cause a multiplicity of suits, the passage of the ordinance may be enjoined."

It may be well said in this case that the natural effect of the passage of such a repealing ordinance would greatly depreciate the value of the bonds for the security of which complainant holds its mortgages as trustee. The repealing ordinance not calling for any affirmative action, complainant would be powerless to obtain redress until there was some threatened action upon the part of the municipality to interfere with the operation of the road. Yet, in the meantime, it would cast such a cloud upon the title of the Tramway Company as necessarily to greatly depreciate the securities. And, while it is probable that the Tramway Company could maintain an action to quiet its title (*Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801), complainant, having an equitable title only, and not having possession of the property, could not maintain such action.

On the part of complainant it is said that as this Ordinance No. 3, 1885, did not relate to the governmental powers of the city, but to powers which were of a private or business character, the rule above stated that a municipal legislative body may not be enjoined from passing an illegal ordinance does not apply. This contention seems to have support in the case of *Poppleton v. Moores*, 62 Neb. 851, 88 N. W. 128, and *Id.*, 67 Neb. 388, 93 N. W. 747.

But these questions we are not required to pass upon in this case, as the decree of the court below did not enjoin the passage of Ordinance No. 65.

[8] It is further said that the decree, in so far as it sought to enjoin the enforcement of Ordinance No. 76 of 1899, was erroneous, in that

said ordinance was passed subsequent to the filing of the bill, and no supplemental bill was filed asking for such relief. The scope and purpose of the bill, however, was to enjoin the city from attempting to impair the contract right claimed under said Ordinance No. 3 of 1885. The passage and effect of Ordinance No. 76 of 1899 was brought into the case by the amended answer filed by respondents, and we think the rule well settled that the court may grant relief as to matters occurring subsequent to filing the bill, without a supplemental bill being filed, if within the scope of the original bill, when such subsequent matters are presented by defendants in their answer and proofs. *Cavender v. Cavender*, 114 U. S. 464, 5 Sup. Ct. 955, 29 L. Ed. 212; *Richardson v. Green*, 61 Fed. 423-431, 9 C. C. A. 565; *Simkins Federal Suit in Equity* (2d Ed.) 432.

It follows from what has been said that the decree of the court below should be modified by omitting therefrom any adjudication as to the duration and scope of the contract based upon Ordinance No. 3 of 1885. The city still insisting upon its right to enforce Ordinance No. 76 of 1899, it should be enjoined from so doing until May 17, 1926, on the expiration of Ordinance No. 74 of 1906, but without prejudice to the rights of the complainant or the city and county of Denver or the Denver City Tramway Company from bringing or maintaining an action either to quiet title or by quo warranto or other appropriate legal or equitable proceeding to determine the duration and scope of the rights granted and acquired under said Ordinance No. 3 of 1885.

The case is remanded to the court below, with directions to modify the decree in accordance herewith.

CARLAND, Circuit Judge (dissenting). Some questions arising upon the record are decided in the majority opinion. The most important, however, are left undecided. On the facts appearing in the record, I am of the opinion that nothing should be decided, the judgment reversed, and the case remanded, with instructions to dismiss the bill without prejudice.

The bill was filed in the court below on May 24, 1899. It was brought by complainant for the purpose of enjoining the passage of aldermanic bill No. 65 by the board of aldermen and the board of supervisors of the city and county of Denver. On the filing of the bill, a motion for a temporary injunction was made and granted. On June 9, 1899, an appeal was allowed to this court, and on May 8, 1900, the order appealed from was affirmed.

On May 15, 1906, by vote of the people of the city and county of Denver, the Denver City Tramway Company was granted a franchise over, upon, along and across certain streets, alleys, viaducts, public ways, and places in the city and county of Denver, said franchise specifying the terms and conditions thereof. The ordinance granting said franchise is numbered 74, and is set out in the record at pages 665 to 686. This ordinance, it is true, preserved the rights of both parties as to matters in controversy at the time of its passage, but it fixed irrevocably for the period of 20 years the relations of the Tramway

Company and the city and county of Denver, so that any order made in this action could have no effect whatever upon the relations of the Tramway Company and the city and county of Denver for approximately 14 years.

The mere fact that the city and county of Denver claims that Ordinance No. 76 is a valid ordinance, and that the Tramway Company claims that the ordinance of 1885 is valid, does not, in my opinion, authorize this court to proceed and determine questions which will not become acute for 14 years and perhaps never. If the city and county of Denver and the Tramway Company can arrange their affairs for 20 years, at the end of 20 years it may be reasonably presumed that they can again arrange them. At least, there is no such present necessity for deciding any question raised upon the record as to make it desirable for the court to act in the premises.

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CENTRAL IMPROVEMENT CO. et al. v. CAMBRIA STEEL CO. et al.

GUARDIAN TRUST CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. October 22, 1912.)

Nos. 3,489, 3,490.

**1. APPEAL AND ERROR (§ 719\*)—REVIEW ON APPEAL IN EQUITY—ERRORS NOT ASSIGNED.**

An appeal in a suit in equity in a federal court invokes a trial de novo in the appellate court, and under rule 11 of the Circuit Court of Appeals (193 Fed. vii, 112 C. C. A. vii) a plain error not assigned on such an appeal may be, and ought to be, considered where the failure to consider it would result in great injustice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968–2982; Dec. Dig. § 719.\*]

**2. RAILROADS (§ 30\*)—REORGANIZATION—PARTICIPATION OF STOCKHOLDERS—LIABILITY OF NEW COMPANY FOR DEBTS OF OLD COMPANY.**

A reorganization of an insolvent railroad company, by which both its mortgage bondholders and its stockholders in exchange for their bonds and stock are given an interest in the new company, which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization, and by consent of the old company and its stockholders, is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid, and renders the new company liable for the claims of such creditors.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 32; Dec. Dig. § 30.\*]

Liabilities enforceable against reorganized corporations, see note to *Armour v. E. Bement's Sons*, 62 C. C. A. 147.]

**3. RAILROADS (§ 30\*)—REORGANIZATION—PARTICIPATION OF STOCKHOLDERS—LIABILITY FOR DEBTS OF OLD COMPANY.**

Bondholders and stockholders of an insolvent railroad company, a dock company, and a belt line company formed a plan of reorganization and for consolidation of the properties of the three companies. Pursuant to such plan, a new company was organized and its stock and bonds exchanged for those of the three companies on an agreed basis. It then purchased the property of the railroad company at foreclosure sale, and,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

having by the exchanges acquired a large majority of the bonds and stock of the belt line company, caused the mortgage securing its bonds to be foreclosed by a formal suit and bought in its property. *Held*, that the transaction was fraudulent as to unsecured creditors of the belt line company whose claims were left unpaid, and that the new company was liable for such claims; the property of the belt line company which was bought in being largely greater in value than their amount.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 32; Dec. Dig. § 30.\*]

**4. RAILROADS (§ 30\*)—REORGANIZATION—RIGHTS OF CREDITORS OF OLD COMPANY—ESTOPPEL.**

The reorganization agreement having provided for payment of the unsecured indebtedness of the belt line company and authorized the committee to use certain securities of the new company for that purpose, such an unsecured creditor, which was also owner of bonds and stock of the belt line company, was not estopped from enforcing its unsecured claim because it joined in the reorganization agreement and exchanged its bonds and stock pursuant thereto.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 32; Dec. Dig. § 30.\*]

**5. EQUITY (§ 426\*)—PRINCIPLES GOVERNING GRANTING OF RELIEF—HE WHO SEEKS EQUITY MUST DO EQUITY.**

A court of chancery will condition its grant of relief to a complainant with the enforcement of any just claim of the defendant which the complainant ought in equity and good conscience to pay, although on account of the statute of limitations or for some other reason defendant might not be able affirmatively to enforce it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 999, 1000; Dec. Dig. § 426.\*]

**6. REFERENCE (§ 24\*)—NATURE OF ORDER—CONSENT.**

Where the issues joined in a suit in equity were referred to a master by the court on its own motion, a subsequent stipulation by the parties that new issues, raised by additional pleadings, should be referred to the same master, did not make the reference one by consent, especially as to issues referred prior to the filing of the stipulation.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 40; Dec. Dig. § 24.\*]

**7. APPEAL AND ERROR (§ 1017\*)—REVIEW—FINDINGS OF MASTER.**

Even though a reference was by consent of parties, such fact does not preclude the Circuit Court of Appeals from correcting manifest errors.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3996-4005; Dec. Dig. § 1017.\*]

**8. RAILROADS (§ 169\*)—MORTGAGES—PRIORITIES OF LIENS AND MORTGAGES—AFTER-ACQUIRED PROPERTY CLAUSE.**

A corporation purchased real estate and issued its stock, equal at par value to the purchase price, to a railroad company which furnished the money to pay to the vendors. The railroad company then pledged the stock to secure an indebtedness of its own. *Held*, that a prior mortgagee of the railroad company acquired no lien upon such stock by virtue of an after-acquired property clause in the mortgage which it could enforce as against the pledgee without first paying the debt secured by the pledge.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 536-548; Dec. Dig. § 169.\*]

Appeals from the Circuit Court of the United States for the Western District of Missouri; John F. Philips, Judge.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



Creditors' suit in equity by the Cambria Steel Company against the Kansas City Suburban Belt Railroad Company, Guardian Trust Company, and others. From the decree, Guardian Trust Company and Central Improvement Company and others appeal. Reversed.

George H. English, Jr., and Edward P. Gates, both of Kansas City, Mo. (D. J. Haff and E. C. Meservey, both of Kansas City, Mo., on the brief), for appellants.

Frank Hagerman, of Kansas City, Mo., for Cambria Steel Co.

Samuel Untermeyer, of New York City, and Samuel W. Moore, of Kansas City, Mo., for Kansas City Southern Ry. Co.

Newel H. Clapp, of St. Paul, Minn., and Enoch J. Price, of Chicago, Ill., for Shedd and others.

Before SANBORN, Circuit Judge, and MARSHALL and WM. H. MUNGER, District Judges.

WM. H. MUNGER, District Judge. While the parties to these controversies are numerous, the questions involved upon the appeal require consideration only of acts of the following named companies, to wit: The Cambria Steel Company, which, for convenience, will herein be designated "Cambria Company"; Kansas City, Pittsburg & Gulf Railroad Company, herein called "Gulf Company"; Port Arthur Channel & Dock Company, herein called the "Dock Company"; Kansas City Suburban Belt Railroad Company, herein called the "Belt Company"; Kansas City Southern Railway Company, herein called the "Southern Company"; Guardian Trust Company, herein called the "Trust Company"; the Provident Life & Trust Company, herein called "Provident Company."

The Gulf Company was a railroad extending from Kansas City to Port Arthur on the Gulf of Mexico; the Dock Company was a local company having terminal facilities at Port Arthur; the Belt Company was a belt line railroad having terminal facilities at Kansas City, Mo. Each of these companies had outstanding bonds secured by mortgages upon its properties. The Cambria Company was a judgment creditor of the Belt Company. The Trust Company owned a large amount of the stock and bonds of both the Gulf Company and the Belt Company and was also a creditor of the Belt Company. The Gulf Company, having defaulted in the payment of interest upon its mortgage, a suit for foreclosure was instituted, and a committee of bondholders was selected to originate and propose a reorganization plan. This committee proposed a plan of reorganization by which the properties of the Gulf Company, the Dock Company, and the Belt Company should be acquired and organized into or operated as a single new company. This committee formulated a plan of reorganization, by the terms of which it was proposed that a new company be organized to acquire the properties of the three mentioned companies. Their plan was published and submitted to the bond and stockholders of each of the companies, the committee declaring that it had formulated and adopted said plan as the basis of the reorganization of the railroad system, having for its ultimate purpose the unification of the main

line and terminals into one ownership and under one management; that such object was sought to be accomplished by having the Gulf Company, when reorganized, acquire the capital stock of the other two companies, namely, the Dock Company and the Belt Company, and, having thus acquired the control and possession, to thereafter adjust the bonded indebtedness standing against the properties of the Belt Company and Dock Company by retiring the existing bonds, and issuing therefor new bonds, the basis of the plan being that the property of the existing Gulf Company should be sold in the foreclosure proceeding, purchased by the committee, and a successor company organized, to which the property so purchased should be conveyed, together with the stock and bonds of the Dock Company and the Belt Company. If sufficient of the stock and bonds of those companies should be deposited with the committee, in exchange for bonds and stock of the new company to be organized, then those properties to be acquired. By that plan it was said the following results would be obtained: The new company to be organized would own the property of the Gulf Company and also the bonds and capital stock of the Belt and Dock Companies, and thereby all three properties would be under one corporate ownership, management, and control. Said stock and bonds so purchased of the Belt and Dock Companies to be pledged under the mortgage to be given by the company to be organized for the payment of: (1) Floating debts and existing car trust obligations; (2) adequate provision for working capital for future acquirements. It was also stated that it was contemplated that said reorganized or new company should issue \$30,000,000 50-year 3 per cent. gold bonds, \$18,000,000 of the bonds to be used for the conversion of the bonds of the Gulf Company, \$1,330,000 for the conversion of the old or existing bonds of the Belt Company, \$817,500 new bonds for the old or existing bonds of the Dock Company, \$3,000,000 of the new bonds to be sold for the necessary cash requirements of the new company, \$3,802,500 to be reserved for the future requirements of the new company, \$3,050,000 of new bonds to be used in acquiring existing outstanding bonds of some other companies that were subsidiary companies of the Belt Company.

It was proposed in the plan that the holders of securities of the Gulf Company were to receive for their bonds 75 per cent. in new bonds and 50 per cent. in new preferred stock; the stockholders of the Gulf Company, upon paying \$10 per share, were to receive one share of new common stock for each share of the old stock.

The bondholders of the Belt Company, for their old bonds, were to receive 133 per cent. of new bonds and 25 per cent. in new preferred stock; the stockholders of the Belt Company were to receive for each share one-quarter of a share of new preferred stock and three-quarters of a share of new common stock.

The bondholders of the Dock Company were to receive for their old bonds 50 per cent. in new bonds, 50 per cent. in new preferred stock, and 50 per cent. in new common stock; the stockholders of the Dock Company, for each share of their stock, were to receive three-quarters of one share of new common stock.

The stock and securities of the respective companies were largely deposited according to the committee's plan. A decree was entered in the foreclosure against the Gulf Company on February 5, 1900, sale had and the property thereunder acquired by the Southern Company on March 19, 1900, the date on which it was organized and incorporated.

The Southern Company issued a new mortgage and bonds, also its stock, according to the terms of the reorganization plan, and such bonds and stock were exchanged for the bonds and stock of the old companies, the holders of which had deposited their bonds and stock in accordance with the proposed plan. The Trust Company accepted the plan and deposited its stock and bonds which it held of the Belt Company and received in new bonds and stock its proportionate amount under the reorganization agreement.

Although the Southern Company had acquired practically all of the bonds and stock of the Belt Company in exchange for its new bonds and stock, in accordance with the reorganization plan and agreement, and acquired possession and control of the property of the Belt Company, the Provident Company, trustee in the Belt mortgage, filed its bill of foreclosure and asked for the appointment of receivers. The master's finding in this regard was as follows:

"On September 6, 1900, nearly six months after the incorporation of the Southern Company, the receivers were appointed for the Belt Company, at the instance of the Southern, and through the Provident Company, as trustee, which filed the foreclosure bill; the foreclosure decree being made on November 6, 1901, and the sale on December 31, 1901, to the Southern Company."

The Trust Company was a party to that foreclosure suit, and before the decree was entered asked leave to file an amended supplemental answer, stating in effect that the reorganization plan had been promulgated in the interests of creditors of the Belt Company as well as bondholders and stockholders, and that it had been intended to pay the Trust Company's debt, the reorganization committee having often promised to pay it until about the time of the institution of the foreclosure suit, and that the purpose of such suit was to vest in the Southern Company title to all the Belt Company property, free from the payment of that company's floating debt, which was a fraudulent purpose. It asked that the Southern Company be made a party to the cause, etc. The court denied the leave to file such answer, but provided, however, as a condition of the denial, that complainant (Provident Company) should, within five days thereafter, file a stipulation that the decree should be without prejudice to the claim of the Trust Company. The last paragraph of the foreclosure decree was as follows:

"This decree is entered on the express condition to which the complainant has assented, that it shall be without prejudice to and shall not bar the right of the Guardian Trust Company, or its receiver, to plead and insist in any litigation now pending or hereafter brought, that the Kansas City Southern Railway Company by virtue of the manner in which it was organized, or for any other reason, is legally or equitably liable for and bound to pay the unsecured debts of the Kansas City Suburban Belt Railroad Company, either in full or to pay them to the extent of the value of any property heretofore ac-

quired by it from the Kansas City Suburban Belt Railroad Company, or that may hereafter be acquired by it from said company by virtue of these foreclosure proceedings, and without prejudice to the right of said Guardian Trust Company or its receiver, to plead and insist, in any pending litigation or litigation hereafter brought, that the members of the reorganization committee of the Kansas City, Pittsburg & Gulf Railroad Company assumed to pay and are liable to pay the unsecured debts of the Kansas City Suburban Belt Railroad Company existing at the time the alleged reorganization was undertaken."

On September 6, 1900, the Cambria Company filed a creditor's bill against the Belt Company, Trust Company, and other companies, the object and purpose of which was to recover certain securities belonging to the Belt Company, which had been deposited with the Trust Company as security for the Belt Company's indebtedness to the Trust Company, claiming in its bill that the Belt Company was not in fact indebted to the Trust Company, and made an application for the appointment of a receiver, and on that day receivers were appointed for the Belt Company upon the joint application of the Cambria Company and the Provident Company complainant in the foreclosure suit against the Belt Company.

In the suit brought by the Cambria Company issues were joined, the receivers appointed for the Belt Company filed a cross-bill against the Trust Company, denying indebtedness upon the part of the Belt Company to the Trust Company, but claiming that the Trust Company was in fact a debtor of the Belt Company. The case was, in November, 1900, referred to Hon. Shannon C. Douglass, as special master, to take the testimony, etc. The hearing proceeded before the master, and after much testimony had been taken an order was made by the court in February, 1905, pursuant to a stipulation of parties, admitting the Southern Company as a party and giving it leave to file a petition of intervention, and the Southern Company filed its petition of intervention on the 27th day of that month, claiming that the various securities held by the Trust Company to secure its indebtedness against the Belt Company were covered by the mortgage which was foreclosed against the Belt Company, and sought to recover such property by its bill of intervention.

The hearing before the master extended over several years, upwards of 34,000 pages of testimony was taken, and the master, on the 21st of May, 1910, filed his report, which comprises 381 pages of the printed record. The evidence has not been brought to this court; hence all questions of fact as found by the master are conclusive upon the parties on this appeal.

The master found that the evidence did not support the claim of the Cambria Company and recommended that its bill be dismissed for want of equity. The master found upon the accounting that there was due from the Belt Company to the Trust Company the sum of \$639,658.86.

The master found fully the facts as to the reorganization plan, the acquiring by the Southern Company of the stock and bonds of the Gulf Company, Dock Company, and Belt Company, the issuing of its new stock and bonds to the holders of the bonds and stock



of those companies, in exchange for the bonds and stock of the respective companies held by them, as we have heretofore stated.

The master found, as a matter of law, that the Southern Company was not liable for the debts of the Belt Company.

The Trust Company filed exceptions to the report of the master, among other things to the finding that the Southern Company was not liable for the floating indebtedness of the Belt Company, giving as reasons therefor that that was not an issue in the case, and no finding thereon should have been made by the master.

Various exceptions were also filed by the Central Improvement Company, one of the defendants in the action.

Subsequently, a hearing was had by the court upon the report of the master and the exceptions thereto, the exceptions were overruled, and the report of the special master was in all things approved and confirmed, and a decree entered in accordance with the findings and recommendations of the master, from which the Trust Company and the Central Improvement Company have prosecuted their appeal.

The decree also provided that, it appearing that all costs incurred by the Cambria Company prior to November 20, 1901, had been paid by it, no further costs should be taxed against the Cambria Company, nor should any costs which had been paid by the Cambria Company be chargeable against any other parties to the action. The remaining costs were taxed by the court one-third against the Trust Company and two-thirds against the Belt Company, to be paid by the Belt Company and Southern Company.

The assignments of error relied upon in this court are: (1) That the court erred in including in said decree the finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness owing by the Belt Company to the Trust Company. (2) That the court erred in requiring the Central Improvement Company and its receivers to convey to the Southern Company the properties specified in the decree. (3) That the court erred in adjudging that one-third of the costs of this action be paid by the Trust Company.

The principal question, and the one which involves the merits of the controversy, rests upon the correctness of the finding of non-liability upon the part of the Southern Company for the debt found due from the Belt Company to the Trust Company, for, as stated by counsel for the Southern Company in their brief:

"The decision of the question of the Southern Company's liability for the debts of the Belt Company was necessary to a disposition of the case. The defense pleaded by the Trust Company to the effect that the Southern Company had assumed or become liable for the indebtedness of the Belt Company was, if true, a perfect answer to the intervening petition. It said, in substance, to the Southern Company: 'Even though you may have the legal or equitable title to the collateral securities or to the properties represented by them, yet they were pledged by the Belt Company to secure its indebtedness, you assumed and agreed to pay that indebtedness, and a court of equity will not award you possession of the securities until you discharge your own obligation. Any relief to you must be conditioned upon your payment of the Belt Company's indebtedness.' "

This contention that, if the Southern Company had become liable for the indebtedness of the Belt Company to the Trust Company, that was a perfect defense to the intervening petition of the Southern Company, is sound and unanswerable, and after a careful review of the record in this case this court holds, and it decides, that the issue whether or not the Southern Company was indebted to the Trust Company for the debt of the Belt Company to the Trust Company was a material and decisive issue between the Trust Company and the Southern Company in this case which it was the duty of the master and the court below to consider and decide. The remarks of this court in *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620, that "the liability of the Southern Company to pay the debts which the Trust Company alleges in the actions at law it has promised to pay is not an issue and cannot be determined in this suit in equity," upon which counsel rely, must be construed, as must all opinions of the courts, in the light of the facts and the issue then in hand. The issue before the court in that case was whether the causes of action in the state court were so identical with the cause of action theretofore pending in the court below that an injunction should be issued to stay the prosecutions of the actions in the state court. This court held that the suit in the Circuit Court was in equity, that it related to the title and ownership and the right to a conveyance of certain specific property, while the actions at law brought by the Trust Company against the Southern Company in the state court were purely in personam to recover the alleged debts of the Southern Company, that in the suit in equity the same relief was not sought as in the actions at law, and that the prosecutions of the actions at law in the state court constituted no interference with the suit in the court below. There was nothing in the decision in that case in conflict with the conclusion which has now been reached.

[1] The master and the court below decided that the Southern Company was not indebted to the Trust Company for the indebtedness of the Belt Company to the latter. The Trust Company requests this court to review that decision upon the report of the master and contends that as a matter of law the Southern Company is so indebted upon the facts which the master finds. The Southern Company objects to this review on the ground that the only exception to the master's conclusion here and the only assignment of error in the affirmance thereof by the court below was placed upon the ground that that issue was not judicable in this suit. But an appeal in a suit in equity invokes a trial de novo in the appellate court and entitles the appellant to a just decree. *Dowagiac Mfg. Co. v. Lochren*, 143 Fed. 211, 74 C. C. A. 341, 6 Ann. Cas. 573; *Blease v. Garlington*, 92 U. S. 1, 8, 23 L. Ed. 521. And under rule 11 (193 Fed. vii, 112 C. C. A. vii) of this court a plain error not assigned may be, and ought to be, considered where the failure to consider it would result in a great injustice. *United States v. Bernays*, 158 Fed. 792, 86 C. C. A. 52; *New York Life Ins. Co. v. Rankin*, 162 Fed. 103, 108, 89 C. C. A. 103; *United States v. Tennessee, etc., R. R. Co.*, 176 U. S. 242, 256, 20 Sup. Ct. 370, 44 L. Ed. 452. And in view of the facts that

the issue here has been long and persistently contested below, that exception was taken and assignment of error made regarding it, though upon an erroneous ground, that both parties have prepared exhaustive briefs upon the question which the Trust Company asks us to review, that neither party can be taken by surprise, and that a failure to review the legal conclusion below would result in an unjust final adjudication of the issue under consideration, we are constrained to consider and decide it.

It is claimed that the Southern Company is liable for the debt of the Belt Company to the Trust Company because it knowingly acquired the property of the Belt Company in the execution of a scheme to exclude the Trust Company's unsecured claim against the Belt Company for \$639,685.86 from the benefit of the Belt Company's property and to apply that property by an exchange of stock and bonds and a mere formal and not actual foreclosure sale to the benefit of the stockholders of the Belt Company.

In *Louisville Trust Co. v. Louisville, etc., Ry.*, 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130, which was an action brought by a creditor to set aside a sale under a foreclosure as being in fraud of its rights, for the reason that such foreclosure was had in the interests of the stockholders as well as the bondholders, Mr. Justice Brewer, rendering the opinion of the court, said:

"The questions in this case are novel and important. They arise on the foreclosure of certain railroad mortgages, and suggest to what extent the same rules and considerations obtain in them as in the foreclosure of ordinary mortgages upon real estate. It goes without saying that the proceeding in the foreclosure of an ordinary mortgage on real estate is simple and speedy. No one need be considered except the mortgagor and mortgagee, and if they concur in the disposition of the foreclosure it is sufficient, and the court may properly enter a decree in accordance therewith. \* \* \*

"But this court long since recognized the fact that in the present condition of things (and all judicial proceedings must be adjusted to the facts as they are) other inquiries arise in railroad foreclosure proceedings accompanied by a receivership than the mere matter of the amount of the debt of the mortgagor to the mortgagee. We have held in a series of cases that the peculiar character and conditions of railroad property not only justify but compel a court entertaining foreclosure proceedings to give to certain limited unsecured claims a priority over the debts secured by the mortgage. It is needless to refer to the many cases in which this doctrine has been affirmed. It may be, and has often been said, that this ruling implies somewhat of a departure from the apparent priority of right secured by a contract obligation duly made and duly recorded, and yet this court, recognizing that a railroad is not simply private property, but also an instrument of public service, has ruled that the character of its business, and the public obligations which it assumes, justify a limited displacement of contract and recorded liens in behalf of temporary and unsecured creditors. \* \* \*

"We notice, again, that railroad mortgages, or trust deeds, are ordinarily so large in amount that on foreclosure thereof only the mortgagees, or their representatives, can be considered as probable purchasers. \* \* \*

"We must therefore recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages mean, not the destruction of all interest of the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor, or mortgagor. \* \* \* Assuming that foreclosure proceedings may be carried on



to some extent at least in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder), we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders, he may do so; but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

A "transfer of property by a debtor with a reservation of an interest therein to himself" is always voidable by his creditors as against a debtor and all claiming under him with notice of his act, and a transfer by stockholders of a corporation of its property with a preservation of an interest in themselves is equally voidable against all who take the property with notice of their act. In *Montgomery-Web Co. v. Dienelt*, 133 Pa. 585, 596, 19 Atl. 428, 430 (19 Am. St. Rep. 663), a new corporation was formed, and part of its stock was issued to the stockholders, and a part of it was issued to the creditors of an old corporation for their holdings, and all the property of the old corporation was transferred to the new corporation. A single creditor of the old corporation assailed the transaction. The Supreme Court of Pennsylvania said:

"Under such circumstances they (the stockholders) were bound to take notice of the nature of the transaction and to know that equity would still regard the property as a trust for the payment of existing debts, and would follow it on behalf of the creditors until it should get into the hands of innocent purchasers for value. Such purchasers they were not. The old stockholders were not purchasers for value at all, and the new stockholders were not innocent, for they knew, or were bound to take notice, of the taint in their co-adventurers' title. We are of the opinion that, as to the stockholders in the Aronia Company, this was a transfer of property by a debtor with the retention of an interest in himself within the settled rule of law that makes such transfers void as against creditors, and that, as to the Aronia creditors who became new stockholders in the Montgomery Company, they took with such notice as prevents them from claiming now as innocent holders for value against the appellants as execution creditors of the old corporation. It is not worth while to cite authorities for these principles; they are settled and familiar."

In *Chicago, R. I. & P. Ry. Co. v. Howard*, 74 U. S. (7 Wall.) 392, 409 (19 L. Ed. 117), the leading case upon this subject, where a foreclosure sale of the property of a corporation was made pursuant to an arrangement whereby 84 per cent. of the purchase price was to go to its bondholders and 16 per cent. to its stockholders, the Supreme Court said:

"Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation and recognizes the rights of creditors to pursue it into whatsoever possession it may be transferred, unless it has



passed into the hands of a bona fide purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the properties until the debts of the corporation are paid."

The facts and the ruling in that case are thus stated in the syllabus:

"A sale under foreclosure of mortgage of an insolvent railroad company, expedited and made advantageous by an arrangement between the mortgagees and the stockholders, under which arrangement the mortgagees, according to their order, got more or less of their debt (100 to 30 per cent.), and the stockholders of the company the residue of the proceeds—a fraction (16 per cent.) of the par of their stock—held fraudulent as against general creditors not secured by the mortgage, and this although the road was mortgaged far above its value, and on sale in open market did not bring near enough to pay even the mortgage debts; so that, in fact, if there had been an ordinary foreclosure, and one independent of all arrangement between the mortgagees and the stockholders, the whole proceeds of sale would have belonged to the mortgagees."

In *Central of Georgia Ry. Co. v. Paul*, 93 Fed. 878, 884, 35 C. C. A. 639, 645, the Circuit Court of Appeals of the Fifth Circuit said:

"There is no substantial dispute that the appellee Mary F. Paul was and is a creditor of the Central Railroad & Banking Company of Georgia, and the question is whether the Central of Georgia Railway Company is liable for her demand. The case shows that the sale of the railway properties under the foreclosure at the suit of the Central Trust Company, the sale of the collateral securing the floating debt claims, and the sale of the 'overflow property,' all were in pursuance of a reorganization plan, which was carried out, and resulted in the transfer of all the property and assets of the Central Railroad & Banking Company of Georgia to the Central of Georgia Railway Company; and the active participating reorganizers were not only the creditors of the Central Railroad & Banking Company of Georgia, secured by mortgage and otherwise, but included as well the stockholders of said company; so that, for the purposes of the present case, it is an indisputable fact that, notwithstanding all the sales of property and other transactions in liquidation, the stockholders of the Central Railroad & Banking Company of Georgia retained their interest and rights, and by virtue thereof are now either stockholders of the new organization, Central of Georgia Railway Company, or are otherwise provided for, and that the new company has acquired, and now holds, all the former property and assets of the old company. It would seem from this state of facts that the appellee has the right to look to the new company for the payment of her claim."

[2] Indeed, it is settled law, that:

"A reorganization of an insolvent railroad company by which both its mortgage bondholders and its stockholders, in exchange for their bonds and stocks, are given an interest in the new company which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization, and by consent of the old company and its stockholders, is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid and renders the new company liable for the claims of such creditors." *Northern Pacific Ry. Co. v. Boyd*, 177 Fed. 804, 101 C. C. A. 18; *Luedcke v. Des Moines Cabinet Co.*, 140 Iowa, 223, 118 N. W. 456, 32 L. R. A. (N. S.) 616; *Hurd v. New York & Commercial Steam Laundry Co.*, 167 N. Y. 89, 60 N. E. 327.

[3] The case under consideration falls directly under this rule of law. A scheme was devised and proposed for the benefit of the stockholders and bondholders of the Belt Company, the Gulf Company, and the Dock Company, as the reorganization agreement reads:

"For the reorganization of the Kansas City, Pittsburg & Gulf Railroad Company, and its property, and also, if necessary, for the reorganization of the Kansas City Suburban Belt Railroad Company and the Port Arthur Channel & Dock Company and their properties, and for the consolidation of said corporations, if such consolidation can be lawfully made, and is found to be practicable *either with or without foreclosure of either or all of said properties, or by means of the acquisition of the stock or other securities of either or all of said corporations, or in any other manner that may be deemed by said committee to be most practicable and feasible.*"

That scheme was accepted, approved, and executed by the stockholders and bondholders of the Belt Company and by the Southern Company for their benefit to the exclusion of the Trust Company's unsecured claim from all benefit from the property of its debtor, the Belt Company. A new company, the Southern Company, was organized, the stockholders and bondholders of the old company, the Belt Company, in exchange for their stock and bonds were offered and took an interest in the new company, the stockholders took for their \$4,700,000 of stock in the old company about \$1,857,000 of the preferred stock and about \$3,562,500 of the common stock of the Southern Company, in all about \$5,419,500 in stock at its par value, and the bondholders took about \$1,330,000 of the preferred stock and \$250,000 of the bonds of the Southern Company, in all about \$1,580,000 at their par value, for their \$1,000,000 of bonds of the old Belt Company, and, after the new company had obtained in this way more than 89 per cent. of the bonds and more than 97 per cent. of the stock of the old company, it purchased the property of the old company at a formal, but not an actual, foreclosure sale, made pursuant to this plan of reorganization at the instigation of the Southern Company as holder of 89 per cent. of the bonds of the Belt Company and with its consent as holder of more than 97 per cent. of the stock of the Belt Company. And what was the actual effect of this entire performance? The property of the Belt Company was transferred to a new company, and its stockholders preserved for themselves an interest in that property. Before the transaction they had common stock of the Belt Company of the par value of \$4,700,000, and the Belt Company owned its property, after the transaction the stockholders had preferred stock of the Southern Company of the par value of about \$1,857,000 and common stock of that company of the par value of about \$3,562,500, and the Southern Company owned the property of the Belt Company. But a sale or transfer by stockholders of the property of their corporation in which they preserve an interest, whether that sale or transfer be by deed, by mortgage, by judgment, by foreclosure sale, or by any other means, is fraudulent and voidable against the unsecured creditors of their old corporation, and a purchaser who takes and converts such property to its own use with knowledge of the facts becomes legally liable to pay the unsecured debts of the old corporation, at least to the extent of the value of the property so taken and converted. The value of the property of the Belt Company so taken and converted by the Southern Company was many times the amount of the Belt Company's debt to the Trust Company. The conclusion is irresistible,

and the judgment of this court is, that the Southern Company which, pursuant to this scheme and in its execution, purchased the Belt Company's property at the formal foreclosure sale with full knowledge of the scheme and of the fact that by its execution the stockholders of the Belt Company were appropriating to themselves the benefits of the property of the Belt Company which in law and in equity belonged to the unsecured creditors of that company, became legally liable to pay and is indebted to the Trust Company to the amount of the debt of the Belt Company to the Trust Company in the sum of \$639,658.86 and interest from June 22, 1910, on \$473,723.59 at the rate of 6 per cent. per annum, on \$46,565.76 at the rate of 7 per cent. per annum, and on \$119,369.51 at the rate of 8 per cent. per annum.

[4] The contention of the Southern Company that the Trust Company is estopped from enforcing and collecting this claim based on the unsecured debt of the Belt Company to it, because, for the bonds and stock of the Belt Company, which it owned, it received bonds and stock of the Southern Company under the plan of reorganization, is untenable. The collection of this claim is not an avoidance; it is an enforcement and execution of the scheme of reorganization and of the trust in favor of the creditors of the Belt Company, which that scheme created. The published plan of reorganization was plenary notice under the law to the Southern Company, and to all who became interested under that plan, that purchasers of property of the companies foreclosed pursuant to it took that property in trust for the unsecured creditors of those companies. That plan expressly set apart \$475,000 to be applied to the payment of the floating debts of those companies, vested in the committee of reorganization discretionary power to pay such of those floating debts as it saw fit to discharge, and that it actually expended \$1,164,172.56 in paying such debts. The committee had full authority to pay this claim of the Trust Company. The Trust Company may well have supposed that its claim, as well as the claims of other creditors of these foreclosed companies, which were paid to the amount of over a million dollars, would be paid by the committee. The Trust Company never represented that it would not, but persistently asserted that it would enforce its demand, and the collection of it from the Southern Company is neither barred by estoppel nor inconsistent with the previous position and action of the Trust Company.

Another objection to the enforcement of this claim is that the Trust Company was guilty of laches. There is nothing in the record to indicate that the Southern Company did not intend to pay the debts of the Belt Company until the foreclosure proceeding was brought by the Provident Company. As stated, the Trust Company interposed its claim in that action, and the decree provided that its rights respecting the enforcement of such claim should remain unaffected. When the Southern Company filed its petition of intervention in the case brought by the Cambria Company, the Trust Company promptly asserted in defense thereto the liability of the Southern Company. The Trust Company also brought an action in the state court against the Southern Company for a part of its claim, for the reasons which it had before asserted. The Southern Company filed its supplemental bill and

obtained an injunction against the prosecution of the action in the state court, which was reversed by this court. *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 146 Fed. 337, 76 C. C. A. 615. The Trust Company then brought a second action in the state court for another portion of its claim. The Southern Company moved the state court to stay the actions, which motion was denied. It then filed another bill for an injunction against the Trust Company to prevent the prosecution of these actions, and the Circuit Court granted a preliminary injunction, which was reversed by this court. *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620. Under these circumstances, the plea of laches is unfounded.

[5] Again, the issue of the liability of the Southern Company to the Trust Company for the debt of the Belt Company to it came into this case as an equitable defense to the intervening petition of the Southern Company of February 27, 1905, wherein it sought to appropriate to itself property of the Central Improvement Company, <sup>1120/1407</sup> of the shares of the stock of which company had been pledged to the Trust Company by the Belt Company to secure \$203,900 of the debt of the latter company to the former. The Southern Company endeavored to appropriate this property of the Central Company under the after-acquired clauses of the old foreclosed mortgages of the Belt Company, the Air Line Company, and the Gulf Company. The Trust Company answered: (1) That the Southern Company owed it this debt, that he who seeks equity must do equity, that the Southern Company was entitled to no relief until it paid this debt; and (2) that by virtue of the pledged stock of the Central Company to secure the payment of the debt of the Belt Company its equitable right to the property of that company was superior to that of the Southern Company. The Trust Company was guilty of no fatal laches here because it held the majority of the stock of the Central Company, and that company held the title to the property which the Southern Company sought to take, so that the Trust Company had a perfect legal right by virtue of its stock to appropriate the property to the payment of its debt and it needed no affirmative relief, and a court of chancery will, and it is its duty to, condition its grant of relief to a complainant with the enforcement of any just claim of the defendant which the latter ought in equity and good conscience to pay, although on account of the statute of limitations, or for some other reason, the defendant might not be able affirmatively to enforce it. *Farmers' Loan & Trust Co. v. Denver, L. & G. R. Co.*, 126 Fed. 46, 51, 60 C. C. A. 588, 593; *Pomeroy's Eq. Jur.* §§ 386, 393, note 4; *Brent v. Bank of Washington*, 10 Pet. 596, 9 L. Ed. 547; *De Walsh v. Braman*, 160 Ill. 415, 43 N. E. 597, 600; *Farmers' Bank v. Iglehart*, 6 Gill (Md.) 50, 57; *Fievel v. Zuber*, 67 Tex. 279, 280, 3 S. W. 273; *Booth v. Hoskins*, 75 Cal. 271, 275, 276, 17 Pac. 225; *De Cazara v. Orena*, 80 Cal. 132, 134, 22 Pac. 74; *Hall v. Arnott*, 80 Cal. 348, 354, 22 Pac. 200; *Grant v. Burr*, 54 Cal. 298, 301; *McKeen v. James* (Tex. Civ. App.) 23 S. W. 460, 464; *Rodriguez v. Haynes*, 76 Tex. 225, 232, 13 S. W. 296; *Hartranft's Estate*, 153 Pa. 530, 533, 26 Atl. 104, 34 Am. St. Rep. 717; 19 Am. & Eng. Enc. of Law (2d Ed.) pp. 177, 178; *Dimick v. Grand Island Banking Co.*, 37



Neb. 394, 399, 55 N. W. 1066; *Gage v. Riverside Trust Co.* (C. C.) 86 Fed. 984, 998; *Whitmore v. Savings Union*, 50 Cal. 145, 150; *Spect v. Spect*, 88 Cal. 437, 444, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314.

[8] It is insisted upon the part of the Southern Company that the reference to a master was by consent of parties, and hence that the findings of the master are not subject to review. We do not think the record supports the statement that the master was appointed by consent of parties. As before stated, the Cambria Company filed its bill September 6, 1900, and the record shows that, on the 7th of November, defendant having answered, the case was referred by the court upon its own motion to Shannon C. Douglass. On February 27, 1905, a stipulation was filed by the parties to the effect that the Southern Railway Company might become a party to the action either by joint complaint or by bill of intervention, as it might elect, and file its bill, asserting its claim, on or before February 25, 1905; that the adverse party should have 10 days thereafter in which to plead, and the testimony theretofore taken should be applicable as evidence in support of and in resistance of the Southern Company's claim; "that such orders of court as may be necessary for the purpose may be entered carrying into effect this stipulation." In accordance with this stipulation, the court made an order, permitting the Southern Company to file its bill of intervention, and gave the adverse party 10 days in which to plead the same, referring the issues to Shannon C. Douglass to take the testimony thereon and report, etc. This stipulation was not a stipulation consenting to the appointment of a master, but was simply one which authorized the court to make the necessary orders relative to permitting the Southern Company to intervene, and fixing the time within which the parties should plead thereto and an order that the testimony theretofore taken should be treated and considered as testimony relative to the issues made by the Southern Company's bill of intervention. The reference to the master was by the court upon its own motion. The court would naturally refer that issue to the master who had theretofore been appointed by the court on its own motion to hear the case. Subsequently, on the 1st of May, 1905, the parties stipulated that the Southern Company might amend its intervening petition, setting up, in addition to the matters contained in its intervening petition on file, a claim against the Trust Company for an alleged breach of trust, and consented in the stipulation that such new issue should be referred to Shannon C. Douglass, the special master, and the court, pursuant to the stipulation, made an order permitting the Southern Company to file its amended intervening petition in that respect, and referred it to Shannon C. Douglass. It is this last stipulation and this order of the court upon which the Southern Company bases its argument that the reference of the case to the master was by consent of parties. As before stated, the main issues, and the issues involved on this appeal, had been referred to the master by the court upon its own motion. The stipulation that the new issue made by the amended intervening petition should be referred to the master was a stipulation with reference to that issue, that issue was decided by the master in favor of the Trust Company, and is not before

us for review. So the case is not one where the issues involved have been heard by a master appointed by consent of the parties. Even though the original appointment of the master had been by consent of parties, a reference under those circumstances would not preclude the court from correcting manifest errors of law made by the master. Rule 11 of this court; *United States v. Tennessee & C. R. R. Co.*, 176 U. S. 242-256, 20 Sup. Ct. 370, 44 L. Ed. 452; *Clyatt v. United States*, 197 U. S. 207, 222, 25 Sup. Ct. 429, 49 L. Ed. 726; *United States v. Bernays*, 158 Fed. 792, 86 C. C. A. 52; *New York Life Ins. Co. v. Rankin*, 162 Fed. 103, 108, 89 C. C. A. 103.

The Central Improvement Company has made application to dismiss its appeal. It is not very material to the disposition of this case and to the adjudication of all the rights of the parties to this suit whether the application is granted or denied because the Trust Company had such an equitable interest in the property of the Central Company by virtue of the pledge to it of 1,120 out of the 1,407 shares of the stock of that company issued that the Trust Company's appeal completely challenges the decree of the court with reference to that property and furnishes ample warrant for its review and reversal. The Central Company has no property of substantial value except that specified in the decree. It is a mere holding company either for the Trust Company or for the Southern Company, and the determination of their respective equities necessarily determines the rights of the Central Company and the ownership of the beneficial interest in its property, and the motion to dismiss its appeal is denied.

The result is that the Southern Company is entitled to no relief in this suit unless it first pays to the Trust Company the amount of the Belt Company's debt to it and the costs of this suit, because it became indebted to the Trust Company in the amount of that debt by its acquisition of the property of the Belt Company under the reorganization scheme with full knowledge that the stockholders of the Belt Company thereby preserved for themselves an interest in that property to the exclusion of the Trust Company, a creditor of that corporation.

[8] Moreover, if the Southern Company were not equitably estopped from recovering the property of the Central Company by its indebtedness to the Trust Company, nevertheless, equity would require it to pay to that company the value of the latter's 1,120 pledged shares of the stock of the Central Company before it would permit it to take the property of the latter company and thus to destroy the value of its stock through its claim as a purchaser at foreclosure sales under the after-acquired clauses of the old mortgages of the Gulf Company, the Air Line Company, and the Belt Company. The property in controversy is the remnant of numerous pieces of real estate to which the Central Company took title and for the purchase prices of which it issued its stock at par to the Gulf Company, the Belt Company, and the Air Line Company, respectively, which companies paid the par value of that stock either to it or to the vendors from whom the property was bought. The result was that the Central Company, a corporation, owned and held the property in trust to pay the stockholders the par value of its stock which was the purchase price of the property.

In this state of the case the Belt Company, which acquired 1,120 of the 1,407 shares of the stock thus issued by the Central Company, pledged this stock in the year 1899 to the Trust Company to secure the payment of \$203,900 of its debt to that company, and the title and rights of the parties stood thus unquestioned from 1899 until 1905, when the Southern Company filed its intervening petition in this case. It asserted that the Central Company held this property in trust for the mortgagor companies and that the after-acquired clauses of their mortgages carried it to itself, the purchaser at the foreclosure sales thereunder. Conceding that the property was appurtenant to the railroad and that the terms of the after-acquired clauses were broad enough to include it, how can this claim of the Southern Company be sustained? The after-acquired clause of a mortgage attaches to the interest acquired by the mortgagor only, and it is always subject and inferior to junior liens, incumbrances, and equities under which the property comes to the mortgagor. *Farmers' Loan & Trust Co. v. Denver, L. & G. R. Co.*, 126 Fed. 46, 49, 60 C. C. A. 588, 591; *United States v. New Orleans R. R. Co.*, 12 Wall. 362, 20 L. Ed. 434; *Central Trust Co. v. Kneeland*, 138 U. S. 414, 423, 11 Sup. Ct. 357, 34 L. Ed. 1014. In a simple case the justice and the application of this rule is plain. A railroad company makes a mortgage of its property with an after-acquired clause. It subsequently purchases a piece of property and gives its note and mortgage for the purchase price, and the vendor sells or pledges the note to a third person to secure his debt. The mortgagee of the railroad may not deprive the pledgee of the note of the property which secures it under the after-acquired clause of his mortgage until he pays the junior note and mortgage, and this because he has given nothing for this property while the junior mortgagee and his pledgee have parted with value for their security upon it. In the case in hand, the Central Company acquired the property here in dispute for its liability to pay to its stockholders the par value of its stock, and it held the property in trust to secure the payment to its stockholders of that liability. The mortgagees under the railroad mortgages and the Southern Company, the purchaser thereunder, knew these facts. They parted with no value on account of this property, and a court of conscience may not permit them to deprive the stockholders of the Central Company, who have really paid for it, of the trust property which the Central Company holds to reimburse them unless the court first requires them to pay to the holders of the stock its actual value.

The fact that the mortgagor companies originally took and held the stock of the Central Company before the Belt Company pledged it to the Trust Company has not been overlooked. That fact, however, only clearly fixes the legal rights and equities of the parties, fixes the title to the land in the Central Company, and estops the mortgagor companies and all claiming under them from denying that the stock which they took and sold or pledged constituted the primary liability of the Central Company and the primary equity in the property it holds as against the mortgagees of the railroad companies and the

purchaser thereunder. *Watson v. Bonfils*, 116 Fed. 157, 163, 166, 167, 53 C. C. A. 535, 541, 544, 545.

The stock of the Central Company was not the property of that company. It was a liability of that company. Conceding that the after-acquired clauses of the mortgages conveyed the Central Company's interest in this land subject to its primary trust to pay this liability, they did not convey its liability, or the stock which represented it. *Humphreys v. McKissock*, 140 U. S. 304, 314, 11 Sup. Ct. 779, 35 L. Ed. 473. The equity of the stockholders as against the Southern Company, which took whatever it has with full notice of all the facts in this case, is the same that it would have been if the liability of the Central Company, now represented by its stock for the purchase price of the property, had been represented by its promissory notes and a mortgage upon this land to secure them and they had been pledged by their owners to secure their debt to the Trust Company. The Trust Company, which holds 1,120 shares of the stock of the Central Company to secure a debt to it of more than \$200,000, has an equitable interest in the land of the Central Company superior to that of the Southern Company, and the latter is entitled to no relief with reference to this property until it pays to the Trust Company the value of that stock.

The controlling equities of this case require that the decree below should be so modified, among other things, that it will adjudge that the Southern Company is indebted to the Trust Company in the amount which the Belt Company owes it, that is to say, in the sum of \$639,658.86 and interest thereon from the date of the original decree, and that no relief be granted to the Southern Company unless that debt is paid.

Three of the stockholders of the Trust Company, at whose instance the question of the liability of the Southern Company was pressed to a decision in this court by the Trust Company, and its counsel, have filed a petition for leave to present the suggestion that, in case this court finds, as it has found, that the Southern Company owes this debt, a decree should be rendered against it in this suit to the effect that the Trust Company recover this amount from the Southern Company and have execution therefor. There is no prayer for this specific relief in any of the pleadings of the Trust Company, but it is relief to which, under the law and upon the facts now found, the Trust Company is clearly entitled from this, or some other court, and in its answer to one of the numerous bills filed in this case it prayed for such other and further relief as should seem meet and just in the premises. The facts that the Southern Company voluntarily intervened in this suit in 1905 and sought to take from the Trust Company the security for its claim furnished by the stock of the Central Company and by a large amount of other stocks, bonds, and property, to which the Southern Company was not entitled, that this attempt of the Southern Company called into this suit the Trust Company's claim that the Southern Company owed it the amount of the debt of the Belt Company, that the Trust Company tendered that issue in actions at law which it brought as long ago as 1905 and 1906, against the Southern



Company in a state court to recover from it this very indebtedness, that the Southern Company delayed and prevented the trial of that issue in those actions at law by means of two successive injunctions which it obtained from the court below, on the ground that this issue was pending in this suit, injunctions which on appeal this court promptly dissolved (*Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 146 Fed. 337, 76 C. C. A. 615; *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. [N. S.] 620), that this suit has been thoroughly litigated by all parties interested in it for more than six years, that tens of thousands of pages of evidence have been taken in this litigation, and that further litigation in the state court over this issue, although it becomes *res adjudicata* by this decision, may by appeal or otherwise result in further delay, cause this suggestion of these stockholders to challenge serious consideration. It seems that if by the amendment of any of the pleadings of the Trust Company, or by the filing by it of a cross-bill, or a supplemental bill, or without them, such a decree as suggested may be lawfully rendered, justice and equity would require that that course should be pursued. The three stockholders are accordingly permitted to file their suggestion, and leave is granted to the Trust Company, the Southern Company, and to any other party to this suit, to make such motions and present such arguments and authorities, either orally or in writing, to this court at St. Louis on January 10, 1913, regarding this suggestion, as to them shall seem meet. The issue presented by this suggestion is reserved for later consideration.

But whatever may be the result of that consideration, the decree below must be reversed, and this case must be remanded to the court below, with instructions to render a decree which shall contain the first five paragraphs of the decree below, shall adjudge that the equitable claim of the Trust Company, by virtue of the pledge to it of 1,120 shares of the stock of the Central Company, in the property of that company described in the sixth paragraph of that decree, is superior to the claim and equity of the Southern Company therein, that the Southern Company is indebted to the Trust Company in the amount of the indebtedness of the Belt Company to that company—that is to say, in the sum of \$639,658.86 and interest from the date of the original decree below, on \$473,723.59 at 6 per cent. per annum, on \$46,565.76 at 7 per cent. per annum, and on \$119,369.51 at 8 per cent. per annum—that the Southern Company must pay this debt as a condition of obtaining any relief in this suit, that the ninth, tenth, eleventh, and thirteenth paragraphs of the original decree be again adjudged, and that the Trust Company recover its entire costs of the Southern Company and the Cambria Company, and that the share of such costs as between themselves, but not as against the Trust Company, that shall be paid by the Cambria Company and the Southern Company, shall be determined by the court below as to it may seem just and equitable.

## SAN FRANCISCO CHEMICAL CO. v. DUFFIELD et al. (two cases).

(Circuit Court of Appeals, Eighth Circuit. November 21, 1912.)

Nos. 3,772, 3,773.

**1. MINES AND MINERALS (§ 38\*)—CONFLICTING LOCATIONS—PLACER AND LODE CLAIMS—PRIORITY—DETERMINATION—NATURE OF ACTION.**

Where complainants located certain lode claims within the boundaries of prior located placer claims, actions to determine the conflicting rights of the claimants were properly instituted in the form of actions to determine adverse claims, authorized by Rev. St. §§ 2325, 2326 (U. S. Comp. St. 1901, pp. 1429, 1430).

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.\*]

**2. MINES AND MINERALS (§ 38\*)—CONFLICTING LOCATIONS—NATURE OF GROUND—DETERMINATION—JURISDICTION.**

Where complainants located certain lode claims within the limits of prior located placer claims, and thereafter instituted actions to determine their adverse claims to such locations, the determination of the question whether the ground was subject to location as placer or lode was not within the exclusive jurisdiction of the Land Department, but, was determinable by the court in such actions.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.\*]

Extent and boundaries of mining claims or locations, see note to Jones v. Wild Goose Mining & Trading Co., 101 C. C. A. 355.]

**3. MINES AND MINERALS (§ 27\*)—MINING CLAIM—LOCATION—ENTRY.**

While a valid claim to unappropriated mining ground cannot be instituted while it is in the possession of another, who has the right to its possession under an earlier lawful location, nor can such a claim be initiated by forcible or fraudulent entry on land in possession of one who has no right either to the possession or to the title, yet every competent locator has the right to initiate a lawful claim to unappropriated ground by a peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire the title or to hold possession.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 64, 65; Dec. Dig. § 27.\*]

**4. MINES AND MINERALS (§ 16\*)—NATURE OF LOCATION—"VEIN" OR "LODE"—"PLACER."**

Rev. St. § 2320 (U. S. Comp. St. 1901, p. 1424), provides for the location of mining claims on veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits. Section 2329 (U. S. Comp. St. 1901, p. 1432) provides for the location of "placers," including all forms of deposit excepting veins of quartz or other rock in place. *Held* that, since the term "vein or lode" is not used in a geological sense, but rather to mean a continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it, which boundaries clearly separate it from the neighboring rock, and the term "placer" denotes ground within defined boundaries which contains mineral in its earth, sand, or gravel, or deposits not fixed in rock, but which may be collected by washing or amalgamation without milling, ground containing a bed of calcium phosphate or phosphate rock lying in horizontal veins of various thicknesses, from a few inches to five or six feet, having a dip and strike, and firmly fixed in the mass of the mountain between strata of limestone, chert, and shale, is subject to lo-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cation only as containing a "lode" or "vein," and not as a "placer" location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 21-23; Dec. Dig. § 16.\*

For other definitions, see Words and Phrases, vol. 6, pp. 5395, 5396; vol. 8, pp. 7286, 7287; vol. 5, pp. 4223-4226.]

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Actions by Morse S. Duffield and another against the San Francisco Chemical Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Jesse R. S. Budge, of Pocatello, Idaho (Clark & Budge, of Pocatello, Idaho, on the brief), for appellant.

Charles C. Dey, of Salt Lake City, Utah (C. B. Jack and A. L. Hoppaugh, both of Salt Lake City, Utah, on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. While the two cases relate to different mining claims, they were both tried together upon the same testimony, were both submitted to this court upon the same argument and briefs, and the material facts applicable to one are applicable to the other.

It appears that appellant's predecessors, on or about August 24, 1905, located upon the public lands of the United States, in Uinta county, state of Wyoming, what is designated and known as the Raymond placer mining claim, and on or about September 5, 1905, located upon the public lands within said county what is designated and known as the Francis placer mining claim; that appellant, and its predecessors, with respect to each claim, performed the requisite discovery work, duly marked the boundaries of their placer mining location in due form, posted and recorded notice of location, and performed the requisite work required to be performed during each calendar year, subsequent to the location thereof, and made proof in due form that said work had been done and the same duly recorded; that on or about November 18, 1907, appellees made discovery and located in due form within the limits of said Raymond claim certain lode mining claims, designated and known as the China and Japan claims, and on or about November 18, 1907, they located within the limits of said Francis claim a certain lode claim known as the Fryerson claim. With respect to each of said lode claims they performed all the requirements of law in respect to posting notices and monuments of discovery, preliminary work required by law, and performed the amount of development work annually required by law, and the proofs thereof were duly recorded.

On September 22, 1910, appellant made application to the United States land office at Evanston, Wyo., for a final patent to each of its

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

placer claims, viz., the Raymond and Francis. Within 60 days thereafter, to wit, November 18, 1910, appellees filed in said land office their adverse claim to each of said claims of appellant, and within 30 days thereafter, to wit, on December 2, 1910, they commenced in the United States Court for the District of Wyoming their two several actions, one to determine the possessory right as between appellant and appellees to the lands covered by the China and Japan lode claims, and the other to determine the possessory right as to the land covered by the Fryerson claim. Issues were joined, cases tried, and decrees rendered in each case for appellees. From those decrees these appeals are prosecuted.

While there are a number of assignments of error, counsel for appellant have correctly grouped them so as to present four propositions:

First. That, by the stipulation of the parties, appellant's location was prior to that of appellees, and that, as appellant performed all the things required by the acts of Congress relating thereto to entitle it to a patent, the decision should be in favor of appellant. The question of the form of the location (that is, whether placer or lode) is one to be determined by the Land Department of the United States, and not for the court.

Second. That appellees, in making their lode locations, were trespassers, and as such acquired no rights thereunder.

Third. That, if the court should assume to determine which form of location (placer or lode) was proper and effectual to initiate a possessory title to the premises in controversy, under the law and the evidence the mineral deposit was properly located as placer, and not as lode.

Fourth. That the evidence as a whole shows that the decree should have been for appellant.

The last proposition, to wit, that the decree should have been for appellant, is necessarily dependent upon a determination of the first three propositions. The provisions of the statute upon which the suits are based, are contained in chapter 6, title 32, of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 1422-1442).

Section 2325 provides for the obtaining of a patent to land claimed and located for valuable deposits, by any person, association, or corporation, authorized to locate a mining claim under that chapter, who has complied with the terms of the chapter, and files in the proper land office an application for patent, under oath, showing compliance with the law, and shall give the notice, by publication or otherwise, required of such applicant. If no adverse claim is filed within 60 days after publication of the notice, the applicant shall be entitled to a patent upon payment of the required amount.

By section 2326 it is provided that, where an adverse claim is filed during the publication, it shall be upon oath of the person or persons making the same, showing the nature, boundaries and extent of the adverse claim, etc., and such application for a patent shall be stayed until the controversy shall be settled by a court of competent jurisdiction. The section also provides:



"It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general, that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceeding, and the judgment roll, shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess."

[1] These actions were properly brought under the statute, to determine the possessory right as between appellant and appellees of the tract of land in controversy. It is true that the decree of the court determines simply as between the litigants which one has the superior right to the possession of the premises in dispute. The title to the land being in the government, the decree of the court does not affect the title, excepting in so far as the judgment of the court may be binding upon or influence the Land Department of the United States. It must be conceded that, if appellant's placer claims were valid, being prior in time to appellees', appellant is entitled to decrees giving it the right to the possession. If, however, appellant's placer claims are void and appellees' claims valid, appellees' right to possession, as between them, would be unquestioned. There being no controversy in this case that appellant and its predecessors complied with the law in all respects, the only question affecting the validity of its claims is whether or not the mineral deposit in the land was of a character which permitted it to be acquired under placer mining locations. If the mineral was not of a character which could be located under the placer mining law, then, clearly, appellant's claims were invalid. But, as stated, appellant's contention is that that is a question for the sole determination of the Land Department, and not for the court in an action of this character. In other words, that the court, in these actions, can only inquire as to the priority of location, whether all the requirements of the act of Congress, to entitle appellant to a patent, have been complied with, and upon such findings being in favor of appellant, decrees in its favor should necessarily be rendered without inquiry as to whether or not the lands covered by appellant's claims were subject to location as placer.

The case of *Webb v. American Asphaltum Co.*, 157 Fed. 203, 84 C. C. A. 651, involved the same question as is presented in the cases under consideration. The court said:

"May the right to the possession and to the title to a vein or lode of asphaltum in rock in place be secured by the location of a placer claim upon the land in which it is found?"

[2] In that case plaintiff's grantors located the premises in controversy as a placer claim. The grantor of the defendant subsequently located two lode mining claims thereon. The defendant applied for

a patent. The plaintiff filed an adverse claim, and brought action under the statute to determine the rights of the parties. The question at issue in that case, and which was decided by the court, was whether the mineral contained in the land in controversy was subject to location as placer or as a vein or lode. It was held that the mineral came under the designation of veins or lodes, and hence that plaintiff's right, by virtue of the placer claim, although prior in time of location to that of defendants, could not be maintained. In other words, as the land was not subject to location as a placer claim, plaintiff obtained no possessory right thereto. The court in that case necessarily determined that, in adjudicating upon the possessory right of the parties, the court could investigate and determine every fact involving a valid possessory right, and in so doing, of necessity, could determine and adjudicate the question as to whether the character of the land subjected it to entry under the acts of Congress in the manner claimed. That case is directly applicable here, and we see no reason why, when Congress required that the adverse claimant, to maintain his claim, must invoke the aid of a court of competent jurisdiction to determine the superior right as between the parties, it can be successfully said that the court, in making such inquiry, is prohibited from determining whether the land is subject to location in the mode and manner claimed by one or both of the parties.

[3] So we think that, in determining the rights of the parties in these cases, our decision must rest upon the question as to whether the mineral land in controversy was of a character which entitled it to be located as a placer mine, or whether it could only be entered as a lode mining claim. What may be the binding force and effect of the judgment in this case, in that respect, upon the Land Department, we are not called upon to decide. The question has been discussed by the Supreme Court in *Richmond Mining Co. v. Rose*, 114 U. S. 576-585, 5 Sup. Ct. 1055, 29 L. Ed. 273; *Iron Silver Mining Co. v. Campbell*, 135 U. S. 286-299, 10 Sup. Ct. 765, 34 L. Ed. 155; *Bennett v. Harkrader*, 158 U. S. 441-447, 15 Sup. Ct. 863, 39 L. Ed. 1046; *Perego v. Dodge*, 163 U. S. 160-168, 16 Sup. Ct. 971, 41 L. Ed. 113; *Clipper Mining Co. v. Eli Mining Land Co.*, 194 U. S. 220, 24 Sup. Ct. 632, 48 L. Ed. 944. In the case of *Thallmann v. Thomas*, 111 Fed. 277, it was said:

"A valid claim to unappropriated public land cannot be instituted while it is in possession of another who has the right to its possession under an earlier lawful location. *Risch v. Wiseman*, 36 Or. 484, 59 Pac. 1111, 78 Am. St. Rep. 783; *Seymour v. Fisher*, 16 Colo. 188, 27 Pac. 240. Nor can such a claim be initiated by forcible or fraudulent entry upon land in possession of one who has no right either to the possession or to the title. *Atherton v. Fowler*, 96 U. S. 513, 516, 24 L. Ed. 732; *Trenouth v. San Francisco*, 100 U. S. 251, 256, 25 L. Ed. 626. But every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire the title or to hold the possession. *Belk v. Meagher*, 104 U. S. 279, 287, 26 L. Ed. 735; *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Nevada Sierra Oil Co. v. Home Oil Co.* (C. C.) 98 Fed. 673, 680."

To the same effect is *Mt. Rosa Mining, Milling & Land Co. v. Palmer*, 26 Colo. 56, 56 Pac. 176, 50 L. R. A. 289, 77 Am. St. Rep. 245.

In the cases under consideration there is nothing to indicate that the appellees' entry upon the premises in question was other than peaceable, and if appellant's earlier location was an unlawful one, the possession under such unlawful location would not prevent appellees from acquiring a valid superior right by virtue of a peaceable adverse entry.

[4] This leaves but a single inquiry, viz.: Was the land in question subject to location as placer mines? Section 2320 provides for the location of mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits. Section 2329 is as follows:

"Claims usually called 'placers,' including all forms of deposit excepting veins of quartz or other rock in place, shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims, but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands."

In *Eureka Consolidated Mining Co. v. Richmond Min. Co.*, 4 Sawyer, 302, Fed. Cas. No. 4,548, Justice Field, in defining what was meant by the term "vein or lode," as found in the acts of Congress, said:

"Those acts were not drawn by geologists or for geologists. They were not framed in the interests of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose. The use of the terms 'vein' and 'lode' in connection with each other in the act of 1866, and their use in the act of 1872, would seem to indicate that it was the object of the legislator to avoid any limitation in the application of the acts, which a scientific definition of any one of these terms might impose. It is difficult to give any definition of the term, as understood and used in the acts of Congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes."

See, also, *Stevens v. Williams*, Fed. Cas. No. 13,414; *Cheesman v. Shreeve* (C. C.) 40 Fed. 787-792; *Book v. Justice Min. Co.* (C. C.) 58 Fed. 106-121; *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* (C. C.) 63 Fed. 540; *Reynolds v. Iron Silver Min. Co.*, 116 U. S. 687-695, 6 Sup. Ct. 601, 29 L. Ed. 774; *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529-533, 6 Sup. Ct. 481, 29 L. Ed. 712; *U. S. v. Iron Silver Min. Co.*, 128 U. S. 673-679, 9 Sup. Ct. 195, 32 L. Ed. 571; *Webb v. American Asphaltum Min. Co.*, *supra*.

In *United States v. Iron Silver Min. Co.*, supra, speaking with reference to section 2329, it was said:

"By the term 'placer claim' as here used is meant ground within defined boundaries, which contains mineral in its earth, sand or gravel, ground that includes valuable deposits not in place; that is, not fixed in rock, but which are in a loose state, and may, in most cases, be collected by washing or amalgamation without milling."

The mineral in question is what is known as calcium phosphate or rock phosphate. This rock is found in horizontal veins, or what is commonly called "blanket veins" (*Iron Silver Min. Co. v. Mike & Starr Co.*, 143 U. S. 394, 12 Sup. Ct. 543, 36 L. Ed. 201); the veins being of various thicknesses, from a few inches to five or six feet. The rock is found in place having a dip and a strike, is firmly fixed in the mass of the mountain, and occurs between strata of limestone, chert, and shale. The veins usually occur between a bed of overlying fossiliferous limestone and an underlying bed of hard siliceous limestone. The line of demarcation between the veins of phosphate rock and wall rock of limestone, shale, or chert is well defined and distinct. The distinction between the phosphate rock, having commercial value, and the wall rock, with no commercial value, is readily determined by visual inspection. The phosphate rock is mined by blasting and otherwise, the same as other veins of valuable ore. Its chief commercial value is a soil fertilizer. The rock, after being mined, is reduced at mills for market.

That the rock in question is mineral within the meaning of the mining laws is not only conceded by both parties but sustained by authority. *Northern Pac. Ry. v. Soderberg*, 188 U. S. 526, 23 Sup. Ct. 365, 47 L. Ed. 575; *Webb v. American Asphaltum Min. Co.*, supra. From a consideration of the whole case, we are clearly of the opinion that the rock in question was subject to location as lode claims, and not as placer.

Such being the view of the trial court, the decrees are affirmed.

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#### GRAND TRUNK WESTERN RY. CO. v. LINDSAY.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1912. On Rehearing, November 25, 1912.)

No. 1,826.

#### 1. MASTER AND SERVANT (§ 258\*)—ACTION FOR INJURY TO SERVANT—SUFFICIENCY OF DECLARATION.

Where the declaration in an action by a switchman against a railroad company to recover for an injury caused by the moving of a train while plaintiff was between two cars making a coupling contained allegations with respect to the defective coupler, such as to bring the case within the provisions of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), and alleged that defendant was engaged in operating the train in interstate commerce, and that plaintiff was employed by defendant in such operation, it will be inferred, after

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



verdict, that the train was moved by defendant, although not so alleged in terms.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.\*]

**2. APPEAL AND ERROR (§ 1068\*)—REVIEW—HARMLESS ERROR.**

In an action by a servant for a personal injury, the refusal of an instruction as to the effect of contributory negligence was not error prejudicial to defendant, where the jury found specially, on evidence which justified such finding, that plaintiff was not chargeable with negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

**3. TRIAL (§ 349\*)—SPECIAL FINDINGS BY JURY—DISCRETION OF COURT.**

It is within the discretion of a federal court to submit special questions to a jury in aid of a general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 823-827; Dec. Dig. § 349.\*]

**4. TRIAL (§ 260\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.**

The refusal of a requested instruction as to the weight to be given to the testimony of a particular witness *held* not error, in view of a general instruction given that the jury were the sole judges of the credibility of witnesses and the weight to be given to their testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**5. DAMAGES (§ 132\*)—PERSONAL INJURY—EXCESSIVE AWARD.**

An award of \$13,000 damages to a switchman, 23 years old, who was earning from \$110 to \$115 per month, for an injury which necessitated the amputation of his right arm near the shoulder, *held* not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

**6. MASTER AND SERVANT (§ 296\*)—ACTION FOR INJURY TO SERVANT—INSTRUCTIONS—EMPLOYERS' LIABILITY ACT.**

In an action by a switchman against an interstate railroad company for a personal injury, based on Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), and Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), a requested instruction that, if it was found that plaintiff did a certain act, such act was the proximate cause of the injury, and he could not recover, was properly refused, as contrary to section 3 of the latter act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

**7. EVIDENCE (§ 514\*)—EXPERT TESTIMONY—SUBJECT-MATTER—AUTOMATIC COUPLERS.**

Automatic car couplers, like other railroad machines and appliances, are not to be supposed to come so fully within the knowledge of average jurymen that experts may not properly be allowed to testify respecting their nature, operation, and normal condition, and it was not error to permit a witness, who had worked for several years as a brakeman, to testify that such a coupler, when in ordinary repair, could be closed with the foot, as well as the hand.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2319-2323; Dec. Dig. § 514.\*]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois; George A. Carpenter, Judge.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action at law by George Lindsay against the Grand Trunk Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Defendant in error, herein called plaintiff, was a switchman on defendant's railroad. On the night of September 21, 1908, he was severely injured by having his hand and arm caught and crushed while trying to lock the coupler between two freight cars; amputation of the arm near the shoulder being found necessary. Suit was brought February 11, 1909, in the state court, and removed to the Circuit Court by reason of diverse citizenship.

In the declaration are two counts, the first based upon both the federal Safety Appliance and Employers' Liability statutes, and the second on the Liability Act alone. In both counts it is alleged that the railroad and train were interstate, defendant then and there a common carrier in interstate commerce, plaintiff then and there employed in such interstate commerce, and that by reason of negligence of defendant, and without negligence on his part, plaintiff was injured. The first count claims a defective coupler as an additional ground of liability, under the automatic appliance statute, and alleges that by reason of such defective condition plaintiff was obliged to go between the cars to adjust the coupler, and while so engaged the cars were negligently pushed together, resulting in the injury.

The evidence clearly showed the coupler defective. After repeated trials it would not work. It was tried by a number of workmen and the chief car inspector, and the lock was finally taken out and another put in. The old lock was not produced at the trial.

It was the plaintiff's duty to couple the car having the defective coupler to another. In order to do this it was necessary for him to go between the cars. Before going between the cars plaintiff gave the conductor and his fellow switchman and the engineer a hard stop and stand signal, which, in railroad usage, meant that he was going between the cars, and that they should not be moved until he gave another signal. This signal was received and answered by the conductor and plaintiff's fellow switchman. While plaintiff was between the cars and endeavoring to adjust the defective coupler so it could be coupled, the cars were, without notice or warning to him, suddenly shoved together, and his right arm was thereby so crushed that it became necessary to amputate it within three inches of the shoulder. This movement of the cars, the evidence tends to show, was due to the engineer's supposition that a "come ahead" signal had been given.

No "come ahead" signal was given by the plaintiff, but the foreman of the switching crew got such a signal from some one and gave it to the engineer. The foreman in the darkness could not tell who gave it, though he knew plaintiff was between the cars trying to couple them, and the signal came from that place. There was a car oiler with a lantern near plaintiff on the same side of the train, who testified that neither he nor plaintiff gave a "come ahead" signal, though the oiler says he made movements of his lantern, while at work, which may have been mistaken by the foreman for a come on signal. There is no contradictory testimony, except an affidavit as to what the testimony of the engineer would have been, if called, used by agreement by reason of his absence at the trial. This affidavit states that "plaintiff gave a signal to Conroy to come ahead, and Conroy repeated it to him as such engineer, and in obedience to such signals he began shoving said cars together." It is, however, perfectly evident that in the darkness the engineer could not see who gave the signal; his statement that plaintiff gave it being clearly not within his knowledge or observation. In the nature of things he could not know.

The jury found a general verdict for plaintiff, and also answered in the affirmative the following special questions:

"Do you find from the evidence that the defendant was guilty of a violation of the Safety Appliance Act, as charged in the first count of the declaration?"

"If you find that the defendant was guilty of a violation of the Safety Appliance Act, as charged, do you find from the evidence that such violation was a proximate or concurrent cause of the plaintiff's injury?"

"Considering all the evidence, including the plaintiff's conduct, both in going between and while between the cars, do you find that he was in the exercise of ordinary care for his own safety?"

By the Safety Appliance Act of March 2, 1893, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), 6 Fed. Stat. Ann. 752, amended by Act May 30, 1908, 35 Stat. 476 (U. S. Comp. St. Supp. 1911, p. 1326), Fed. Stat. Ann. Supp. 588, and by Act April 14, 1910, 36 Stat. 298 (U. S. Comp. St. Supp. 1911, p. 1327), it is provided that it shall be unlawful for a common carrier engaged in interstate commerce to haul or permit to be hauled on its line any car used in moving interstate traffic not equipped with complete couplers coupling automatically by impact, and which can be coupled without the necessity of men going between the ends of the cars; also that employes do not assume the risk of the prohibited use of any such car, although continuing in their employment after the unlawful use is brought to their knowledge.

The following provisions of the Railroad Employers' Liability statute of April 22, 1908, are material:

Section 1: "Every common carrier by railroad, while engaging in commerce between any of the several states or territories \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, \* \* \* for such injury \* \* \* resulting \* \* \* by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances \* \* \* or other equipment."

Section 3: "\* \* \* The fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: Provided, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

Section 4 abolishes assumption of risk in case of the violation of such a statute as is mentioned in section 3. Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), Fed. Stat. Ann. Supp. 584, 585.

**Assignments of error:**

"(1) The declaration does not state a cause of action.

"(2) The court erred in admitting in evidence the following: 'Q. In the ordinary working of these couplers when they are in ordinary repair, can a man shove them in with his heel as well as his hand? A. Yes.' The question was duly objected to, on the ground that the witness was not qualified, and as calling for a conclusion.

"(3) The court erred in not giving the following requested instruction: 'The court instructs the jury that if you believe from the evidence that the plaintiff gave a "come ahead" signal to the switchman and engineer, and then went between the cars, and in consequence thereof was injured, then the giving of the "come ahead" signal by the plaintiff was the proximate cause of the injury, the defect in the coupler being a remote cause, then the plaintiff is not entitled to recover.' Also in giving in place thereof the following: 'You are further instructed that if you believe from the evidence, by a preponderance of the evidence, that the plaintiff gave a "come ahead" signal to the switchman or engineer—one or both—and after that went between the cars and was injured, then you have a right to consider whether the giving of the "come ahead" signal by the plaintiff was the proximate cause of the injury, as distinguished from the condition of the coupler. And if you find that, under the circumstances, the "come ahead" signal was the proximate cause for the injury, then your verdict must be for the defendant.'

"(4) The court erred in refusing the following requested instruction: 'The jury are instructed that if you believe from the evidence that plaintiff was guilty of negligence, which contributed to his injury, then he cannot recover.' Also in giving in place thereof the following: 'If after he started to go between the cars he has done something which was carelessly done, or which you can see from a preponderance of the evidence contributed proximately to the accident, then he cannot recover. If there be contributory negligence at

all, it depends not upon his assuming the risk under the circumstances in evidence in this case, but upon the care with which he acted while in the performance of the work which he assumed.'

"(5) Plaintiff was guilty of contributory negligence which bars his right to a recovery.

"(6) The court erred in requiring the jury to make the special findings above stated.

"(7) The court erred in refusing the following instruction: 'The court instructs the jury that the testimony of defendant's car inspector, Hanses, that he did inspect the car in question and did not discover any defect in the coupler, that his testimony should be given the same consideration, other things being equal between the witnesses, as positive testimony.'

"(8) The damages are excessive."

George W. Kretzinger and L. L. Smith, both of Chicago, Ill., for plaintiff in error.

James C. McShane, of Chicago, Ill., for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above). [1]  
1. The declaration is sufficient, if it brings the case within the provisions of the Safety Appliance and Employers' Liability Acts above stated and otherwise states a cause of action. It pleads, in both counts, that defendant was an interstate carrier, engaged in interstate commerce at the time of the injury, and that plaintiff was employed in such commerce. In addition it is stated in the first count that the automatic coupler, owing to its improper construction and defective and inoperative condition of repair, could not be coupled from the side of the car without the necessity of switchmen going between the end of the car having such coupler and the car or cars to which it was to be coupled. Other allegations are made showing how plaintiff was injured by reason of such defects, and that said cars were shoved together, without the express allegation that this was done by defendant. It is also stated that plaintiff was then and there employed by defendant as a switchman to work and switch with a certain engine and certain cars, which it was then and there operating upon its railroad in its business. This sufficiently shows that defendant shoved the cars together, by which the injury occurred. The question was not raised until after verdict, by a motion in arrest of judgment. Under such circumstances it may be inferred, if necessary, that defendant moved the cars. *Sargeant v. Baublis*, 215 Ill. 430, 74 N. E. 455; *American Bridge Co. v. Peden*, 129 Fed. 1004, 64 C. C. A. 581. And the declaration is in other respects good, and brings the case within the statutes referred to.

2. The question was asked the witness whether a coupler in ordinary repair could be closed with the foot as well as the hand. It was error to receive the testimony, because calling for a conclusion and invading the province of the jury; but in view of the uncontradicted testimony as to the condition of the coupler, clearly showing beyond any controversy that the coupler was not in a state of ordinary repair, the error was not prejudicial.



3. Defendant asked an instruction, based upon the testimony already stated in relation to the "come ahead" signal, to the effect that if it was given by plaintiff he could not recover. But it has been seen that the evidence shows the plaintiff did not give any such signal. It was not error, therefore, to refuse the instruction. The instruction actually given left the question to the jury; but defendant was not injured, because the proof shows no such signal by plaintiff.

[2] 4. Defendant asked an instruction submitting generally the question of contributory negligence. This was refused, and the jury charged that if plaintiff did something careless after starting to go between the cars, which contributed proximately to his injury, he could not recover. This was based upon *Schlemmer v. Buffalo R. & P. R. Co.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681, Id., 220 U. S. 590, 31 Sup. Ct. 561, 55 L. Ed. 596. *Delk v. St. Louis & S. R. Co.*, 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590, and *Chicago, R. I. & P. R. Co. v. Brown*, 185 Fed. 80, 107 C. C. A. 300, in this court. Plaintiff did not assume the risk caused by the defective coupler. Merely going between the cars, therefore, was not negligence, if he used ordinary care in doing so. If he went in with care, and after he got there still continued to act with ordinary prudence, the jury were authorized to find he was not chargeable with contributory negligence, as they did; and their conclusion is fully justified by the record. Indeed, under the Employers' Liability statute, even contributory negligence would not defeat recovery, only lessen damages; but the jury having found no want of care by plaintiff, and the record sustaining their conclusion, this provision of the liability statute is not involved.

5. This assignment involves the same question, whether plaintiff was negligent. The objection confused assumption of risk and contributory negligence. Whether plaintiff was negligent was fairly submitted to the jury, and decided for him. He testifies what he did after going between the cars, when he was justified in assuming that his "hard and fast" signal would be respected by the engineer. He gave no other signal, but by mistake the cars were pushed together and his arm crushed. It was negligence per se, for defendant to use the car having the defective coupler, even though the shoving of the cars together was accidental. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582. On the other hand, it was not negligent for plaintiff to attempt to use the defective coupler, because the statute expressly provides that he should not assume that risk by continuing to work after he knew the appliance was defective. The evidence tends to show plaintiff's diligence, not negligence, and the jury have decided in his favor.

[3] 6. This objection is that it was error for the court, in addition to a general verdict, to interrogate the jury whether defendant violated the Safety Appliance Act, whether this was a proximate cause of the injury, and whether plaintiff used ordinary care for his own safety. Questions almost identical were submitted, by request of

the same counsel who asked them in this case, in *Chicago, R. I. & P. R. Co. v. Brown*, supra, where this court affirmed the judgment. The practice of submitting special questions in aid of a general verdict is an exceedingly convenient one, and is of long standing. In *Walker v. New Mexico & Southern Pacific Railroad Co.*, 165 U. S. 593, at page 597, 17 Sup. Ct. 421, at page 422 (41 L. Ed. 837), Justice Brewer said:

"It was also a common practice, when no special verdict was demanded, and when only a general verdict was returned, to interrogate the jury upon special matters of fact. Whether or no a jury was compelled to answer such interrogations, or whether, if it refused or failed to answer, the general verdict would stand, or not, may be questioned. *Mayor, etc., v. Clark*, 3 Ad. & Ell. 506. But the right to propound such interrogatories was undoubted and often recognized. *Walker v. Bailey*, 65 Me. 354; *Spurr v. Shelburne*, 131 Mass. 429. In the latter case the court said (page 430): 'It is within the discretion of the presiding justice to put inquiries to the jury as to the grounds upon which they found their verdict, and the answers of the foreman, assented to by his fellows, may be made a part of the record, and will have the effect of special findings of the facts stated by him. And no exception lies to the exercise of this discretion. *Dorr v. Fenno*, 12 Pick. [Mass.] 521; *Spoor v. Spooner*, 12 Metc. [Mass.] 281; *Mair v. Bassett*, 117 Mass. 356; *Lawler v. Earle*, 5 Allen, 22.' So that the putting of special interrogatories to a jury and asking for specific responses thereto in addition to a general verdict is not a thing unknown to the common law, and has been recognized independently of any statute."

In *Rockefeller v. Wedge*, 149 Fed. 130, at page 132, 79 C. C. A. 26, at page 28, the court says:

"The practice of calling on jurors to specialize their verdict in the way that was done is furthermore deprecated, and the right of the court to do so is challenged. But the right to interrogate a jury, and to act upon their findings, is directly sustained in *Walker v. Southern Pacific R. R.*, 165 U. S. 593, 597, 17 Sup. Ct. 421, 41 L. Ed. 837, and *City of Elizabeth v. Fitzgerald*, 114 Fed. 547, 52 C. C. A. 321, and does not need to be vindicated here. And, far from being open to the criticism made of it, if it were oftener resorted to, it would save not a few mistrials; many rulings to which objection could otherwise be justly made being eliminated and rendered harmless. *Clementson on Special Verdicts*, 95, 286; 4 Mich. Law, Rev. 493."

And in *City of Elizabeth v. Fitzgerald*, supra, the trial court, upon a motion by defendant to direct a verdict, submitted special questions to the jury, not covering all of the issues, and, upon those questions being answered, granted the motion to direct. Not only is the practice beneficial, but it is difficult to see how it could properly be held erroneous, in any case; defendant suffering no injury. The case of *Daube v. P. & R. Coal Co.*, 77 Fed. 713, 23 C. C. A. 420, opinion by Judge Woods, is not in point, as that was a special verdict, which did not cover the whole case, and no general verdict.

[4] 7. This assignment covers a requested instruction as to the testimony of the car inspector, by whom the car in question was inspected, but who had no recollection of the particular car, relying wholly on his record book. By the requested instruction his testimony was to be given the same consideration, other things being equal between the witnesses, as positive testimony. While this particular instruction was refused, the court gave the ordinary one, substantially in this language: The greater weight of evidence does not depend

upon the number of witnesses testifying to the existence of a given fact. The jury are the sole judges of credibility, and the weight which should be given to their testimony, and might consider their interest, relation, demeanor, frankness, or candor (or the contrary), corroboration, or the reverse; and, all things considered, the jury should determine where the greater weight of evidence rests. This instruction as given was particularly applicable to the question of the coupler's condition, because so large a number testified to its faulty operation, as against the statement of the car inspector, who says he found nothing wrong with it. Under these circumstances, we think the point presented by the request was sufficiently covered by the general instruction.

[5] 8. The last assignment raises the question whether \$13,000 was an excessive recovery for the injury. Plaintiff was 23 years old at the time of the accident. As a result of his injuries his right arm was amputated, leaving less than three inches of a stump at the shoulder. As a switchman he earned from \$110 to \$115 a month. It was a year after the accident before he was able to work. His first work after the accident was keeping an account of the number of boxes turned out in a box factory, at which work he earned \$2 per day. After leaving the box factory he has ever since worked as a switch tender, earning \$55 a month. If he had not been injured, he might have worked up in the railroad service. As it is, he is filling one of the most ordinary positions in such service, with little or no chance of promotion. Under these conditions, the verdict should not be held excessive.

The judgment of the Circuit Court is affirmed.

SEAMAN, Circuit Judge. [6] I concur in the conclusion for affirmance and in the several rulings of the opinion, excepting one in reference to evidence of a "come ahead" signal given by the plaintiff below. Whatever may be deemed the preponderance of evidence thereupon, I believe the testimony of two witnesses—the engineer and the foreman of the switching crew—cannot, as matter of law, be rejected as testimony tending to prove that the signal was so given. Nevertheless, I am of opinion that the requested instruction, mentioned in the third assignment of error, was rightly denied, as it was inconsistent with the provisions of the act of April 22, 1908, referred to in the opinion. If the signal was given by the plaintiff, his action was negligence, contributing, with the defective coupler, in causing the injury; and no instruction of law was authorized that one or the other contributing negligence was a proximate cause.

#### On Rehearing.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges..

PER CURIAM. In the petition for rehearing defendant contends that three errors were committed in the opinion heretofore delivered by this court through SANBORN, District Judge.

[7] 1. In holding that, while the trial court erred in permitting wit-

ness Miller to testify that an automatic coupler in ordinary repair can be closed with the foot as well as the hand, nevertheless the error was not prejudicial, because the uncontradicted evidence showed that the coupler in question was out of repair. (Paragraph 2 of the opinion.)

On re-examination we find that the evidence to prove that the coupler was out of repair was not entirely uncontradicted. So we inquire anew whether the testimony was admissible. Objections were that the answer gave only an opinion or conclusion, and that the witness was not qualified as an expert. Miller had worked for several years as a brakeman, and coupling was a large part of his work. We think he was sufficiently qualified. He had already testified that he had put his "heel against the knuckle trying to push it in, and it would not go." His testimony (objected to) that couplers in ordinary repair can be closed with the foot as well as the hand might be deemed a matter of fact learned from observation and experience; but, if it be taken as a matter of opinion, we consider the testimony admissible. Automatic couplers, like buffers, switches, frogs, cattle guards, spark arresters, and other railroad machines and appliances, are not to be supposed to come so fully within the knowledge of average jurymen that experts may not properly be allowed to testify respecting their nature, operation, and normal condition. *Gila Valley R. Co. v. Lyon*, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. Ed. 276; *Troxell v. Delaware, L. & W. R. Co.* (C. C.) 180 Fed. 871; *Baltimore & P. R. Co. v. Elliott*, 9 App. D. C. 341; *Schroeder v. Chicago & N. W. R. Co.*, 128 Iowa, 365, 103 N. W. 985; *Johnson v. Detroit & M. R. Co.*, 135 Mich. 353, 97 N. W. 760; *Buckalew v. Quincy, O. & K. R. Co.*, 107 Mo. App. 575, 81 S. W. 1176; *Jones v. Shaw*, 16 Tex. Civ. App. 290, 41 S. W. 690; *San Antonio & A. P. R. Co. v. Waller*, 27 Tex. Civ. App. 44, 65 S. W. 210.

2. In holding that there was no evidence on which to base defendant's requested instruction that if plaintiff gave a "come ahead" signal to the engineer, and then went between the cars and in consequence thereof was injured, then the giving of the "come ahead" signal was the proximate cause and plaintiff could not recover. (Paragraph 3 of the opinion.)

On re-examination we agree with the view expressed by Judge SEAMAN in his concurring opinion that there was conflicting evidence respecting the giving of the "come ahead" signal, but that, even so, the requested instruction was properly refused. If, under the Employers' Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted "in whole or in part" from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act.



3. In overruling the fourth assignment of error. (Paragraph 4 of the opinion.)

For the reasons given in the opinion, we believe that the trial court committed no error against defendant in giving the challenged instruction.

The judgment is reaffirmed.

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WINTERS v. UNITED STATES.†

(Circuit Court of Appeals, Eighth Circuit. November 6, 1912.)

No. 3,723.

**1. POST OFFICE (§ 48\*)—MISUSE OF MAILS—OBSCENE LETTER—INDICTMENT.**

Where an indictment for sending an obscene letter through the mail charged that defendant deposited in the United States post office for mailing and delivery a certain obscene, lewd, and lascivious letter, he, the said defendant, knowing the contents of the letter and intending that it be transmitted and delivered by the post office establishment of the United States to the addressee, and described it by giving the commencing and closing sentences thereof, it was sufficiently certain to withstand a demurrer and sustain a conviction.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.\*]

Nonmailable matter, see notes to *Timmons v. United States*, 30 C. C. A. 79; *McCarthy v. United States*, 110 C. C. A. 548.]

**2. POST OFFICE (§ 48\*)—MISUSE OF MAILS—NONMAILABLE LETTER—INDICTMENT.**

Where an indictment for sending an improper letter through the mail did not identify or describe the letter, except by alleging that it was of a certain filthy and indecent character, and that it contained an article intended to be used to prevent conception, without alleging what such article was, it was fatally defective for want of certainty.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.\*]

**3. CRIMINAL LAW (§ 1038\*)—INSTRUCTIONS—SCOPE.**

Defendant was not entitled to urge on appeal objections to instructions not brought to the attention of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.\*]

**4. CRIMINAL LAW (§ 1172\*)—REVIEW—INSTRUCTIONS—PREJUDICE.**

Where an indictment charged defendant only with the mailing of certain nonmailable letters, he was not prejudiced by instructions authorizing a conviction if the jury found that he mailed the letters or "caused them to be mailed."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

**5. CRIMINAL LAW (§§ 663, 858\*)—TRIAL—EVIDENCE—SUBMITTING DOCUMENTS TO JURY—CARRYING TO JURY ROOM.**

Where, in a prosecution for misuse of the mails in depositing therein certain nonmailable letters, the letters were introduced in evidence, it was not error for the court to omit the reading of the letters to the jury in the courtroom, and to permit the jury to take the letters with them on retirement, though the better practice would have been to have either

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied February 17, 1913.

read the letters to the jury or given them to the jurors in turn to be read to themselves in open court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1602, 2056-2059, 2062; Dec. Dig. §§ 663, 858.\*]

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

A. M. Winters was convicted of sending illegal matter through the mails, and he brings error. Reversed in part, and affirmed in part.

Lee Monroe, of Topeka, Kan. (Phillip C. Wilson, W. S. Roark, and Carr W. Taylor, all of Topeka, Kan., on the brief), for plaintiff in error.

McCabe Moore, Asst. U. S. Atty., of Kansas City, Kan. (H. J. Bone, U. S. Atty., of Topeka, Kan., on the brief), for the United States.

Before SANBORN and CARLAND, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. The plaintiff in error, A. M. Winters, was indicted by the grand jury for a violation of section 211 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]). The indictment contained eight counts. The first count charged in substance that A. M. Winters, on or about the 30th day of July, in the year 1910, within the jurisdiction of the court, did then and there willfully, unlawfully, knowingly, and feloniously deposit for mailing and delivery in the post office of the United States, at Topeka, Kan., a certain obscene, lewd, and lascivious letter, the same being in typewriting and beginning as follows:

"Topeka, Kansas, July 29th, 1910.

"Mr. [name will be omitted], 1022 Taylor Street, City—Dear Sir: We wish to inform you, and have you find out for yourself and for our benefit, and for the benefit of yourself and your daughter, if what Dr. Winters is telling, \* \* \*" and ending as follows: "Hoping that you will find out the truth of this case, and kindly inform us, we beg to remain,

"Faternally yours,

K. C. Club House, President City."

The indictment charged that the said letter was then and there inclosed in an envelope, sealed up, and stamped with a two cent United States postage stamp and addressed "Mr. [name will be omitted], 1022 Taylor Street, Topeka, Kansas," and said A. M. Winters then and there knowing said letter to be of the character above set forth, and then and there intending the same to be transmitted and delivered by the post office establishment of the United States to said addressee, said letter being too obscene, lewd, and lascivious to be set forth in full herein or spread upon the records of the court, contrary to the form of the statute made and provided, and against the peace and dignity of the United States. The remaining eight counts, with the exception of the seventh, which will be hereafter discussed, charge said A. M. Winters, in the same formal manner, with depositing certain obscene, lewd, and lascivious letters in the United States post office at Topeka, Kan., for mailing and delivery in the post office of the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

United States to the addressee, he, the defendant, Winters, then and there knowing the contents of said letters; each count containing the beginning and closing sentence of a letter, and in most instances the date of such letter. The seventh count was as follows:

"And the grand jurors aforesaid, on their oath aforesaid, do further find and present that the said A. M. Winters, on or about the 27th day of July, in the year 1910, in the said division of said district, and within the jurisdiction of said court, then and there being, did then and there willfully, knowingly, unlawfully, and feloniously deposit for mailing and delivery in the post office of the United States at Topeka, Kan., in said division and district, a certain filthy letter of an indecent character, and then and there containing and inclosed in said envelope a certain article designed, adapted, and intended for preventing conception, and calculated to be used or applied for an indecent and immoral purpose, said article designed and intended as above set forth then and there being inclosed in an envelope and stamped with a two cent United States postage stamp and a special delivery stamp, and addressed: '[The name will be omitted], the Continental Creamery Co., Topeka, Kansas. Personal'"

—and said A. M. Winters then and there knowing said envelope and said inclosure therewith to be of the character above set forth, and then and there intending the same to be transmitted and delivered by the post office establishment of the United States to said addressee, said envelope and its inclosure then and there being too filthy and indecent to be set forth or more fully described herein, or spread upon the records of the court, contrary to the form of the statute made and provided and against the peace and dignity of the United States. To each of the eight counts defendant filed a demurrer, which was overruled, and an exception taken.

[1] These counts, with the exception of the seventh, it will be observed, charge every element of the offense, to wit, that the defendant deposited in the United States post office for mailing and delivery, a certain obscene, lewd, and lascivious letter, he, Winters, knowing the contents of the letter, and that the same was intended to be transmitted and delivered by the post office establishment of the United States to the addressee. It informed the defendant of the identity of the letter by giving the commencing and closing sentence thereof. We think the respective counts of the indictment, except the seventh, were sufficient in this respect, and that they each charge a violation of the statute, and with sufficient particularity to inform the defendant of the particular offense with which he was charged, and that the demurrer as to these counts was properly overruled.

[2] The seventh count failed in every respect to identify the letter said to have been mailed, excepting that it was described as of a certain filthy and indecent character, that it contained a certain article designed, adapted, and intended for preventing conception, and calculated to be used or applied for an indecent and immoral purpose. What the character of the article was was not indicated. It may have been a drug, or it may have been some mechanical device. It did not even give the date of the letter. This count clearly failed to disclose to the defendant the nature of the offense with sufficient definiteness to advise him of what he was charged, or to avail himself of his conviction or acquittal as a protection against further prosecution for the

same offense. The decision in *United States v. Pupke* (D. C.) 133 Fed. 243, is directly applicable to this count of the indictment. In that case the charge in the indictment was that the defendant:

"Did then and there unlawfully and feloniously deposit and cause to be deposited [in the St. Louis post office for mailing and delivery] a certain letter and writing giving information to one Miss Effie Williams where, how, and of whom, and by what means, an article or thing designed and intended for the prevention of conception might be obtained."

The court said:

"The letter is then set out, with appropriate averments as to the time of its mailing and its destination; but the letter in no wise states what the particular article or thing consisted of. It refers to the fact that the accused has inclosed to the addressee a copy of [our Hydro System]. The sufficiency of this indictment is challenged by demurrer, and the point made against it is that the pleader does not disclose what the particular 'article or thing' is about which the defendant gave information to the addressee.

"The language of the section in question, already set out, makes any article or thing designed or intended for the prevention of conception nonmailable, and it is first made an offense against the United States to mail any 'such article or thing.' Suppose the indictment had charged the defendant with having mailed 'an article or thing designed or intended for the prevention of conception,' without any specification as to what that article or thing was; could it be contended for a moment that the defendant was thereby duly informed of the nature and cause of the accusation against him, within the meaning of the constitutional guaranty to that effect? Could it be successfully contended that he was thereby so furnished with such a description of the charge against him as would enable him to make his defense, or avail himself of his conviction or acquittal as a protection against further prosecution for the same cause, within the meaning of the leading case on that subject of *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588?

"These questions seem to answer themselves. The statutes of the states of the Union make the larceny of personal property an offense. Surely it would not be sufficient to charge a defendant in an indictment with 'stealing personal property,' without specifying what the property was. Now, if it is not sufficient pleading to aver that a defendant 'mailed an article or thing designed or intended to prevent conception,' without specification as to what that article or thing was, the same reasoning would, in my opinion, conduce to the conclusion that it would not be sufficient to allege that the defendant mailed a letter informing the addressee where, how, and of whom she might obtain such an article or thing, without specifying what the article or thing was."

We think the foregoing excerpts from the opinion in the above-cited case is not only a correct announcement of the law (*Floren v. U. S.*, 186 Fed. 961, 108 C. C. A. 577; *U. S. v. Tubbs* [D. C.] 94 Fed. 356-360; *U. S. v. Hess*, 124 U. S. 483, 486, 487, 8 Sup. Ct. 571, 31 L. Ed. 516; *Evans v. U. S.*, 153 U. S. 584, 587, 14 Sup. Ct. 934, 38 L. Ed. 830; *Brown v. U. S.*, 143 Fed. 60, 62, 74 C. C. A. 214), but particularly applicable in this case to the count under consideration. As stated, this count in no respect attempts to identify the letter alleged to have been mailed, excepting that it was of a filthy and indecent character. It did not in any manner indicate the nature or kind of article inclosed, except that it was an article to prevent conception and calculated to be used or applied for an indecent or immoral purpose. This was clearly insufficient, and the demurrer to the seventh count of the indictment should have been sustained.



The defendant was found guilty, and sentenced by the court on each count to pay a fine of \$100 and be imprisoned for a term of 2½ years, the respective sentences of imprisonment to run concurrently. Defendant brings the case here for review.

The court, in its charge to the jury, speaking with reference to the first count, said:

"If you believe from the evidence in this case beyond a reasonable doubt that the defendant did either mail or cause this letter to be mailed to the father of this girl, you will return against him a verdict of guilty."

Later on the court said:

"The thing you will determine all along is whether the defendant mailed or caused them to be mailed to this witness [the name will be omitted]. If so, return your verdict against the defendant."

Later in the charge the court said:

"Consider all the facts and circumstances in this case having any concern whatever as to in any manner violating the law, only ascertaining beyond a reasonable doubt that the defendant did mail these different letters. In each case that you find that he did, return your verdict against the defendant. In case you fail to so find, return a verdict in his favor of not guilty."

The defendant excepted to the above portion of the charge of the court as follows:

"The defendant further specially excepts to the portion of the charge which instructs the jury that they find the defendant guilty in case he mailed or caused to be mailed through the mails, because the indictment does not charge him with causing them to be mailed."

[3, 4] The foregoing portions of the charge should doubtless have included a statement of knowledge by defendant of the contents of the letters, but no objection was made to the charge in that respect; the objection being confined to the statement that if the jury found that defendant mailed or caused the letters to be mailed, and for the reason that the indictment charged the mailing only; that it did not charge defendant with having caused them to be mailed. While the objection is technically correct, we do not think it of such a prejudicial character as to justify a reversal.

Certain requests to charge were made, but we think they were sufficiently covered in the main charge.

Objections were made to the admission and exclusion of certain evidence during the trial. These objections, however, are without merit. Objection was made to certain statements by government's counsel in his argument to the jury. He was, however, promptly, on objection, admonished by the court to refrain from such statements. We do not think, under the circumstances, the statements were of such a prejudicial character as to warrant a reversal of the case.

[5] It is further insisted that the court erred in permitting the letters alleged in the respective counts of the indictment to be taken by the jury to their room without their having been read to the jury or by the jury upon the trial. The court said that he thought, in the interest of justice and decency, in view of the crowded courtroom, that the letters better not be read then to the jury; but he would permit them to be taken by the jury to their room when they retired,

to be read by them. To this procedure defendant made no objection. The letters were introduced in evidence on the trial, seen and inspected by the defendant, and we think the mere matter of the letters being taken by the jury to be read in their room while deliberating upon the case, rather than being read to the jury or by the jury on the trial of the case, was a matter which the defendant could waive. It would be better practice, however, to have the letters either read to the jury, or given to the jury and each one of the jurors required to read them, while the case was on trial, rather than to have them take them to the jury room, to be there first read.

For reasons already given, the judgment based upon count 7 is reversed, and the cause remanded, with directions to sustain the demurrer to the seventh count. In all other respects the judgment is affirmed.

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WEBB et al. v. STONE et al.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1912.)

No. 3,771.

**1. MORTGAGES (§ 319\*)—PAYMENT—EVIDENCE.**

Complainant company, having advanced defendant S. \$28,813.50 to purchase 788 head of cattle, agreed to advance him \$10,000 more to feed the cattle, on condition that complainant W. would guarantee the company to that extent. To obtain such guaranty, defendants executed a mortgage on certain real property, pursuant to a contract that, on payment of \$26,000, he would cause the mortgage to be released. The cattle were thereafter sold for \$38,650.22, but prior thereto complainant company sold 299 head of other cattle to S., for which he gave his note for \$10,500: the wife of S., to whom the mortgaged property belonged, being in no manner connected with that transaction. *Held*, that complainant W. had no right to apply the proceeds of the cattle sold to the payment of the purchase price of both bunches of cattle before applying the same to the \$10,000 advancement for feed, and that the note and mortgage were therefore paid and satisfied.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 855-863, 875, 913, 1356, 1366; Dec. Dig. § 319.\*]

**2. SUBROGATION (§ 7\*)—SECURITY TO GUARANTOR—ENFORCEMENT.**

Where defendants executed a mortgage on real property to W. to induce him to guarantee defendants' indebtedness to a commission company for advances, W. was not entitled to foreclose the mortgage prior to his having paid anything to the creditor on the guaranty.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 18, 21-29, 38, 77, 83, 92; Dec. Dig. § 7.\*]

**3. TRUSTS (§ 210\*)—CONTRACT OF TRUSTEE—CONCLUSIVENESS AGAINST BENEFICIARY.**

Where defendants executed a mortgage to W. to induce him to guarantee defendants' indebtedness to a commission company, the latter was bound by W.'s contract with defendants with reference to the payment of the debt in case W. were regarded as a trustee of the security for the commission company.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 297, 299, 300; Dec. Dig. § 210.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by Percy M. Webb and the French-Webb Live Stock Commission Company against Rene E. Stone and another to foreclose a mortgage on certain real estate owned by defendant Grace E. Stone, with cross-action by defendants Stone to have the mortgage canceled and their title quieted as against such mortgage. From a decree in favor of defendants in the original action and for complainants in the cross-action, Percy M. Webb and the French-Webb Live Stock Commission Company appeal. Affirmed.

I. W. Stephens, of Ft. Worth, Tex. (Stephens & Miller, of Ft. Worth, Tex., on the brief), for appellants.

W. I. Gilbert, of Oklahoma City, Okl. (E. H. Bond, of Oklahoma City, Okl., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. It appears from the facts in this case that in November, 1909, the French-Webb Live Stock Commission Company advanced to Rene E. Stone the sum of \$28,813.50, with which to purchase 788 head of cattle. The cattle were purchased by Rene E. Stone, and a mortgage given upon them to the French-Webb Live Stock Commission Company to secure the money thus advanced. Stone expected to obtain money from a local bank with which to procure feed for said cattle. After getting the cattle to his place, the bank failed to furnish him the money with which to procure feed for the cattle, and he then applied to the French-Webb Company, of which Percy M. Webb was at that time vice president, and, during the following year, president, stating the condition, and saying in effect that he saw no way out but for them to take the cattle back. Negotiations were had whereby the French-Webb Commission Company agreed to advance Stone money with which to buy feed for the stock, if Percy M. Webb would guarantee the payment of the same. Percy M. Webb guaranteed the Commission Company to the extent of \$10,000, and to secure Webb from loss by reason of such guaranty Rene E. Stone and Grace E. Stone gave to Webb a mortgage upon certain real estate owned by Grace E. Stone, in the sum of \$10,000. At the same time of the giving of the mortgage, a contract was entered into between Percy M. Webb and Rene E. Stone, as follows:

"Know all men by these presents, that, whereas, R. E. Stone, of Purcell, Okla., is indebted to the French-Webb Live Stock Com. Co. of Ft. Worth, Texas, in the sum of twenty-eight thousand eight hundred thirteen and 50/100 (\$28,813.50) dollars, for which the said Rene E. Stone has given his certain promissory notes; and, whereas, the said R. E. Stone, joined by his wife, Grace E. Stone, has this day executed to Percy M. Webb their joint promissory note in the sum of ten thousand (\$10,000.00) dollars, due and payable July 1, 1910:

"Now, in consideration of the mutual undertakings of the parties hereto, it is agreed that upon the payment of said \$10,000.00 to the said Percy M. Webb, and sixteen thousand (\$16,000.00) dollars additional, the same consti-

tuting a portion of the \$28,813.50, the said Percy M. Webb shall cause to be executed and delivered to the said R. E. Stone a release to the mortgage this day executed by the said R. E. Stone and Grace E. Stone, his wife, said release to be in statutory form, to be properly executed and acknowledged, and that upon the payment of said sums, neither the said Percy M. Webb, nor the said French-Webb Live Stock Com. Co. shall have or claim any further lien or interest whatsoever in and to the lands described in the mortgage of even date herewith.

"Witness our hands at Purcell, Oklahoma, this 27th day of November, 1909.

Rene E. Stone.

"Percy M. Webb."

It was also agreed between Webb and Stone that Stone should put 400 head of the cattle upon full feed, the remaining 388 head to be run in the stock fields upon rough feed. Subsequently Stone sold 425 head of the cattle for \$19,801, and remitted a check for the same either to Percy M. Webb or to the French-Webb Live Stock Commission Company. They deducted therefrom, as expenses, commissions upon the sale of the cattle, discount on the check, retained out of the amount in round numbers \$2,000 to cover advances, and credited Rene E. Stone upon his note for \$28,813.50, with \$17,000. The remaining cattle were subsequently sold for Stone by the French-Webb Live Stock Commission Company, and he was credited with the net proceeds. The total amount for which the 788 head of cattle sold was \$38,650.22; the last of the cattle being sold in June, 1910. In April, 1910, the French-Webb Live Stock Commission Company sold another bunch of cattle, consisting of 299 head, to Rene E. Stone, for which he gave his note in the sum of \$10,500. Grace E. Stone was in no manner connected with the latter purchase. In December, 1910, Percy M. Webb brought an action to foreclose the real estate mortgage given by Rene E. Stone and Grace E. Stone upon her land. They answered, alleging payment, and also instituted their action against Webb and the French-Webb Live Stock Commission Company, to have said mortgage canceled and their title quieted as against said mortgage. The two actions were subsequently consolidated and heard together. The trial court found that the mortgage was paid, entered a decree dismissing the foreclosure bill filed by Percy M. Webb, and in favor of Rene E. Stone and Grace E. Stone, canceling and discharging the mortgage, from which Percy M. Webb and the French-Webb Live Stock Commission Company prosecute this appeal.

[1] The real question in the case is this: Was the mortgage paid and satisfied upon the net payment of \$26,000 by Stone out of the proceeds of the sale of the 788 head of cattle. We think it was. This mortgage was given to secure Webb from loss upon his guaranty to the French-Webb Live Stock Commission Company for advancements which the French-Webb Live Stock Commission Company should make to Stone to feed the 788 head of cattle, to the amount of \$10,000; and the contract between Webb and Stone was that, upon payment of the \$10,000, which should be so advanced, and of \$16,000 additional, upon the \$28,813.50 mortgage given for the purchase price of the cattle, that the real estate mortgage should be discharged. More than this was paid from the proceeds of those cattle; but the



French-Webb Live Stock Commission Company and Percy M. Webb insist that they have a right to apply the proceeds of the cattle in full payment of the \$28,813.50 mortgage, and the indebtedness resulting from the purchase and sale of the subsequent lot of cattle bought by Stone, before applying anything upon the \$10,000 note secured by the real estate mortgage.

In executing the \$10,000 note and securing the same by mortgage upon real estate owned by Grace E. Stone, Grace E. Stone was, as between her and her husband, Rene E. Stone, a surety merely, and such fact was known to Percy M. Webb. The written contract above mentioned, between Rene E. Stone and Percy M. Webb, was executed, as stated, at the same time of giving the \$10,000 note and real estate mortgage. It was a part and parcel of the same transaction, and they should be construed together. The note and mortgage were made with reference to advancements which should be made by the French-Webb Live Stock Commission Company, to procure feed for the 788 head of cattle only, and when there was paid, from the proceeds of those cattle or otherwise, the amount advanced for such feed (not exceeding \$10,000), and \$16,000 upon the note of \$28,813.50, the note for \$10,000, for which Grace E. Stone mortgaged her real estate as surety, was fully discharged. The account of the Commission Company with Rene E. Stone was kept as a running account, covering advancements made relative to the two purchases of cattle, and after crediting all Stone's payments to the Commission Company upon both transactions there was a balance of \$8,385 due from Stone, and as this was \$1,615 less than \$10,000 they credited \$1,615 upon the note secured by the real estate mortgage.

[2, 3] In the first place, Percy M. Webb could not maintain the action of foreclosure, as he had not paid the Commission Company anything upon his guaranty of \$10,000, and hence there was nothing due him from the Stones. If it be said that he took the mortgage in effect to himself as trustee for the French-Webb Live Stock Commission Company, they are bound by his contract with Stone. So, in either event, whether the contract referred to between Stone and Webb was made by Webb in his individual capacity, and in consideration of his guaranty of advances of money to feed the 788 head of cattle to the extent of \$10,000, or whether it was made with him as trustee for the French-Webb Live Stock Commission Company, is immaterial. In either view of the case, the contract was performed, which entitled the Stones to a release of that mortgage.

For these reasons, the decree is affirmed.

## RAPHAEL v. WASATCH &amp; J. V. R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1912.)

No. 3,712.

## 1. JUDGMENT (§ 588\*)—RES JUDICATA.

Complainant's father, since deceased, owned certain railroad bonds secured by a deed of trust which was subject to two other mortgages of underlying companies. These having been foreclosed under the power of sale contained therein, complainant's father sued to set aside such sales for fraud and was defeated; the court rendering judgment sustaining the sales. *Held*, that such judgment was res judicata against the right of complainant to foreclose the junior deed of trust securing bonds which he received from his father's estate.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062, 1090; Dec. Dig. § 588.\*]

## 2. JUDGMENT (§ 677\*)—RES JUDICATA—PARTIES.

Where the trustee in a junior deed of trust securing railroad bonds, which was subject to mortgages on the property of underlying companies, was a party to a suit to set aside a foreclosure of such mortgages, a judgment sustaining the foreclosure was conclusive on the bondholders represented by such trustee.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062, 1193; Dec. Dig. § 677.\*]

Appeal from the Circuit Court of the United States for the District of Utah; John A. Marshall, Judge.

Suit by Russell Sage Raphael against the Wasatch & Jordan Valley Railroad Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Thomas Bracken, of New York City, and Hiram E. Booth, of Salt Lake City, Utah (Delos McCurdy, of New York City, on the brief), for appellant.

Henry McAllister, Jr., of Denver, Colo. (Joel F. Vaile, of Denver, Colo., and Waldemar Van Cott, E. M. Allison, Jr., and William D. Riter, all of Salt Lake City, Utah, on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. This action was brought in the Circuit Court of the United States for the District of Utah, to foreclose a mortgage executed by the Wasatch & Jordan Valley Railroad Company, May 1, 1879, to the Union Trust Company of New York, as trustee, to secure the payment of 1,200 bonds of \$1,000 each; plaintiff alleging that he is the owner and holder of 585 of the bonds covered by said mortgage. To this action the defendants pleaded a former adjudication, to wit, an action brought by Nathaniel W. Raphael, then owner and holder of 579 of the 585 bonds held by this complainant. The usual replication was filed to said plea of former adjudication, upon trial said plea was sustained, and plaintiff's bill dismissed, from which judgment of the court complainant prosecutes this appeal.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] From the evidence it appears that, on the 7th day of January, 1902, Nathaniel W. Raphael, on his own behalf and on behalf of all other bondholders similarly situated, who might choose to join as complainants and bear a pro rata portion of the expense of the suit, filed his bill in the Circuit Court of the United States for the District of Utah, against the Wasatch & Jordan Valley Railroad Company, the Rio Grande Western Railway Company, the Union Trust Company of New York, as trustee, and others, as defendants, in which bill he alleged the execution of the mortgage from the Wasatch & Jordan Valley Railroad Company, of date May 1, 1879, to the Union Trust Company of New York, as trustee, to secure the issue of 1,200 bonds of the denomination of \$1,000 each; that 884 were issued. He alleged his ownership of 579 of the bonds, with interest coupons thereto attached, for the interest which fell due November 1, 1899, and subsequently, that the interest had not been paid, that he had made written demand upon the defendant, the Union Trust Company of New York, to declare the principal of said bonds due and payable, and to institute a suit to foreclose said trust deed, and alleged that said Trust Company declined to bring suit for foreclosure of said trust deed, and alleged that, because of the refusal of said trustee to act as aforesaid, and because the defendant the said Wasatch & Jordan Valley Railroad Company failed to pay the said interest coupons, and more than six months had elapsed since demand of payment was made, that he, as owner of said 579 bonds, elected to declare, and did declare, the principal of said bonds due and payable. He further alleged that the Wasatch & Jordan Valley Railroad Company was organized in April, 1879, under and pursuant to the laws of the territory of Utah, by the consolidation of a railroad organized under the laws of said territory, called the Bingham Canon & Camp Floyd Railroad Company, and a certain other railroad corporation, organized under the laws of said territory, called the Wasatch & Jordan Valley Railroad Company. The bill further showed that, at the time of said consolidation, there was outstanding a trust deed covering that part of the railroad owned by the said old Wasatch & Jordan Valley Railroad Company, dated April 10, 1873, to secure payment of 710 bonds of the old Wasatch & Jordan Valley Railroad Company, of the denomination of \$500 each; that at the time of said consolidation there was also outstanding a trust deed executed by the Bingham Canon & Camp Floyd Railroad Company, dated June 3, 1874, securing the payment of 300 bonds of said Bingham Canon & Camp Floyd Railroad Company, of the denomination of \$1,000 each; that each of said trust deeds issued by said underlying companies contained a power of sale, authorizing the trustees therein named to sell the mortgaged premises, in default of payment of the interest or principal of the bonds, and that the trustees purported to sell, under the powers of sale expressed in said trust deeds, to the Denver & Rio Grande Western Railroad Company, a railroad corporation organized and existing under the laws of the territory of Utah, on the 29th day of December, 1881, the railroad and equipment described in said trust deeds; that the trustees executed to said company a deed of con-

veyance thereof, covering the properties therein described, which was, by the bill shown to be the same properties covered by the trust deed of May 1, 1879. Complainant alleged the invalidity of said foreclosure sales, charging fraud and various irregularities, and prayed in his bill as follows:

"Wherefore, complainant prays that it be decreed:

"1. That said foreclosure sales, under said underlying mortgages by said George M. Young, by said Charles W. Scofield and George T. M. Davis, as trustees, be declared illegal and be set aside, and complainant be allowed to redeem on his own behalf and on behalf of the other bondholders secured by the said trust deed of May 1, 1879, the railroad properties so sold upon paying the amount found to be due upon an accounting being first had.

"2. That an accounting be had by the defendant the Rio Grande Western Railway Company of the use and occupancy of the said mortgaged premises and of the said 11½ miles of extensions, not only while in its own possession, but while in the possession of the Denver & Rio Grande Western Railway Company, and that the said defendant the Rio Grande Western Railway Company be decreed to pay the amount such accounting shall show to be due for the use and occupation of said property.

"3. That an account be taken of the amount due of principal and interest on the said bonds outstanding secured by said trust deed of May 1, 1879, and the said premises be decreed to be sold according to law and the rules and practice of this court, should the said defendant the Wasatch & Jordan Valley Railroad Company fail to pay, upon a day to be named by this court, the amount found to be due upon said accounting being had.

"4. That the defendant the Wasatch & Jordan Valley Railroad Company, and all persons claiming under said last-named company, may be barred and foreclosed of all right, claim, lien, and equity of redemption in and to the said mortgaged premises described in the said trust deed of May 1, 1879.

"5. That in the foreclosure sale of the property described in said trust deed of May 1, 1879, said bonds issued and outstanding under said trust deed may be ratably received in payment by any purchaser or purchasers of said described mortgaged property, provided sufficient amount in cash is paid by said purchaser or purchasers to pay the costs and expenses of this action.

"6. That a receiver be appointed at once to take possession of and operate said railroad property described in said trust deeds, May 1, 1879, during the pendency of this suit, and that a writ of injunction be issued out of this court restraining the defendant the Rio Grande Western Railway Company, its officers and agents, from in any manner interfering with the receiver or disposing of said railroad properties during the pendency of this suit.

"7. That complainant may have such other or different relief as may be just and equitable."

The Union Trust Company, though duly served with process, defaulted, and a decree pro confesso was entered against it. Other defendants joined issue, evidence was taken, and the cause submitted to the court. The trial court found upon the issues certain facts, among them being the following:

"First. The complainant does not occupy the position of an innocent purchaser for the value of the 579 bonds held by him. \* \* \*

"Second. There is no substantial evidence of any fraud or improper conduct on the part of the trustees in the underlying mortgages of the old Wasatch and Bingham roads, participated in by the Denver & Rio Grande Railway Company, to prejudicially influence or affect the sale of the properties to the Denver & Rio Grande Western Railway Company.

"(a) The properties brought their fair and reasonable value at the sale, and the claim that they were sold for such a grossly inadequate sum as to be in and of itself evidence of fraud is entirely unsupported by the proof.



"(b) There was an undoubted default in the payment of interest on both the old Wasatch and Bingham bonds.

"(c) There is no substantial evidence that there were any net earnings in 1880 or 1881, of either of these last-mentioned roads, applicable to the payment of interest on their bonds, and certainly no evidence that any one, and much less any one whose acts are imputable to the defendant the Rio Grande Western Railway Company or its predecessor, fraudulently concocted a scheme to divert net earnings to other objects for the purpose of creating a fictitious and false necessity to foreclose the mortgages.

"(d) Any and all other suggestions of actual fraud found either in the bill or argument by counsel are without substantial foundation.

"Third. There were no such irregularities attending the execution of the powers of sale found in either the old Wasatch or Bingham mortgages as to invalidate the sales made. \* \* \*"

The court entered a decree dismissing complainant's bill. Thereupon complainant appealed to this court, and the decree was affirmed. *Raphael v. Rio Grande Western Ry. Co.*, 132 Fed. 12, 65 C. C. A. 632. (A statement of the facts will there be found recited much more in detail than is thought necessary to now state them.) Raphael petitioned the Supreme Court for a writ of certiorari, which was denied. 198 U. S. 587, 25 Sup. Ct. 804, 49 L. Ed. 1175.

The mortgage of May 1, 1879, under which complainant claims, was subject to the two mortgages before mentioned of the underlying companies, which were foreclosed by virtue of the power of sale in them contained in December, 1881, and it was necessary for Nathaniel W. Raphael, in his action of foreclosure, to avoid and have set aside as invalid the foreclosure sales of December, 1881, for, as said by Judge Hook, rendering the decision of this court in that case, in his statement of facts:

"If the trustee's sale of 1881 should be sustained against complainant's attack, the lien of the second mortgage, which was given to secure the bonds held by him, is concededly cut off and foreclosed."

It is very apparent, then, that it was necessary for Nathaniel W. Raphael, in his suit to foreclose the mortgage of May 1, 1879, to establish that it was an existing lien upon the property. This could only be done by showing that the trustees' sales in December, 1881, were invalid. That was the principal and prime issue before the court. It was adjudicated in that case that the trustees' sales of 1881 were valid, and hence that the lien of the mortgage of May 1, 1879, no longer existed as a lien upon the property, and could not be foreclosed as such. The complainant in the case before us, Russell Sage Raphael, acquired the ownership of 579 of the bonds sued upon from the estate of his father, Nathaniel W. Raphael, being the bonds upon which his father's action was based. As to them he was clearly in privity with his father.

[2] As to the remaining 6 bonds, which he has subsequently purchased, he is equally bound by that decree, for the reason that the Union Trust Company, trustee of the mortgage, was a party to that action and bound by the judgment therein. It being a party to that action, he, as beneficiary, is equally bound. In *Woods v. Woodson*, 100 Fed. 515-519, 40 C. C. A. 525, 529, Judge Thayer, writing the opinion for this court, said:

"It is further claimed in behalf of the appellant that the decree against the Farmers' Loan & Trust Company, adjudging the invalidity of the joint deed of trust, is not binding upon him, because he was not a party to the suit in which the decree was rendered, even if it is binding upon his trustee, the Farmers' Loan & Trust Company, who was duly served with process. This point, however, must be ruled against the appellant on the strength of the following cases: *Beals v. Railroad Co.*, 133 U. S. 290, 10 Sup. Ct. 314, 33 L. Ed. 608; *Kerrison v. Stewart*, 93 U. S. 155, 160, 23 L. Ed. 843; *Shaw v. Railroad Co.*, 100 U. S. 605, 611, 25 L. Ed. 757; *Richter v. Jerome*, 123 U. S. 233, 247, 8 Sup. Ct. 106, 31 L. Ed. 132—and especially on the strength of the decision in *Beals v. Railroad Company*, which is on all fours with the case in hand. In the latter case a bill was filed against the trustee in a deed of trust, to cancel the same; but the complainant *Beals*, who was a bondholder, was not made a party thereto. Nevertheless it was ruled that the bondholders were parties by representation, and that a decree canceling the mortgage was obligatory upon the bondholders, as well as upon their trustee."

In addition to the cases cited in the excerpt from the opinion of Judge Thayer, see *Farmers' L. & T. Co. v. Kansas City, etc., Co.* (C. C.) 53 Fed. 182-185; *Heckman v. U. S.*, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820.

It is strenuously insisted, however, on the part of appellants, that the action brought by Nathaniel W. Raphael was not one to foreclose the mortgage, but one to redeem from the foreclosure sales of 1881. While it is true that Nathaniel W. Raphael, in his prayer for relief, did ask to be permitted to redeem from those sales, that was not the main and chief object of his suit. The object of his suit was to have the mortgage of May 1, 1879, established as a lien upon the road, and it foreclosed. To do this, as before stated, it was necessary and essential that the sales of foreclosure in 1881 be declared invalid, or he permitted to redeem from that sale, which, if he was entitled to do, would have the effect of restoring the lien of the mortgage of 1879, and it could then be foreclosed. It is insisted that it could not be a foreclosure proceeding, because, under the statute law of Utah, a mortgagee could have but one remedy, either at law to recover the indebtedness secured by the mortgage, or foreclose the mortgage, and it is argued that, as in that case, Nathaniel W. Raphael sought to have the sales of 1881 declared void, or he permitted to redeem therefrom, and for an account of the rents and profits from the Rio Grande Railway Company, he was seeking a remedy inconsistent with the foreclosure of a mortgage, and hence it cannot be said to have been an action of foreclosure. But as we have before seen, it was essential, to enable him to obtain a foreclosure of that mortgage, to avoid the sale of 1881, either by showing its invalidity or by redeeming therefrom. Unless he could do one of these, the mortgage securing his bonds had no existence as a lien upon the railroad properties. This was the issue directly tried, and found against him, and the relief he sought, to wit, the foreclosure of that mortgage, denied.

The decree in that case, we think, possesses every element of *res adjudicata*, and the court below rightly sustained the plea, and its decree is affirmed.

## CANADIAN NORTHERN RY. CO. v. OLSON et al.

(Circuit Court of Appeals, Eighth Circuit. December 10, 1912.)

No. 3,747.

*(Syllabus by the Court.)***1. RAILROADS (§ 484\*)—SETTING FIRES—SUFFICIENCY OF EVIDENCE.**

The evidence of the setting of a fire by an engine of a defendant railroad company reviewed, and *held* to be so substantial that there was no error in the refusal to withdraw it from the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740–1746; Dec. Dig. § 484.\*]

**2. RAILROADS (§ 481\*)—SETTING FIRES—FIRES STARTED BY OTHER ENGINES OF DEFENDANT.**

When the engine which might have set the fire is unknown or unidentified, it is competent to introduce testimony that some of the defendant's engines threw ignited sparks or set fires, or that fires started near the track, soon after they passed, at other times within a few weeks of the time the fire in question started, and at other places in the vicinity of the place of its origin.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1717–1729; Dec. Dig. § 481.\*]

In Error to the District Court of the United States for the District of Minnesota; Charles F. Amidon, Judge.

Actions, tried together on the same evidence, by Elias Olson and others against the Canadian Northern Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Oscar Mitchell, of Duluth, Minn. (Hector Baxter, J. L. Washburn, and W. D. Bailey, all of Duluth, Minn., on the brief), for plaintiff in error.

Charles Loring, of Crookston, Minn. (Albert Chilgren, of Williams, Minn., on the brief), for defendants in error.

Before SANBORN and HOOK, Circuit Judges.

SANBORN, Circuit Judge. One of the statutes of the state of Minnesota charges each railroad corporation owning or operating a railroad in that state with responsibility in damages to any person whose property is injured or destroyed by fire communicated, directly or indirectly, by the locomotive engines in use upon the railroad it uses or operates. Laws of Minnesota 1909, c. 378, p. 454 (Rev. Laws Supp. 1909, § 2041). The plaintiffs below, who are the defendants in error here, brought their separate actions against the Canadian Northern Railway Company, a corporation, under this law, to recover damages which they alleged were inflicted upon their respective properties by a fire which they averred was set by one of the company's engines on September 29, 1910. The three actions were tried together by stipulation upon the same evidence, and verdicts and judgments were rendered against the company, which it challenges on two grounds: That there was no substantial evidence to sustain the finding that the fire which started on September 29, 1910, was

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

set by the railroad company; and that the court erroneously admitted evidence tending to show that other fires had been set by the defendant's engines in the immediate vicinity of the origin of the fire in question during four months preceding September 29, 1910.

The record before us discloses substantial evidence tending to show these facts: The fire was first discovered on the north side of the railroad track about half way from Williams to Cedar Spur within 15 minutes after a heavy freight train had passed over this track. The track between these places was straight, the distance between them was  $2\frac{1}{2}$  miles and one could see along the track from one place to the other. The summer and early fall of the year 1910 were dry, and numerous fires had been, and some were, burning in the vicinity. The right of way of the railroad company on the sides of the track was incumbered with weeds, grass, brush, and wood. The wind was blowing from a southerly direction. About the time the freight train left Williams, the witness Dahl started to walk along the track from Cedar Spur to that place, and the witness Senyohn started to walk along the track from Williams to Cedar Spur. There was no wagon road between these places, and pedestrians customarily traveled between them on the railroad right of way. When Dahl and Senyohn started, they looked along the track and right of way, but saw no one between them, except those upon the freight train, and no fire or smoke on the right of way, except the smoke which the engine emitted. There was a downgrade from Williams to Cedar Spur, and it was unnecessary to work the engine, and it was not worked between these places, but some of the way it sent forth some smoke. A few minutes after the engine passed a point midway between these stations, the two witnesses, who were walking upon the track toward each other, saw smoke rising at that point on the north side of the track, and a few minutes later, when they reached the point from which the smoke arose, a brisk fire was burning there. Sparks had been seen at other times, which were thrown from freight engines of the defendant during the summer of 1910, which lived until they reached the ground, and fires had started by the side of the track a few minutes after engines of the defendant had passed. The engine which drew the freight train at the time the fire in question started was equipped with the best devices to arrest sparks. These devices were in perfect order, the engine was carefully and properly operated, and suitable fuel to prevent the emission of sparks was used to drive it. There was testimony in the case of other facts, but of none that can change the deduction that must be drawn from those which have been recited.

[1] If the question to be determined in this case were whether or not there was any substantial evidence here of the negligence of the defendant company, the answer might well be that there was none, because, if the engine set a fire, that fact might not overcome the fact that the defendant carefully operated the most approved devices and machinery, since a part of the sparks unavoidably escape, notwithstanding such operation. *Woodward v. Chicago, Milwaukee & St. Paul Ry. Co.*, 145 Fed. 577, 579, 75 C. C. A. 591, 593. But under



the Minnesota law a railroad company is liable for the damage caused by a fire it sets, although it is free from all negligence (Rev. Laws of Minnesota 1909, § 2041), and the only question here is whether or not there was substantial evidence that one of the engines of the defendant caused the fire. A careful review of the contents of the record in hand has failed to convince that this question should be answered in the negative. The facts that the material on the right of way was dry and inflammable, that no human being but those on the freight train passed the point where the fire originated immediately before it started, that the freight engines of the defendant sometimes emitted sparks which lived until they reached the ground, that this fire sprang up a few moments after the defendant's engine passed the place of its origin, and that no evidence of any other cause of its origin so probable as the possible sparks from this engine is to be found in the record, have convinced that the question was fairly for the jury, and that neither the court below nor this court would be justified in withdrawing it from them. It is gratifying to learn that this conclusion has been reached by the Supreme Court of Minnesota in the consideration of a similar state of facts relating to the origin of the same fire under consideration in the case in hand. *Babcock v. Canadian-Northern Ry. Co.*, 117 Minn. 434, 136 N. W. 275, 276.

[2] Did the court below err in the admission of evidence that fires had started by the side of the railroad track in the vicinity of the place of the origin of that in question shortly after the passage of some of the defendant's engines during the four months preceding the date of the commencement of this fire? If, before this evidence was received, the defendant had admitted or proved the identity of the engine which passed from Williams to Cedar Spur at the time this fire was set, the question would have been presented whether or not, as in cases where the charge is negligence (*Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.*, 114 Fed. 133, 138, 52 C. C. A. 95, 100), the evidence of fires started by other engines would have been admissible. But in order to determine the correctness of the ruling of the court below, this court must place itself in the situation of that court at the time it made the ruling. While, in the subsequent progress of the case, the engine was identified, it had not been identified when the trial court admitted this evidence, and when the engine which might have set the fire is unknown or unidentified it is competent to introduce testimony that some of the defendant's engines threw ignited sparks or set fires, or that fires started near the track soon after they passed at other times within a few weeks of the time of the fire in question, and at other places in the vicinity of the place of its origin, because, where the engine charged is unknown, it may be that this unknown engine was one of those which set the fires at other times and places, and the fact that engines of the defendant set out such fires becomes in this way testimony from which the jury may reasonably infer that the fire under consideration was set by some engine of the defendant. *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.*, 114 Fed. 133, 137, 52 C. C. A. 95, 99; *Railroad Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356; *Railroad Co. v. Gil-*

bert, 52 Fed. 711, 3 C. C. A. 264; Railroad Co. v. Lewis, 2 C. C. A. 446, 51 Fed. 658, 664; Campbell v. Railroad Co., 121 Mo. 340, 351, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530; Piggot v. Railway Co., 3 Man. G. & S. 229; Webb v. Railroad Co., 49 N. Y. 420, 10 Am. Rep. 389; Sheldon v. Railroad Co., 14 N. Y. 218, 67 Am. Dec. 155; Cleaveland v. Railway Co., 42 Vt. 449; Railroad Co. v. McClelland, 42 Ill. 355, 358; Smith v. Railroad Co., 10 R. I. 22; Hoover v. Railway Co. (Mo.) 16 S. W. 480.

There was no error in the trial of this case, and the judgments below must be affirmed.

It is so ordered.

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HOUCK et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1912.)

No. 3,699.

**1 LEVEES (§ 37\*)—INTERFERING WITH GOVERNMENT WORKS—CONSTRUCTION OF STATUTE—"LEVEE."**

Act March 3, 1899, c. 425, § 14, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), providing that "It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or \* \* \* injure, obstruct by fastening vessels thereto, or otherwise or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, \* \* \* for the preservation and improvement of any of its navigable waters or to prevent floods," etc., applies to a levee built by authority of Congress to prevent floods from overflow of the Mississippi, although it may be several miles from the bank of the river, and persons who willfully obstruct or injure such levee, whether fully or partly completed, are subject to criminal prosecution therefor under section 16 of the act.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 13; Dec. Dig. § 37.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4100, 4101.]

**2. LEVEES (§ 13\*)—GOVERNMENT IMPROVEMENT—LOCATION.**

Act June 4, 1906, c. 2572, 34 Stat. 208 (U. S. Comp. St. Supp. 1911, p. 1550), authorizing the construction of levees on the Mississippi river under direction of the Secretary of War in accordance with the plans and recommendations of the Mississippi River Commission, vests a large discretion in such officers as to the location of the levees, and in the exercise of such discretion they may lawfully locate a levee at a distance from the bank of the river.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 4; Dec. Dig. § 13.\*]

**3. EMINENT DOMAIN (§ 242\*)—CONDEMNATION PROCEEDINGS—CONCLUSIVENESS OF JUDGMENT.**

In such a criminal prosecution, where the obstruction was on land over which the United States had acquired right of way by a decree of condemnation in proceedings instituted under authority of Act April 24, 1888, c. 194, 25 Stat. 94 (U. S. Comp. St. 1901, p. 3525), the defendants cannot collaterally attack the validity of such decree.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 626; Dec. Dig. § 242.\*]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Criminal prosecution by the United States against Giboney Houck and others. From a judgment of conviction, defendants bring error. Affirmed.

Chester H. Krum, of St. Louis, Mo., for plaintiffs in error.

Charles A. Houts, U. S. Atty., and Charles H. Daues, Asst. U. S. Atty., both of St. Louis, Mo., for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. From the facts in this case, it appears that the United States was constructing a levee along the Mississippi river, near and below Cape Girardeau, Mo.; said levee being constructed by a contractor under the direction and supervision of engineers of the United States, detailed by the Secretary of War for that purpose. This levee crossed the railroad track and right of way of the Cape Girardeau & Thebes Bridge Terminal Railroad Company. The government had theretofore condemned a right of way for the construction of the levee 250 feet in width, over and across the right of way of said Bridge Terminal Railroad Company. The section of the levee had been completed on either side of the railroad right of way, said levee at the base being some 70 feet in width, and the portions on either side had been constructed up to practically the ties of the railroad, and sloped up towards the top. The levee, when completed, was to be some 10 feet high. The Bridge Terminal Railroad Company, something like a year before, had been requested to remove its tracks or elevate them, so they would pass over and above the levee when completed. This the Bridge Terminal Railroad Company refused to do. Something like a month before the occurrence in question, a similar request was made upon the Bridge Terminal Railroad Company, and they again refused to act. About the 8th of December, 1910, one Douglas Jordan, superintending the construction of the work for the government, with some men, removed the rails and ties, upon the right of way which had been acquired by the condemnation proceedings, and the contractor proceeded with the work of filling in the gap, so as to complete the construction of the levee. He had filled in across the gap a portion of the width of the levee to a height of some three feet, when the plaintiffs in error, with an engine, ran a car against the portion of the levee constructed across the track and up to the end of the rails, so as to, in a measure, destroy and deface the work. That night, or early the following morning, they ran some five cars in onto the work, dumping them over in such a way as to injure the work that had been constructed, and temporarily impeded further construction of the work.

They were indicted in the United States Court for the Eastern District of Missouri; the indictment containing two counts. In the first, they were charged with unlawfully defacing and injuring a certain levee built, owned, and controlled by the United States, for the preservation or improvement of a navigable river of the United States, to wit, the Mississippi river, as authorized by an act of Congress, ap-

proved June 4, 1906, entitled "An act to enlarge the authority of the Mississippi River Commission in making allotments and expenditures of funds appropriated by Congress for the improvement of the Mississippi river," and further by the River and Harbor Act approved March 2, 1907 (chapter 2509, Statutes at Large, vol. 34, p. 1103). In the second count, they were charged with obstructing and knowingly aiding and abetting in obstructing a certain levee built, owned, and controlled by the United States, etc. They were tried, convicted, and sentenced to pay a fine.

On the trial of the case the court admitted, over the objection and exception of the defendant, the judgment of condemnation by the government of the United States of the right of way in question, and also admitted, over the objection and exception of the defendant, the receipt of the Cape Girardeau & Thebes Bridge Terminal Railroad Company for the amount of money awarded to it in such condemnation proceeding.

The court also admitted in evidence the contract between the United States and one P. H. Rogers, for the construction of this levee, and also evidence of the death of P. H. Rogers, and the letters testamentary to T. H. Walsh, as his executor; also admitted the evidence of one Kerr, an engineer employed by the government, as to the condition of the work on the levee, and what was done at the point of the crossing of the railroad track; also admitted the evidence of one Jordan, as to the acts and conduct of the defendants, with reference to said projected levee on the crossing of the track. The admission of this testimony is embraced in the six paragraphs of the first assignment of error.

It is further assigned as error that the court, in his charge to the jury stated:

(1) That he was not prohibited from stating to them what appeared to the court to be the facts.

(2) That certain acts with reference to putting in cars in the gap of the levee had been done, at least to the court's satisfaction.

(3) That the evidence showed, to the satisfaction of the court, that a car was run into the gap by the defendants.

(4) That although the levee was not completed, it was an offense to injure or obstruct the work being done.

(5) That if a car was run into the gap and the work going on obstructed, and such part of the work as had been done defaced, an offense was committed.

[1] The principal ground which is urged in support of the assignments of error is that the act of Congress, upon which the indictment was based, did not authorize the levee in question, for the reason that it appears from the evidence that this part of the levee was upwards of two miles from the bed or bank of the Mississippi river, and hence was not a levee within the meaning of the statute. The applicable sections of the statute read as follows:

"Sec. 14. That it shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in



any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works; Provided, that the Secretary of War may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest."

"Sec. 16. That every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections thirteen, fourteen, and fifteen of this act shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. And any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel, who shall knowingly engage in towing any scow, boat or vessel loaded with any material specified in section thirteen of this act to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of War, or who shall willfully injure or destroy any work of the United States contemplated in section fourteen of this act, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section fifteen of this act, shall be deemed guilty of a violation of this act, and upon conviction be punished as hereinbefore provided in this section, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections thirteen, fourteen, and fifteen of this act shall be liable for the pecuniary penalties specified in this section, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof."

Counsel for plaintiffs in error, in their brief, state their contention as follows:

"It is obvious that the levee contemplated by the statute is not one inland and miles distant from the bank of a navigable stream. *Noscitur a sociis*. The word 'levee' is associated with sea wall, bulkhead, jetty, dike, wharf, pier, or other like work built by the United States. The reading of the statute makes it obvious Congress intended to cover structures which are accessible from the water itself, structures to which vessels might be moored, or at which they might be anchored, or to which they might be attached, and you might just as well talk about building a levee on a hill forty miles from the river and have it covered by this section, as to talk about the levee built where this one was built being covered by that statute. \* \* \*

"Now, doesn't it involve a degree of absurdity to contend that you can go inland under this statute and find a structure whose injury rendered this statute operative as against an individual who injured the structure, when every word in all the sections, from beginning to end, contemplates a structure to which access is to be had from the body of water upon which that structure is erected. If it is the water of a navigable river, from that navigable river; if it is the water of a navigable lake, from that navigable lake;

and if it is the water of a sea, or in case of structure in any harbor, from that sea or harbor?

"Why talk about an injury to a structure of this description at the hands of a master of a vessel, when the thing to be injured is five miles inland, when there is not a suggestion of water in connection with it, even when the Mississippi river overflows its banks, and then floods the lowlands to the extent of a few feet?"

[2] The foregoing excerpts from the brief of counsel for plaintiffs in error are given as it is a succinct statement of their theory why the judgment is erroneous. We think, however, counsel overlook the fact that the purpose of the statute in question, in providing for the construction of levees, was twofold: First, to improve the navigability of the river; second, to provide against destruction by overflows. If it be conceded that the main and primary purpose was to improve the navigation of the river, we do not think, even then, it was essential or necessary that the levees follow the bank of the river in all of its meanderings. The evidence shows that at the point in question there was a sharp bend in the river, which formed a sort of a narrow peninsula, and that the levee was constructed across the base, so as to prevent the flooding of the country during high water. To follow along the bank of the river in all of its meanderings would cause a useless and unnecessary expense. Of course, the act contemplated that much of the way and probably the principal part of the levee work would be along the water bank of the river, and as to such places the prohibition against "fastening vessels thereto, or otherwise, or in any manner whatever impairing the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier," etc., is applicable; but that is not the only prohibition. The prohibition is against "any person or persons to take possession of or make use of for any purpose, or building upon, alter, deface, destroy, move, injure, obstruct \* \* \* or in any manner whatever impair the usefulness \* \* \* of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters, or to prevent floods, or as boundary marks," etc. The statute, we think, very much broader than the construction given to it by counsel. Before the acts complained of, Congress had provided for a commission to mature such plan or plans and estimates as would correct, permanently locate, and deepen the channel, and protect the banks of the Mississippi river, improve and give safety and ease to the navigation thereof, prevent destructive floods, promote and facilitate commerce, trade, and the postal service, and the Secretary of War was authorized to proceed in the construction of such work. Much discretion in the location of the levee was left to the Secretary of War, as Congress might do. *U. S. v. Certain Lands in Narragansett, R. I.* (C. C.) 145 Fed. 654; *Union Bridge Co. v. U. S.*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523. We do not think it should be said that the Secretary of War, in executing the great project contemplated by Congress, not only to improve the navigation of the river but to prevent destructive floods by overflow, was not authorized in many instances to shorten the work and thereby greatly reduce the expense, by departing from the meanderings of the river in places where the purposes contemplated by the

act would be accomplished by constructing the levee across the base of little peninsulas formed by bends in the river.

[3] It is insisted that the condemnation proceedings, acquiring the right of way across the right of way of the Cape Girardeau & Thebes Bridge Terminal Railroad Company were void for the reason that the Secretary of War had no authority to acquire a right of way so remote from the bank of the river. That, however, involves the correctness of the foregoing interpretation of the provisions of the statute. Furthermore, it may be said that that question was not subject to collateral attack in this trial.

As said by Judge Sanborn, writing the opinion of the court in *Foltz v. St. Louis S. F. Ry. Co.*, 60 Fed. 316, 8 C. C. A. 635:

"There are three questions that the trial court must determine in every condemnation proceeding, viz.: First, has the plaintiff corporation legal capacity to exercise the power of eminent domain? Second, is it necessary for the plaintiff to take the land it seeks to condemn? Third, does it seek it for a public use? Every judgment of condemnation is necessarily an affirmative decision of each of these questions. If either of them is erroneously decided, the judgment may be reversed by a writ of error for that purpose. But to hold that either of these questions can be tried *de novo* in an action of trespass, or of ejectment, or in any other collateral proceeding, would be counter to our views of justice, of the reason of the case, and of the uniform decisions of the courts."

Applying the principle there stated to the case before us, we find that Congress, by an act approved April 24, 1888, 25 Stat. 94 (U. S. Comp. St. 1901, p. 3525) provided as follows:

"That the Secretary of War may cause proceedings to be instituted in the name of the United States in a court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way or material needed to enable him to maintain, operate or prosecute work for the improvement of rivers and harbors for which provision has been made by law, such proceedings to be prosecuted in accordance with the laws relative to suits for condemnation of property in states wherein the proceedings may be instituted."

This gave the Secretary of War authority to institute the proceedings in question as provision had been made by law for the work in question. The court, then, in the condemnation proceedings, had jurisdiction, and its judgment in this proceeding is conclusive of the authority of the Secretary of War to institute condemnation proceedings; that it was necessary to take the land sought; and that it was for a public use.

Such being our view of the proper construction of the statutory provisions referred to, and the proof fully sustaining the allegations of the indictment, the principal assignments of error urged are untenable.

It is, however, further urged that the statute only applies to a completed work and has no application to cases of defacing, injuring, and obstructing levees that are in process of construction simply. This objection is equally untenable. The work, though but partially completed, nevertheless was a levee within the meaning of the statute. Surely Congress did not intend that the government, in prosecuting such a public work, could be obstructed or have the work defaced or

destroyed before being fully completed, and the offender not be amenable to the provisions of the statute. The prohibition clearly includes a levee in process of construction as well as a completed one, for otherwise the government might never be permitted to complete the work. It is also said that, as the work was being constructed by a private contractor, though under the supervision and direction of the Secretary of War, it was not a work of the United States within the meaning of the statute. The mere fact that the physical work was being done by a private contractor for the United States did not take from it its character as a levee built by the United States. It was as much a work of the United States, though built by contract under the direction and supervision of an engineer detailed by the Secretary of War for that purpose, as if it had been done by day laborers employed by the Secretary of War.

From a consideration of the entire case, we find no error committed by the trial court, and the judgment is affirmed.

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CAPE GIRARDEAU & T. B. T. R. CO. v. JORDAN et al.

(Circuit Court of Appeals, Eighth Circuit. November 21, 1912.)

No. 3,707.

In Error to the Circuit Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by the Cape Girardeau & Thebes Bridge Terminal Railroad Company against Douglas Jordan and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Chester H. Krum, of St. Louis, Mo., for plaintiff in error.

Charles A. Houts, U. S. Atty., of St. Louis, Mo., Homer Hall, Asst. U. S. Atty., of Trenton, Mo., and Henry Craft, of Memphis, Tenn., for defendants in error.

Before SANBORN and CARLAND, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. This action was brought by the Cape Girardeau & Thebes Bridge Terminal Railroad Company against Douglas Jordan et al. for an alleged trespass upon the plaintiff's right of way, tearing up the rails, and obstructing the operation of said railroad, to the alleged damage of the plaintiff in the sum of \$10,000.

The facts are that the United States was constructing a levee across and over the right of way of the plaintiff company. The United States had by condemnation proceedings acquired a right of way for the construction of the levee across and over the right of way of plaintiff company. The plaintiff had accepted, received, and receipted for the value of such right of way awarded it in said condemnation proceedings. The acts done by the defendant were done in the construction of the levee across such right of way. The levee had been completed on either side of the right of way up to the right of way, and the plaintiff had been requested and directed to remove its track or lift the same, which it had failed and declined to do. Thereupon the defendants removed the rails and ties of plaintiff's track within the limits of the right of way which the government of the United States had acquired through the condemnation proceedings. The defendants were acting under the direction of officers of the United States having charge of the construc-



tion of the levee in question. At the close of all the testimony the court directed a verdict for the defendants.

The facts and law in this case are in all material respects identical with those in the case of *Houck et al. v. United States*, 201 Fed. 862, just decided. They involve the construction of the same statute, the construction of the same levee, and at the same point as was presented in that case. The law announced in that case is applicable to this, and thus applied, the defendants were not trespassers.

The judgment is affirmed.

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### HENRY v. SPEER.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1913.)

No. 2,350.

#### 1. JUDGES (§ 51\*)—DISQUALIFICATION TO ACT—FEDERAL STATUTE.

Judicial Code, § 21 (Act March 3, 1911, c. 231, 36 Stat. 1090 [U. S. Comp. St. Supp. 1911, p. 134]), which went into effect January 1, 1912, providing that, on the filing of an affidavit by a party that the judge before whom the action is to be tried has a personal bias or prejudice either against him or in favor of any opposite party, another judge shall be designated to try the suit, is available to a party, even though the suit was commenced before the Code took effect.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224-231; Dec. Dig. § 51.\*]

#### 2. JUDGES (§ 51\*)—DISQUALIFICATION TO ACT—FEDERAL STATUTE—SUFFICIENCY OF AFFIDAVIT.

Such section expressly requires the affidavit to state that the judge has a "personal" bias or prejudice, and, unless it so charges, it is insufficient to warrant action thereon.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224-231; Dec. Dig. § 51.\*]

#### 3. JUDGES (§ 51\*)—DISQUALIFICATION TO ACT—FEDERAL STATUTE—DETERMINATION OF OBJECTIONS.

Upon the filing of an affidavit under such section, accompanied by the required certificate of counsel, it is the duty of the judge to pass on its legal sufficiency, and he need not determine on the facts his own disqualification.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224-231; Dec. Dig. § 51.\*]

Petition for Mandamus to the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

In the matter of the petition of C. S. Henry for a writ of mandamus to Hon. Emory Speer, District Judge for the Southern District of Georgia, and to said District Court. Petition denied.

C. S. Henry petitions this court for a rule against Hon. Emory Speer, United States District Judge for the Southern District of Georgia, and against the District Court of the United States for that district, to show cause why writ of mandamus should not issue commanding them to send an authenticated copy of a certain affidavit of disqualification filed by C. S. Henry in the equity cause of C. S. Henry v. E. B. Harris, pending on the docket of that court and the proceedings had thereon, to the senior circuit judge for the Fifth Circuit then in the circuit, and to desist from retaining or exercising any further jurisdiction in said cause.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The complainant in the court below sought to avail himself of the provisions of section 21 of the Judicial Code of the United States (January 1, 1912), and made and filed an affidavit accompanied by certificate of counsel of record, whereby he undertook to disqualify the judge of the district from sitting in and deciding the cause in which he was complainant because of alleged bias and prejudice of the judge. This affidavit is as follows:

"Before me, an officer duly authorized by law to administer oaths, appeared the undersigned, C. S. Henry, who on oath deposes and says there is now pending in the Circuit Court of the United States for the Western Division of the Southern District of Georgia a bill for specific performance filed by the deponent against one E. B. Harris. An order of reference was duly entered in said case directing J. N. Tally, standing master in chancery, to hear evidence and submit an opinion to the court both on the law and the facts. After evidence taken and arguments of counsel, the master found in favor of the complainant. Exceptions were filed to said report, and are now pending before the Circuit Court, the Honorable Emery Speer, Judge. Deponent avers that it is his honest belief that he cannot get a fair and impartial trial before the said judge, the Honorable Emery Speer, by reason of prejudice and bias against him and in favor of the opposite party to said suit, for the following reasons: Deponent avers that after suit, or after the bill was filed and the report of the standing master, involuntary petition in bankruptcy was filed against the said E. B. Harris; trustee selected and in due time was made a party to this suit. That on information and belief, after the election of said trustee, the Honorable Emery Speer rendered, or rather delivered, to the newspapers an opinion relative to the above-entitled cause, a copy of which is hereto attached, marked 'Exhibit A' and made a part of this affidavit, in which practically every issue is prejudged and determined by the said judge. This opinion, as deponent is informed and believes, was written before the above-named case had been assigned for trial, without the report of the master, or the evidence in said cause having been read by the judge and before any arguments of counsel. Deponent avers that in his judgment and belief this opinion very clearly indicates the bias and prejudice of the said judge against deponent's right to recover, and precludes for him the possibility of a fair and impartial trial. Deponent, as he is informed by counsel, could not avail himself of this privilege prior to the first of January, nineteen hundred and twelve, in that said law did not go into effect until that day, and for the further reason that this opinion above referred to was not delivered until December —, 1911."

It appears that, after filing this affidavit with certificate of counsel, the attorneys for the petitioner moved the judge to have an authenticated copy thereof forthwith certified to the senior circuit judge, then present in the circuit. Thereupon the judge proceeded to determine as to the legal sufficiency of the affidavit, and also to hear evidence upon the question of the existence vel non of the bias or prejudice on his part as charged and alleged therein. This hearing resulted in an order overruling the petitioner's motion, dismissing the affidavit, and assigning the cause in which the affidavit was filed for hearing on its merits. The cause of action in which the affidavit was filed arose and was commenced long prior to January 1, 1912, the time when the Judicial Code by its terms took effect and went in force.

W. D. McNeil and M. Felton Hatcher, both of Macon, Ga., for petitioner.

Arthur L. Dasher, Jr., and Malcom D. Jones, both of Macon, Ga., and Andrew J. Cobb, of Athens, Ga., for respondent.

Before PARDEE, Circuit Judge, and NEWMAN and MEEK, District Judges.

MEEK, District Judge (after stating the facts as above). The questions to be determined are: (1) In view of the time of the accrual of complainant's alleged cause of action and commencement of this suit

was he entitled to avail himself of the provisions of section 21 of the Judicial Code? (2) If so, did the affidavit made and filed by him meet the requirements of this section? (3) What duty was imposed upon the judge upon the filing of the affidavit and certificate of counsel?

[1] Section 21 of the Judicial Code of the United States January 1, 1912, reads as follows:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

It is contended that because the alleged action in which the affidavit was filed arose and was commenced prior to the time the Judicial Code became effective the provisions of section 21 may not be availed of therein to disqualify the judge. This contention is based on section 299 of the Code, which declares in part:

"The repeal of existing laws, or the amendments thereto, embraced in this act, shall not affect any act done, or any rights accruing or accrued, or any suit or proceeding \* \* \* pending at the time of the taking effect of this act, but all such suits and proceedings for acts arising or for acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendment had not been made."

This section manifestly pertains to the acts and rights of parties as those acts and rights are involved in the commencement and prosecution of suits and controversies. They may commence and prosecute their causes "within the same time and with the same effect as if said repeal and amendment had not been made." Section 21 does not affect the acts done by nor the rights accruing to litigants in the sense this language is used in section 299. We are of opinion that section is entirely irrelevant in this connection. Section 21 has to do with the personality of the judge before whom the suit is to be tried and rights established. It is remedial in its nature; that is, it is meant to afford relief from adventitious predicaments which fair-minded men recognize should be relieved against, when they in fact exist. In affording this relief the Congress has expressed itself plainly and perspicuously. It is not difficult to arrive at its true intent and meaning. We hold the provisions of section 21 to be available, even though the cause of action in which they are invoked arose and was commenced before the time the Judicial Code became effective.

[2] In the enactment of section 21 the plain purpose of the Congress was to afford a method of relief through which a party to a suit may avoid trial before a judge having a *personal* bias or prejudice

against him or in favor of the opposite party. That sought to be relieved against is a personal bias or prejudice—a bias or prejudice possessed by the judge specifically applicable to or directed against the suitor making the affidavit or in favor of his opponent. The statute qualifies the words bias and prejudice by the single word “personal.” The deponent in the affidavit filed below failed to use the qualifying word “personal” in making oath to the existence of bias or prejudice on the part of the judge before whom the case was to be tried. It is contended that the use of the word in the statute, in view of the context, is merely cumulative and tautological; that it may be omitted from the affidavit, and still the quality of bias or prejudice will be revealed to be personal. But the statute requires the use of the word, and it may not be avoided. Owing to the nature of the statute and its liability to abuse, we are inclined to hold those seeking to avail themselves of it to a strict and full compliance with its provisions. The affidavit filed below illustrates the necessity for such compliance. Its perusal reveals the facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner but rather a prejudgment of the merits of the controversy and “against deponent’s right to recover.” Section 21 is not intended to afford relief against this situation.

[3] Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification.

The judge having correctly ruled that the affidavit herein filed was not the affidavit specified and required by the statute, the duty was not imposed upon him to comply with the provisions of section 20.

The petition for mandamus will be denied.

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HENRY v. HARRIS et al.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1913.)

No. 2,369.

**EQUITY (§ 410\*)—REPORT OF MASTER—BURDEN OF SUSTAINING EXCEPTIONS.**

The findings of a master in chancery are *prima facie* correct, and, where they are in favor of a complainant and exceptions thereto are filed by defendant, the burden of sustaining the exceptions rests on defendant, and the court is not warranted in dismissing the suit for want of prosecution without considering and disposing of them.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 905-919; Dec. Dig. § 410.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Suit in equity by C. S. Henry against E. B. Harris and Cook Clayton, trustee in bankruptcy for E. B. Harris. Decree (191 Fed. 868) for defendants, and complainant appeals. Reversed.

This is an appeal from an order passed by the court below dismissing complainant's bill for want of prosecution. Certain of the assignments of error submitted on this appeal are leveled at the action of the trial judge in assuming jurisdiction to make any order pertaining to the trial or disposition of this cause after the filing by complainant of an affidavit by which it was sought to disqualify the judge from further hearing or trying the cause. The questions raised by these assignments are treated and disposed of in an opinion this day filed in the case of C. S. Henry, Petitioner, v. Emory Speer, District Judge, 201 Fed. 869. They will not again be considered, and reference is made to that opinion for our views.

It appears that after issue was formed in the cause of C. S. Henry v. E. B. Harris by the filing of the bill of complaint, answer, and replication, upon motion of solicitors for complainant, it was referred to J. N. Tally, Esq., standing master, "to take evidence and make his findings, both of the evidence and as to the law of said cause, and report said findings to the court"; that, in pursuance of this order of reference, the standing master took the evidence and made his findings of fact and of law, and returned them into the clerk's office. These findings both of fact and law were in favor of the complainant, the master finding that upon the facts shown the complainant was entitled to a decree of specific performance for the conveyance of certain property as prayed in his bill, and was also entitled to recover certain amounts as the rental value of the property. Thereafter the defendant E. B. Harris filed numerous exceptions to the master's findings and conclusions. Later the defendant E. B. Harris was adjudged bankrupt, and Cook Clayton, trustee of the bankruptcy estate, was made party defendant to the cause. The court by order assigned the cause for hearing for a day and hour certain, and ordered that counsel for the respective parties be served with notice of such assignment. At the time fixed the court called upon the solicitors for the complainant to proceed with the submission of the cause. They refused to proceed, and thereupon the court passed an order dismissing complainant's bill for want of prosecution.

W. D. McNeil and M. Felton Hatcher, both of Macon, Ga., for appellant.

Arthur L. Dasher, Jr., and Malcolm D. Jones, both of Macon, Ga., and Andrew J. Cobb, of Athens, Ga., for appellees.

Before PARDEE, Circuit Judge, and NEWMAN and MEEK, District Judges.

MEEK, District Judge (after stating the facts as above). The cause standing for trial on exceptions filed by the defendant to the report of the master in chancery, it is urged that the court erred in dismissing complainant's bill upon failure of solicitors for complainant to proceed, for the reason that the burden of sustaining the exceptions was on the defendant; there being no burden upon the complainant nor legal requirement that they should argue the exceptions.

The filing of the report on the facts and the law by the standing master favorable to the complainant and the subsequent filing of exceptions thereto by the defendant shifted the burden of going forward from the complainant to the defendant. The present "Rules of Practice for the Courts of Equity for the United States" were adopted

by the Supreme Court at the October term, 1881. So early as the October term, 1882, the point here raised was settled by that court in *Metzker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654. There, speaking for the court, Mr. Justice Miller said:

"The evidence taken by the master was reported with his findings, and the case seems to have been treated by the court below without much regard to the finding of the facts by the master, or any special regard to the exceptions made to his report. This is not correct practice in chancery cases in the circuit courts of the United States, whatever may be the rule in the state courts. The findings of the master are *prima facie* correct. Only such matters of law and of fact as are brought before the court by exceptions are to be considered, and the burden of sustaining the exception is on the objecting party."

In the court below, the defendant, the exceptor, should have been called upon to proceed, and the court should have taken action upon the exceptions to the master's report in disposing of the cause. It is true the report of the master is entirely within the power of the court to set aside, modify, or correct in any manner consistent with the justice of the case. *National Folding Box & Paper Co. v. Dayton Paper Novelty Co.* (C. C.) 91 Fed. 822, and authorities there cited. *Jaffrey v. Brown* (C. C.) 29 Fed. 476. But the master's report is a step in the progress of the cause toward the decree of the court. It is so recognized to be by the equity rules and the authorities. There should not be a dismissal of the bill without consideration of the exceptions to the master's report and a proper disposition thereof.

The cause will be reversed, with directions to proceed in conformity with the view here expressed.

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### SELLS v. CITY OF CHICAGO.

(Circuit Court of Appeals, Seventh Circuit. October 8, 1912.)

No. 1,895.

#### 1. CONTRACTS (§ 232\*)—CONSTRUCTION—CONTRACTS FOR SERVICES—EXTRA COMPENSATION.

A contract by which plaintiffs, as accountants, were employed by defendant city to make a complete investigation and adjustment of all special assessment accounts for a stated sum, and defendant agreed to furnish them with all records belonging to it, construed, and *held* not to entitle plaintiffs to extra compensation because of the necessity of examining state and county records as well as city records, and the refusal of defendant to furnish the same, especially in view of an express provision that no pay would be allowed for extra work.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1071-1094; Dec. Dig. § 232.\*]

#### 2. EVIDENCE (§ 441\*)—PAROL EVIDENCE—MUNICIPAL CONTRACTS.

The rule that a written contract cannot be varied by parol evidence of prior negotiations is especially applicable to municipal contracts.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Action at law by Elijah Watt Sells, surviving partner of the firm of Haskins & Sells, composed of Charles Waldo Haskins and Elijah Watt Sells, against the City of Chicago. Judgment for defendant, and plaintiff brings error. Affirmed.

Plaintiff in error, surviving partner of the firm of Haskins & Sells, termed plaintiff herein, together with his said partner, entered into a written contract with defendant in error, hereinafter termed defendant, on the 1st day of March, 1901, whereby said firm agreed to make and complete an investigation, examination, and adjustment of all the special assessment accounts of the city, in accordance with specifications thereto attached, within a period of 10 months from the commencement of the work. Said firm undertook to obtain all original documents necessary, and to search all the records required, whether such records contain other matter or not, to carry out said work, to rewrite all the records of special assessment accounts, do everything necessary in order to produce a complete and perfect record of each and every special assessment warrant of the city and arrange the same in such order as would make them convenient for public use and convenient and ready for reference. The term "special assessment" was to include all special assessments as they stood on April 30, 1901, including those of municipalities or parts thereof, which had been annexed to the city, so far as necessary to make a complete record. On its part defendant agreed to pay \$65,000 for the completed work from the appropriation made for that purpose.

Defendant further agreed to furnish said firm immediate access to all records, vouchers, warrants, contracts, books of account, or other records or papers belonging to or in the custody of defendant, and provide them a place for their work. Clause 12 of the contract reads:

"It is further mutually understood and agreed that in no event will said parties of the first part be allowed or paid for any extra work done or claimed to be done by them; and in no event will the compensation to be paid the said parties of the first part exceed sixty-five thousand (\$65,000) dollars."

From the declaration it appears that said firm shortly afterwards entered upon the performance of their part of said contract; that after commencing the work said firm discovered that certain necessary records and papers were not in the defendant's possession, and were not delivered to said firm, and that, in order to complete the task undertaken by said firm, it became necessary for them to resort to records of the state of Illinois and of the county of Cook, and to investigate various other and outside sources of information and do a large amount of work not contemplated by the contract, which would have been unnecessary had the city complied with the contract; that, when notified by said firm that it was the duty of the city, under said contract, to furnish them all of said missing records and papers, defendant demanded that they complete said work under penalty of forfeiting their bond, which they had given to secure the performance of

the contract by them, and the money deposited with the city for a like purpose, and take all necessary steps and do all necessary things to produce and create from contemporaneous sources, if necessary, such necessary records and documents as were missing including the investigation of the Cook county and Illinois records, etc.; that said firm, still insisting that defendant had breached the contract as above set out, completed the work called for by the contract; that in so doing it was necessary that said firm should examine, and they did examine, said outside records and various other outside sources of information, and do a large amount of uncompleted work; that the result was accepted by the defendant and the \$65,000 was paid over as agreed.

It further appears that by reason of the failure of the defendant to furnish such missing records and documents said firm was delayed for a long period (two years) in doing said work, was compelled to construct and replace a great number and amount of records and documents, and was obliged to employ extra help far beyond what would have been otherwise necessary.

The declaration further sets out the contract, avers the legal obligation of defendant to keep all the records, warrants, and other documents pertaining to special assessments, charges that the same were assumed to be so kept, and that said firm was only required to deal with what records and documents were stored in the vaults and storage places of defendant, and not with county and state records.

The defendant declined to make any further payment, and plaintiff brought suit to recover damages so sustained, laid by plaintiff at the sum of \$500,000.

To the declaration defendant filed six pleas. The first plea sets out that if said agreement was made as construed by plaintiff the contract would have been void as in contravention of the constitutional provision regulating the amount of municipal indebtedness. The second plea sets out that there was no appropriation made for the payment of anything in excess of \$65,000; and therefore, if the contract was made to pay the extra sum, it would have been void. The third plea alleges the statute requiring the advertising for and taking bids for such work, and charges that no bids for the work were taken; wherefore the agreement to pay such extra sum, if made, would have been void. The fourth and fifth pleas set up the failure to comply with said necessity of taking bids, etc., in accordance with the city ordinances, and the want of action on said claim by the council, and its consequent invalidity. The sixth plea sets up the ordinance forbidding the payment for extra work, unless the council authorize it on the report of the commissioner of public works, charges that no such action was had in the present case, and that therefore the claim of plaintiff is void. Plaintiff demurred to each of said pleas.

On the hearing the court overruled the demurrer to the pleas and carried it back and sustained it to the declaration. Plaintiff thereupon elected to stand by his declaration; whereupon the court entered judgment for defendant. To correct these alleged errors, this writ of error was sued out.



David B. Gann, George H. Peaks, and Morris M. Townley, all of Chicago, Ill. (Delevan A. Holmes, of Chicago, Ill., of counsel), for plaintiff in error.

Wm. H. Sexton and Charles M. Haft, both of Chicago, Ill., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] The only matter which we deem it necessary to consider is whether defendant obligated itself by the contract, in terms or by implication, to furnish to plaintiff's firm the records and documents and other information which plaintiff was compelled to search for and obtain from the county and state records.

Defendant undertook to provide plaintiff's firm with all records and documents belonging to it, or in its custody. Said firm agreed to obtain all original documents necessary and to search all the records required, whether such records contained other matter or not, to carry out said undertaking. They agreed to do the work within 10 months from the time defendant furnished them a place in which to do it, and gave them access to the records, etc., so far as the same were in defendant's possession. They stipulated with defendant that their undertaking covered the special assessments of those municipal corporations, or parts thereof, theretofore annexed to defendant.

Now, it is apparent that the only language of the contract which gives any color to plaintiff's contention is that quoted above, whereby the defendant agrees to furnish plaintiff's firm with all records, etc., *belonging to it*, etc.; but these words, taken in connection with the rest of the contract, leave no doubt but that the defendant was obligated to make no search for or furnish to plaintiff such information as was to be procured from court or other outside records; nor was it to be presumed that defendant had these in its possession. They were neither city records nor documents.

[2] There could be no stronger declaration that no extras would be allowed than that of said clause 12 of the contract. There is no obscurity in this language. There is no ground for the claim that defendant failed to perform its part of the agreement. No allegation of the declaration can prevail over the plain language of the writing between the parties. This is too well settled to require citation of authority. Nor can the terms of the contract be in any way modified by what was said prior to the execution thereof. This is particularly the case in regard to municipal undertakings, which are hedged about by statute with safeguards and preliminary requirements of such a character as to prevent informal modifications of the substance thereof. *Simpson v. U. S.*, 172 U. S. 372, 19 Sup. Ct. 212, 43 L. Ed. 482; *Sanitary District v. Ricker*, 91 Fed. 833, 34 C. C. A. 91; *Brawley v. U. S.*, 96 U. S. 168, 24 L. Ed. 622; *Cleveland v. Richardson*, 132 U. S. 318, 10 Sup. Ct. 100, 33 L. Ed. 384.

In our judgment, the contract in this case precludes any claim of plaintiff for remuneration in excess of the \$65,000. The declaration fails to make out a case for the relief sought, and the action of the

court in carrying back and sustaining the demurrer to that instrument involves no mistake of law.

The judgment of the District Court is therefore affirmed.

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**PARKER WASHINGTON CO. v. CRAMER.**

(Circuit Court of Appeals, Seventh Circuit. November 18, 1912.)

No. 1,858.

**1. COURTS (§ 322\*)—JURISDICTION OF FEDERAL COURTS—ALLEGATION OF CITIZENSHIP—CORPORATIONS—"CITIZEN."**

An allegation merely that a defendant corporation is "a citizen" of a particular state is not sufficient as a basis of jurisdiction of a federal court on the ground of diversity of citizenship, since the corporation is not in truth a citizen of any state, but for the purposes of such jurisdiction it is conclusively presumed that the stockholders whom it represents are citizens of the state by which it is chartered, and the approved form of allegation is that the defendant is a corporation organized and existing under the laws of the named state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876-881, 887; Dec. Dig. § 322.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1168, 1169.

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.]

**2. APPEAL AND ERROR (§ 1178\*)—REVERSAL—REMAND TO TRY QUESTION OF JURISDICTION.**

Jurisdiction of a federal court on the ground of diverse citizenship does not depend on the presence or absence of allegations in the plaintiffs pleading respecting citizenship but on the actual fact of diversity of citizenship, and where a cause has been tried on the merits and a verdict, and judgment rendered for plaintiff, on a reversal by the appellate court because of the absence of any sufficient allegation in the declaration, or proof in the record to show such diversity, it is competent for the court to remand with leave to permit plaintiff to file an amendment and defendant to take issue thereon, and, in case the trial of such issue shows jurisdiction, to enter judgment on the previous verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.\*]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Action at law by Harold Cramer, a minor, by his next friend, Harriet E. Stears, against the Parker Washington Company. Judgment for plaintiff, and defendant brings error. Reversed.

Sheppard Barclay, of St. Louis, Mo., for plaintiff in error.

B. J. Wellman and P. L. McArdle, both of Chicago, Ill., Thomas T. Fauntleroy and P. H. Cullen, both of St. Louis, Mo., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. [1] Defendant in error, plaintiff below, filed his declaration in the Circuit Court of the United States for the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Northern District of Illinois to recover damages for personal injuries alleged to have been sustained by him through the negligence of the defendant. Respecting jurisdiction on the ground of diversity of citizenship, the declaration alleged that the plaintiff was a citizen of Illinois, and that the defendant, a corporation, was a citizen of New Jersey. Without challenging the truth or the sufficiency of the jurisdictional averment, defendant went to trial upon the merits, and the jury returned a verdict for plaintiff, and the court thereupon entered the judgment to which this writ of error is addressed.

The record is barren of anything to sustain jurisdiction, except the averment in the declaration. Inasmuch as the fiction is, not that the corporation itself is really a citizen, but that the stockholders are all citizens of the state which chartered the corporation, and that the corporation is a mere form through which such citizens are exercising their constitutional right of being heard in a federal court when the controversy is between citizens of different states, the approved form of allegation is that the defendant is a corporation organized and existing under the laws of the named state. From this formula of averment an irrebuttable presumption that the stockholders are citizens of the chartering state is held to arise. And, since the corporation itself cannot be in truth a citizen, an allegation that it is a citizen is inadmissible as a basis on which to found the aforesaid irrebuttable presumption. We are constrained, therefore, to hold that the averment of jurisdiction is bad, and to reverse the judgment for the want of any showing of jurisdiction. *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Knight v. Litcher & Moore Lumber Co.*, 136 Fed. 404, 69 C. C. A. 248.

[2] How far back must the proceedings in the trial court be torn up and held for naught? If defendant had raised in limine a question of the sufficiency of the jurisdictional averments, an amendment in due form would have been allowed at once. And, if defendant had filed a special plea to the jurisdiction on the ground that the controversy was not between citizens of different states, a trial of that issue of fact, and by a jury if defendant so desired, could have been had before defendant pleaded his defense to the cause of action and went to trial on the merits. Indeed, prior to Act March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), a defendant could only take issue on the averments of citizenship by a plea in abatement. But while the Act of 1875 leaves the question of jurisdiction open throughout the case and makes it the duty of the trial court and of reviewing courts, of their own motion, to be satisfied that jurisdiction exists, nevertheless the nature of the question of jurisdiction is inherently the same as it was prior to 1875; that is, it is a matter of abatement. It may end the instant suit, but does not touch or affect the cause of action.

If jurisdiction depended upon the presence or absence of an averment in the declaration respecting citizenship, unquestionably we would be required to set aside all the proceedings in the trial court back to the declaration, with leave to the plaintiff to file an amended declaration. But jurisdiction in the trial court is not dependent upon

the allegation, but upon the actual fact of diversity of citizenship. An undenied allegation in the declaration may be taken as truthfully presenting the facts; but, if the declaration is wholly deficient, jurisdiction nevertheless exists if the fact of diversity of citizenship is brought into the record at any time or in any way while the cause is before the trial court.

In *Mexican Central Railway v. Duthie*, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. Ed. 715, the declaration was deficient, the defendant joined issue on the merits, and a trial was had resulting in a verdict for the plaintiff. But there was nothing in the record preceding the verdict to show that there was, in truth, a controversy between citizens of different states. The trial court permitted the plaintiff to allege and to offer proof to sustain the fact of diversity of citizenship, and the Supreme Court held that this was within the power of the trial court. This decision further indicates, we think, that a defendant would not be denied the right of trial by jury, if, after verdict, an issue of fact respecting diversity of citizenship was framed and a trial by jury was desired.

If a defendant may hold tight to a defective jurisdictional averment as an anchor to windward and then go through a trial on the merits, knowing that, if he wins on the merits, he can have the record cured so that his opponent is forever stopped, while, if beaten, he may sue out a writ of error and insist to the appellate tribunal that it is powerless to do other than grant him a new trial on the merits, skill in fencing by the advocates would seem to be more influential in reaching results than justice between the parties; for, if a defendant in such circumstances should demand a new trial at the hands of the trial court on the ground that jurisdiction did not affirmatively appear in the record, that court, under the authority of the *Duthie Case*, *supra*, would give the plaintiff an opportunity to bring the fact of diversity of citizenship upon the record, after verdict, instead of setting the verdict aside. And we believe that an appellate tribunal is not inevitably bound to allow such a defendant any greater advantage by reason of his covering the objection than he would have had on disclosing it to the trial court; that an appellate tribunal has power to mold its mandate on affirmance or on reversal so as to give more importance to the substantial rights of the parties than to the feints and covers of advocates. In *Grand Trunk Western Railway Co. v. Reddick*, 160 Fed. 898, 88 C. C. A. 80, we followed the course of reversing a judgment, while leaving what we found to be a just verdict stand, pending an inquiry in the trial court into the fact of diversity of citizenship; and a reconsideration of the question has not led us to find any valid ground for departing from that decision.

It is true, as defendant insists, that we cannot ultimately determine the merits at this time. That is, we cannot now affirm a judgment which has not yet been entered and which will never be entered if the trial court finds that there was, in fact, no diversity of citizenship. The judgment heretofore entered, to which the present writ of error is addressed, must inevitably be reversed because this court, having only appellate jurisdiction on this writ of error, cannot conduct an



inquiry into the facts of diversity of citizenship. But we have before us the whole record, which we have been at liberty to search and have searched for the purpose of finding evidence of facts to sustain jurisdiction. There is no such evidence; so, it being our duty to reverse the judgment, we have considered whether the trial court should take up the question as one arising subsequent to the verdict, as in the Duthie Case, *supra*, or whether the trial court should take up the question at the threshold of a trial *de novo*. We have found nothing in the record which would justify or require the trial court to put the parties to the trouble and expense of a new trial on the merits. The declaration states a good cause of action. There was evidence to show that the defendant, a contracting corporation, in constructing a tunnel, had created a dump of earth and broken rock in which pieces of wire with unexploded caps were left, with defendant's knowledge, and that defendant knew that numbers of children had been playing on this dump and finding these unexploded caps; and that plaintiff, without fault on his part, was injured through the explosion of one of those caps. We have found no errors in the instructions to the jury and there is nothing in the record to indicate that the award of damages is disproportionate to the injuries actually suffered by the child. These findings are, of course, only used by us as the basis of determining the scope of the mandate in reversing the judgment and are not intended as conclusive upon the defendant, in case a new judgment is entered against it in the trial court.

The judgment is reversed, with the direction to the trial court to permit plaintiff to file an amendment respecting diversity of citizenship and to permit the defendant to take issue thereon, if it is so advised, and to grant to the parties the trial of such issue by a jury, unless the jury is duly waived, and to dismiss the action without prejudice, at plaintiff's costs, if it be found that diversity of citizenship did not exist, but otherwise to enter judgment upon the verdict.

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YAZOO & M. V. R. CO. v. LONG.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1913.)

No. 2,238.

**1. MASTER AND SERVANT (§ 205\*)—INJURIES TO SERVANT—NEGLIGENCE—SAFE PLACE AND APPLIANCES—ASSUMPTION OF RISK.**

Where a brakeman fell and was injured while attempting to mount a box car because of the alleged absence of a handhold on top of the car, defendant's negligence consisted in a failure to provide reasonably safe appliances, and hence plaintiff did not assume the risk arising from methods of work adopted by defendant, in that plaintiff had knowledge that defendant in inspecting cars made no inspection of the roof, except such as could be seen from the ground.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.\*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 201 F.—56

**2. MASTER AND SERVANT (§ 124\*)—INJURIES TO SERVANT—RAILROADS—CARE REQUIRED—INSPECTION.**

Where a brakeman was injured while attempting to climb a car by the alleged absence of a handhold on the roof, the carrier owed him the duty of reasonable inspection to discover whether the handholds were safe, and plaintiff was entitled to presume that defendant would make a reasonably sufficient inspection of the car to ascertain its actual condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

**3. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—RAILROADS—INSPECTION—QUESTION FOR JURY.**

Whether a railroad's inspection of a freight car from which plaintiff fell and was injured was in fact reasonably sufficient is ordinarily one of fact for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

**4. MASTER AND SERVANT (§ 205\*)—INJURIES TO SERVANT—BRAKEMEN—ASSUMED RISK.**

If a brakeman may be charged with having assumed the risk of a mere insecure fastening of a handhold on top of a car by reason of his knowledge of the railroad company's method of inspection from the ground, such assumption would not extend to the risk of an entire absence of a grabiron near the edge of the roof, plainly visible on an inspection from the ground.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.\*]

**5. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—RAILROADS.**

Where plaintiff was injured by falling from a railroad car because of the absence of a grabiron on the roof, whether he was negligent in climbing on the car without first ascertaining whether it had a roof grabiron was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

**6. TRIAL (§ 280\*)—EXCEPTIONS—SCOPE.**

An exception generally to the court's summary of the facts and the court's statement in regard thereto was not sufficient to raise the question of mere inaccurate but not otherwise unfair summary of the facts, whether as including too much or too little, being sufficient only to require consideration as to whether the court's statements, summary of the testimony, and comments were unfair, as tending to excite prejudice or as inconsistent with judicial caution, or as invading the jury's province.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 691-693; Dec. Dig. § 280.\*]

In Error to the Circuit Court of the United States for the Western District of Tennessee; Jno. E. McCall, Judge.

Action by J. J. Long against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Fitzhugh & Biggs and Thos. A. Evans, both of Memphis, Tenn. (C. N. Burch, of Memphis, Tenn., of counsel), for plaintiff in error. Anderson & Crabtree, of Memphis, Tenn., for defendant in error.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before KNAPPEN, Circuit Judge, and SATER and SESSIONS, District Judges.

KNAPPEN, Circuit Judge. Defendant in error (plaintiff below) recovered verdict and judgment against plaintiff in error (as defendant below) on account of injuries alleged to have been received by plaintiff while in defendant's employ as brakeman.

Plaintiff's testimony tended to show that while attempting, in the discharge of his duty, at one of defendant's terminals, to climb to the top of a standing freight car, he reached up to seize the handhold or grabiron which should be upon the top of the car; that in his then position he could not see the top of the car, nor whether the handhold was there; that the handhold was in fact gone, with the result that plaintiff lost his footing (recovering himself, however, before reaching the ground), his abdomen striking "the handhold and (on?) the side of the car," causing hernia and other permanent injuries.

Defendant's alleged negligence with respect to maintaining this handhold was the only ground of liability submitted to the jury; and an instruction was given that no recovery could be had if the handhold was there at the time of the accident. Defendant introduced evidence that at and before the time of plaintiff's injury the customary method of inspection at defendant's terminals, as well as at those of other railroad companies, was to observe from the ground whether there were any apparent defects in the roof (which was visible from the ground), and if the roof looked sound and all right, and the bad order card showed nothing wrong with the roof, to make no further inspection.

Plaintiff had had several years' experience in railroad operation, and had at one time been in the service of the Interstate Commerce Commission as safety appliance inspector. A few days before the accident, he had sustained a similar fall through lack of a grabiron on the top of a car. He testified that in his previous railroad experience he had frequently found grabirons missing from roofs of cars. In a letter written after the accident he said:

"Car inspectors say they were not supposed to go on top of cars to inspect them, so that is why these things are not seen."

On this evidence the defendant contended that plaintiff had assumed the risks incident to defendant's method of inspection, and asked for direction of verdict accordingly. This being refused, an instruction was asked (likewise refused) that if defendant had a method of car inspection which did not include inspection of the roof grabirons, and that this method of inspection was known to the plaintiff, the latter "assumed this method of work," and could not recover on account of defendant's failure to inspect the roof irons.

[1] We think these requests were properly refused. We are unable to agree with defendant's contention that this case falls within the rule that an employé by entering and continuing in the employment assumes the risks arising from methods of work which he knows, or by the exercise of reasonable care should have known, to be dangerous. The case here presented does not involve the method of carry-

ing on the work in which the employé is engaged, but the exercise of care by the employer in the performance of his duty to furnish the employé reasonably safe appliances or a reasonably safe place with or in which to work. The object of an inspection is to ascertain the actual existence of dangerous conditions, as preliminary to their removal.

[2] Defendant primarily owed plaintiff the duty of using due care, by way of reasonable inspection, to discover whether the handholds were in safe condition; and it is elemental that plaintiff had the right to presume that defendant would make a reasonably sufficient inspection of the car.

[3] The question whether the inspection actually made was in fact reasonably sufficient would ordinarily be one of fact for the jury. *Felton v. Bullard*, 94 Fed. 781, 37 C. C. A. 1. Whether or not plaintiff's knowledge that the method of inspection regularly used by defendant was insufficient to disclose all defects reasonably ascertainable called upon him to exercise greater care in looking out for his own safety, the contention that he thereby assumed all risks resulting from an insufficient inspection, and absolutely relieved defendant therefrom, is, we think, contrary to reason and unsupported by authority. The effect of such contention would be to impose pro tanto upon the employé the otherwise nondelegable duty of the employer. In our opinion, the case of *Texas & Pacific Ry. Co. v. Archibald*, 170 U. S. 665, on page 672, 18 Sup. Ct. 777, on page 779, 42 L. Ed. 1188, is distinctly opposed to defendant's contention. Mr. Justice White there said that:

"No reason can be found for and no authority exists to support the contention that an employé, either from his knowledge of the employer's method of business or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished, which contain defects that might have been discovered by reasonable inspection. . . . The employé is not compelled to pass judgment on the employer's methods of business or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe and to deal with those furnished, relying on this fact, subject, of course, to the exception which we have already stated, by which where an appliance is furnished an employé in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such defective appliance, if, with the knowledge above stated, he negligently continues to use it."

[4] But if it were to be conceded that plaintiff assumed the risk of a mere insecure fastening of the handhold, not discoverable by an inspection from the ground, such assumption could not reasonably extend to the risk of the entire absence of a grabiron near the edge of the roof, plainly visible on an inspection from the ground.

From the conclusion reached that plaintiff did not assume the risk resulting from lack of the grabiron through his knowledge of defendant's custom in not making a roof inspection it follows that no prejudicial error was committed in the refusal to permit a cross-examination of plaintiff, when produced on rebuttal, as to his knowledge of the custom of railroads generally to omit such roof inspection.

[5] It is urged that verdict should have been directed for defend-



ant on the ground that plaintiff was conclusively shown to have been negligent in climbing upon the car without first ascertaining whether it had a roof grabiron. This proposition needs little discussion. The question of plaintiff's negligence was clearly for the jury, in view of his testimony that the car had no bad order card or any indication that it was out of order, and that the grabiron, if there, would not have been visible to him when climbing up the side of the car. The facts of plaintiff's previous injury under similar circumstances, and his knowledge that grabirons were frequently missing from tops of cars, were addressed to, but did not conclude the question of fact.

There was a sharp conflict of testimony as to the facts of the absence of the grabiron and as to whether plaintiff's injuries were the result of the alleged accident. The defendant gave evidence, among other things, that on an inspection of the car, made as soon as information of the alleged defect was received, the grabiron was found securely in place, although somewhat bent, and that the plaintiff immediately following the accident was not treated for, and gave no evidence of the existence of the permanent injuries of which he now complains; defendant's theory being that the alleged permanent injuries (other than hernia) were the result of disease having no relation to the accident.

The court clearly and pointedly stated to the jury the issues on both these questions, together with the claims of the respective parties, and to some extent summarized the testimony relating to both propositions, with comments upon certain features of the testimony. The learned judge expressed his opinion that the greater weight of the evidence favored plaintiff's right of recovery. The court's summary of the evidence on the question whether the handhold was missing is criticised as unduly emphasizing the plaintiff's contention and not fairly stating that of defendant; and his summary of the facts as to the extent of the injury is criticised in certain respects as an invasion of the province of the jury, unwarranted by the record, and highly prejudicial to defendant.

It should go without saying that, if the charge is subject to these criticisms, defendant is entitled to a new trial. It is conceded that the trial judge had the right to express his opinion upon the facts, provided the jury were given clearly to understand that the court's expression of opinion was not binding upon them, and that the jurors were the final and sole arbiters of the questions of fact. The court fully performed its duty in this regard.

[6] The only exception which can be thought to relate to the criticisms in question is found in the statement of counsel to the court that he desired "to generally except to your summary of facts and your statement in regard thereto." This exception is not sufficiently specific to raise the question of a merely inaccurate (but not otherwise unfair) summary of the facts, whether as including too much or too little. So limited, a more specific criticism and the giving of opportunity to make necessary or proper corrections or additions would be necessary. *United States Coal Co. v. Pinkerton* (C. C. A. 6) 169 Fed. 536, 541, 95 C. C. A. 34. We think, however, the exception specific

enough to require us to consider whether the court's statements, summary of testimony, and comments were unfair to defendant, as tending to excite prejudice or as inconsistent "with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances." On a careful consideration of the entire charge, and taking into account that the court's attention was not challenged to any specific inaccuracy of statement, we are not impressed that it is subject to the criticism of unfairness as above defined.

Assignments of error numbered 4½, 9, and the first paragraph of No. 5, which are directed against certain parts of the charge as given, are unsupported by exception, and cannot be considered.

The judgment of the Circuit Court is affirmed, with costs.

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GEORGE H. LEONARD & CO., to Use of MARDEN, ORTH & HASTINGS,  
v. ROLLER.

(Circuit Court of Appeals, Fourth Circuit. December 21, 1912.)

No. 1,119.

EVIDENCE (§ 417\*)—SALES—TIME FOR PERFORMANCE.

Defendant contracted to make and sell to plaintiffs, who were dealers, 5,000 barrels of tanning extract, to be delivered at fairly regular intervals during a year. After 10 months, defendant having delivered but about 1,000 barrels, a new contract was made, extending the time, and by which defendant agreed to report weekly the quantity on hand, to enable plaintiffs to order accordingly. He failed to keep such agreement, and after the lapse of 14 months more, during which defendant delivered but 49 barrels, plaintiffs demanded the greater part of the remainder called for, and, when it was not delivered, sued for breach of the contract. The second contract did not in terms fix any time when it should expire. *Held*, that the court could not say as matter of law that it expired at the end of a year, but that plaintiffs were entitled to show, by the circumstances and conduct of the parties, that it had not expired when they made their demand, and, if such fact was proved, to show the damages they sustained by its breach.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 417.\*]

In Error to the District Court of the United States for the Western District of Virginia, at Harrisonburg; Henry C. McDowell, Judge.

Action at law by George H. Leonard & Co., to the use of Marden, Orth & Hastings, against John E. Roller, trading as the Excelsior Oak Extract Company. Judgment for defendant, and plaintiffs bring error. Reversed.

R. T. Barton, of Winchester, Va., for plaintiffs in error.

Rudolph Bumgardner, of Staunton, Va. (Bumgardner & Bumgardner, of Staunton, Va., on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and ROSE, District Judges.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ROSE, District Judge. This is a suit for a breach of a contract to make, sell, and deliver tanning extract. The plaintiffs in error were plaintiffs below. They were the buyers. They will be referred to as such. They are all citizens of Massachusetts. The defendant below is defendant in error here. He is a citizen of Virginia. He was the seller. He will be so designated. He is a manufacturer of tanning extracts. The buyers were dealers in such commodities. They contracted with producers to take large quantities of their output at more or less frequent intervals, extending sometimes over considerable periods, as, for example, a year. They sought purchasers for what they had agreed to buy. If they found those who took what they had bought, when and as they were able to deliver it, and who would pay them a higher price than they had bound themselves to give, they made money. If they did not, they lost. To save cost of transshipment, they caused the extracts to be shipped directly from the factory of production to those who had purchased from them. This method of doing business necessarily resulted in their agreeing to deliver what at the time was not in their possession. If the producers carried out their bargains with them, they were safe. If the reverse happened, they might find themselves under serious liability.

The declaration in this case says that the method of doing business above described was in contemplation of both the buyers and the seller at the time they entered into contractual relations with each other. For present purposes this allegation must be assumed to be true. The first agreement between them bore date September 12, 1904. The contract then made was in writing. By its terms the seller sold and the buyers bought an aggregate of 5,000 barrels of extract f. o. b. cars, Broadway, Va. Shipments to fill the contract were to be made at fairly regular intervals between September 15, 1904, and September 15, 1905, as buyers might from time to time order. Up to the 22d of July, 1905, the seller had shipped only 1,026 barrels, and 3,974 had not been delivered. On the last-mentioned date the parties made a new contract. It took the form of an agreement proposed by the seller and accepted by the buyers. The seller stated that he entered into it in consideration of his having failed to make delivery under his contract of September 12, 1904, according to its terms, and in consideration of the buyers giving him further time to fulfill it. The seller undertook to report to the buyers each Wednesday the approximate quantity of wood bark, extract, and tank cars on hand, the estimated quantity of extract which he would make in the next week, and the shipments of extract made since the preceding report. He was to make shipments as instructed by the buyers as rapidly as possible until the balance of the 5,000 barrels were delivered. He was to ship to nobody else, except one concern, and not to it unless there was extract due it on a contract made prior to the date of his original agreement with the buyers, viz., September 12, 1904.

As the case is now before us, it must be assumed that the seller broke his contract as to almost all of the 3,974 barrels which he was to ship as directed by the buyers. He shipped 49, and 3,925 are still undelivered. He never made a single weekly report called for in the

contract. The course the case took below rendered it unnecessary for him to explain, excuse, or justify these apparent breaches of contract. The buyers charged, in one or the other of the counts of their declaration, that on various dates, ranging from September 15, 1905, to September 12, 1906, they had by letters, telegrams, and personal interviews urged the seller to carry out his contract, by reporting the quantities of material as therein provided for, and by shipping the extract to the persons and places to which the buyers had directed. They assert that they could not, without such reports, safely sell the extract to be obtained from him, and as a consequence could not give him orders for shipment. In some instances they say that they refused profitable orders for the kind and quality of extract he was to deliver to them. In other cases they bought extract to fill such orders at a higher price than that they agreed to pay him. They further charged that he broke his contract by selling and delivering extract to other persons.

For the present purposes it may be assumed that the buyers properly charged the making of the contract between them and the seller and its breach by the latter. Below the dispute between them was primarily as to the measure of damages to which the buyers were entitled, and secondarily as to the manner in which such damages were to be proved.

Before discussing these questions it may be said that in August, 1905, the buyers gave the seller an order for a car load, or 60 barrels, of extract. This order was not filled by him. It is agreed that this failure damaged the buyers to the amount of \$119.58. This sum the seller paid into the court below. The buyers may have it whenever they are ready to take it.

The pending controversies between the parties concern the remaining 3,865 barrels. The buyers say that their failure to obtain these from the seller has cost them \$9,846.78. The learned judge below refused to allow them to offer any evidence to show that they had in fact suffered this loss, or any part of it.

In the declaration it is alleged that on the 18th and 19th of September, 1906, the buyers ordered the seller to deliver the major part of these 3,865 barrels, and it is also charged that they could and would have sold the remainder if they could have obtained them. They claimed to recover the difference between the price which, under their contract, they were to pay the seller and (1) the price at which they had to buy extract to fill the orders which, on September 18 and 19, 1906, they had given him, and (2) the price at which they could have sold the remainder in September, 1906. It will be noted that the date on which these large orders were given by the buyers to the seller was nearly 14 months subsequent to the making of the contract of July 22, 1905. It was, however, only 6 or 7 days after the declaration alleges that the buyers in a personal appeal made their last attempt to induce the seller to carry out his contract.

The demurrer of the seller to the amended declaration was overruled. The learned judge below was, however, of opinion that the seller was entitled to be informed by a bill of particulars in detail pre-



cisely what damages the buyers proposed to prove they had suffered and in what manner such damage had been occasioned. The buyers thereupon filed a bill of particulars. In it they said that they intended to prove the loss they had suffered by the failure of the seller to comply with their orders of September 18 and 19, 1906, so far as such orders had been given, and to show the difference between the contract price and the market price prevailing in September, 1906, so far as concerned that portion of the extract for which they had not given the seller any orders. The learned judge below was of opinion that by a fair construction of the contract of July 22, 1905, the buyers were bound to order, and the seller bound to deliver, the extract in fairly regular quantities. He held that the failure of the seller to make the weekly reports called for by his contract relieved the buyers of any obligation to give orders, but that such failure did not of itself extend the time for the performance of the contract. He ruled that such time expired not later than July, 1906. He reached this conclusion by assuming that the contract of July, 1905, called for substantially the same rate of delivery as that of September 12, 1904, which was 5,000 barrels in 12 months, or  $416\frac{2}{3}$  barrels per month. He said the 3,974 barrels which were undelivered when the contract of July 22, 1905, was made, should at this rate have been delivered in 9.53 months—that is to say, by some time early in May of 1906—and that it could not be assumed that the parties had contemplated that the time of such delivery would extend beyond July, 1906. He thereupon notified the counsel for the buyers and the seller that at the trial he would not allow the former to offer evidence in support of any of the items of damage alleged in such bill of particulars. He said that under the declaration the buyers might be entitled to present evidence of other damage suffered by them. He added, however, that such evidence, if offered at the trial, would constitute a complete surprise to the seller, unless the latter was notified in advance that it would be so presented. He therefore ordered that the buyers, if they wished to prove other damage, should file a new bill of particulars. His letter to the counsel is in the record as one of the orders in the case. It closes by stating:

"I anticipate that no bill of particulars will be filed under the order of today. If so, the result will merely be that no evidence \* \* \* can be received in behalf of plaintiffs, on the theory that my construction of the second contract will be accepted as a dernier resort."

No other bill of particulars was tendered by the buyers. It followed that under the rulings of the court there was nothing to try. All that remained to be done was to make the necessary formal arrangements for seeking here to review by writ of error the accuracy of the rulings below. The parties stipulated to waive a jury trial and to submit the case to the judge. The buyers made formal tender of evidence to support their declaration and to prove the items of damage alleged in their bill of particulars. In accordance with the ruling previously made, the latter evidence was rejected. Exception was taken. The case is here.

We are of opinion that upon the allegations of the declaration it was error to rule as a matter of law that the time during which the buyers could call for deliveries had necessarily expired before September 18 and 19, 1906. It is true that, had the original contract been carried out according to its terms, the seller would have delivered more than 400 barrels a month. It is equally true that in the 10½ months between the making of the first and the second contract he actually delivered only 1,026 barrels, or at the rate of less than 100 barrels a month, and neither party then treated the contract as at an end. No specific time of delivery was a term of the second contract. Under such circumstances, we do not see how it is possible, in advance of the actual presentation of the evidence at a trial, to say when the time for performance of the contract of July, 1905, by its terms expired, much less what effect the acts of the parties and other circumstances might have had in extending the time for its performance beyond the date assumed by the court below. The buyers should be allowed to prove, if they can, that the seller broke the contract. After so much has been shown, and the court and jury know what took place subsequent to the making of the contract of July 22, 1905, and prior to the orders of September 18 and 19, 1906, it will be possible for the court to determine what the proper measure of damages is. It hardly can be safely done before. It is not impossible that the testimony will take such a shape that, after it is in, all that the court will be able to do will be to tell the jury that if they shall find certain facts there will be one measure of damages, and if they shall find certain other facts there will be another. In order to prevent surprise to the seller, the buyers may within proper limits be required to give, in the form of a bill of particulars or otherwise, notice of all the proofs of damage which they propose to offer, whether it be upon one theory of the case or another, or upon several. From the record before us it would appear that there may have been an almost total breach by the seller of his contract, and that the buyers have been losers thereby. It would seem that the latter should have their day in court to prove what their loss has been, that it is of a kind and character for which the law will allow them to recover, and that it can be supported by evidence which the law holds competent.

It follows that the judgment below must be reversed, and the cause remanded for a new trial.

Reversed.

AIELLO v. CRAMPTON.

In re ALEXANDER MERCANTILE CO.'S ESTATE.

(Circuit Court of Appeals, Eighth Circuit, November 6, 1912.)

No. 3,774.

1. CORPORATIONS (§ 1\*)—SEPARATE ENTITY.

A corporation is an entity distinct and separate from its stockholders, though all of its stock is owned by a single individual.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1, 3-6; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1608-1621; vol. 8, pp. 7619, 7620.]

2. BANKRUPTCY (§ 165\*)—PREFERENCES.

Where a bankrupt, being indebted to a corporation, executed a note to it for such indebtedness, which note the corporation transferred to claimant, who, while the owner of most of the corporation's stock, was also a private banker, the fact that the corporation thereafter received certain notes of a third person from the bankrupt in part payment of its claim, which were not transferred to the claimant, was not sufficient to establish that claimant had received a preference from the bankrupt, under the rule that unless a creditor receives a portion of the bankrupt's property there is no preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.\*]

On Transfer from the Supreme Court of the State of New Mexico. Claim of John Aiello against E. C. Crampton, as trustee of the bankrupt estate of the Alexander Mercantile Company. From an order of the District Court reversing a referee's order allowing the claim, and directing that the same be disallowed, claimant appealed to the Supreme Court of the Territory of New Mexico, by which the same was transferred to the Circuit Court of Appeals. Reversed, with directions to affirm the order of the referee.

Jesse G. Northcutt, of Trinidad, Colo. (A. W. McHendrie, of Trinidad, Colo., on the brief), for appellant.

H. L. Bickley, J. Leahy, and L. S. Wilson, all of Raton, N. M., for appellee.

Before SANBORN and CARLAND, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. The Alexander Mercantile Company, of Raton, N. M., was a corporation engaged in the mercantile business, and on the 22d day of July, 1910, certain of its creditors filed a petition in the district court for the Fourth judicial district of the territory of New Mexico, asking that said Alexander Mercantile Company be adjudged a bankrupt. Such proceedings were had therein that on September 27, 1910, said company was adjudged a bankrupt. The case was duly referred to a referee, and various creditors filed their claims for allowance against the bankrupt estate, among them being appellant, John Aiello, whose claim was based upon a note

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the sum of \$5,000, executed March 27, 1910, by said Alexander Mercantile Company to the Southern Colorado Mercantile Company, a corporation of Trinidad, Colo.; said note having been transferred by assignment to appellant, John Aiello. Objections were filed to the allowance of the claim, and after hearing had the claim was, on November 5, 1910, allowed by the referee. From the order of the referee allowing the claim, the trustee duly filed a petition for a review thereof. On May 13, 1911, the district court of the Fourth judicial district of the territory after hearing had, reversed the order of the referee allowing the claim, and entered its order directing that the claim be disallowed. From this judgment of the district court appellant, John Aiello, appealed to the Supreme Court of the territory of New Mexico. As the case was pending in the Supreme Court of the territory upon its admission as a state, the Supreme Court, pursuant to the provisions of the enabling act, transferred the cause to this court.

From the facts it appears that the Alexander Mercantile Company, being indebted to the Southern Colorado Mercantile Company, gave its note to the Southern Colorado Mercantile Company some time in the latter part of the year 1909, for the sum of \$5,000, which note was renewed on March 27, 1910; said renewal note being the one sought to be proved by John Aiello as a claim against the bankrupt estate. It also appears from the evidence that some time during April, 1910, the Alexander Mercantile Company being insolvent, sold to one Guy M. Alexander a portion of its stock of merchandise for the sum of \$2,500, in consideration of which Guy M. Alexander and his father executed notes aggregating the sum of \$2,500, secured by a second mortgage upon a piece of real property, said notes being dated April 26, 1910, and the same were given to, and received by, the Southern Colorado Mercantile Company, and that amount credited upon the account which the Alexander Mercantile Company owed to it. Appellant, John Aiello, was, at the time of the transaction referred to, president and manager of the Southern Colorado Mercantile Company, owned most of the stock of the company, and personally conducted the transaction on behalf of that company. He was also engaged in the banking business at Trinidad, having a private bank owned solely by himself.

The entire contention in this case is based upon the proposition that the transfer of the notes of \$2,500, given by Guy M. Alexander and his father, in payment of the merchandise which Guy M. Alexander purchased in April, 1910, from the Alexander Mercantile Company, the bankrupt, to the Southern Colorado Mercantile Company as a payment upon the indebtedness of the bankrupt to the Southern Colorado Mercantile Company, constituted, under the circumstances and knowledge which the parties possessed, a preference under the bankrupt law; that as John Aiello was the president and manager of the Southern Colorado Mercantile Company, and owned most of the stock, a preference given to it was in fact and in law a preference given to John Aiello; and that John Aiello, while retaining the benefit of such preference, was not entitled to prove up his claim based on the \$5,000 note.



[1, 2] Notwithstanding Aiello owned most of the stock of the Southern Colorado Mercantile Company, the company was an entity, distinct and separate from himself as an individual. *Watson v. Bonfils*, 116 Fed. 157, 53 C. C. A. 535. So that the fact that the Southern Colorado Mercantile Company received the notes of Guy M. Alexander for \$2,500 in payment upon its claim was in no respect the receiving of a preference by John Aiello; for, before he can be charged with having received a preference, he must, in his capacity as a creditor, have received some portion of the property or assets of the bankrupt. As stated in *Mason v. Nat. Herkimer County Bank*, 172 Fed. 529, 97 C. C. A. 155:

"The one thing absolutely essential to a preference is that the bankrupt transfers some portion of his property to the creditor. If the creditor received none of the bankrupt's property, there is no preference."

See, also, *Catchings v. Chatham Nat. Bk.*, 180 Fed. 103, 103 C. C. A. 601.

It is not shown that the transfer of the \$5,000 note to John Aiello (in his business capacity as banker) was with a view to defeat the provisions of the bankrupt law. On the contrary, we think it appears that he was a good faith owner of that note.

The evidence failing to show that John Aiello received any of the property of the bankrupt within four months preceding the filing of the petition in bankruptcy, the judgment of the district court of the territory of New Mexico is reversed, and the case is remanded to the United States District Court for the District of New Mexico, with directions to affirm the order of the referee allowing appellant's claim.

SANBORN, Circuit Judge. I concur in the result in this case because, in my judgment, the record fails to prove that John Aiello or the Southern Colorado Mercantile Company had reasonable cause to believe, when they received the note and mortgage, that it was intended by the sale of the goods, the taking of the note and mortgage and its transfer by the Alexander Mercantile Company in payment of its debt to the Southern Company, to give a preference to the Southern Company or to Aiello over other creditors or persons similarly situated.

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SEEP v. FERRIS-HAGGARTY COPPER MINING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1912.)

No. 3,653.

**1. COURTS (§ 405\*)—COURT OF APPEALS—JURISDICTION—EXTENT OF REVIEW.**

The Circuit Court of Appeals, being a court of error only, can review only such errors in an action tried by the court as are presented by legal propositions presented to and ruled on by the trial court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1097-1103; Dec. Dig. § 405.\*]

Jurisdiction of Circuit Court of Appeals in general, see notes to *Lau Ow Baw v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. APPEAL AND ERROR (§ 846\*)—REVIEW—PRESENTATION OF QUESTION TO TRIAL COURT.**

Where an action is tried to the court, questions of law can be raised for review by writ of error only by first making seasonable objections to the admission or rejection of evidence, and by requesting the court before the trial is ended to make declarations of law, and excepting to its refusal to do so, and to its declarations of law, if any, that do not accord with the propositions asked, in the same way as instructions to a jury would be requested, and exceptions taken to the giving or refusal thereof, if the case had been tried to a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3347-3362, 3366; Dec. Dig. § 846.\*]

**3. APPEAL AND ERROR (§ 1008\*)—FINDINGS OF TRIAL COURT—EFFECT.**

Where an action is tried to the court without a jury, the court's finding, whether general or special, performs the same office as the verdict of a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.\*]

**4. APPEAL AND ERROR (§ 846\*)—SUFFICIENCY OF EVIDENCE—REVIEW.**

Where an action is tried to the court without a jury, if the appellant desires the Circuit Court of Appeals to review the question whether there is substantial evidence to support the judgment, he must request the trial court to make a finding or enter a judgment in his favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3347-3362, 3366; Dec. Dig. § 846.\*]

In Error to the Circuit Court of the United States for the District of Wyoming; John A. Riner, Judge.

Action by Joseph Seep against the Ferris-Haggarty Copper Mining Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Horace N. Hawkins, of Denver, Colo., for plaintiff in error.

Charles E. Blydenburgh and A. McMicken, both of Rawlins, Wyo. for defendants in error.

Before SANBORN and CARLAND, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. This was an action at law. A jury was waived, and trial had to the court, which made a general finding for defendant, and entered judgment thereon. The assignments of error are:

"First. The court erred in finding for the defendants.

"Second. The court erred in rendering judgment against the plaintiff in error.

"Third. The court erred in rendering judgment that the defendants go hence without day.

"Fourth. The court erred in rendering judgment that the defendants recover of the plaintiff the costs of the cause.

"Fifth. The court erred in not finding for the plaintiff.

"Sixth. The court erred in not awarding the plaintiff judgment as prayed for in the petition."

Plaintiff tendered to the court no request for any finding of fact or law, or for judgment in his favor. Such being the case, under numerous decisions of the Supreme Court and this court, there is

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

nothing which this court can review. *Mercantile Trust Co. v. Wood*, 60 Fed. 346-348, 8 C. C. A. 658; *United States Fidelity & G. Co. v. Board of Com'rs*, 145 Fed. 144-151, 76 C. C. A. 114; *Nat'l Surety Co. v. United States for the use, etc.*, 200 Fed. 142, decided at this term, and cases therein cited.

As the same question is presented at nearly every term of this court, and in three different cases at the present term, we will restate the rules heretofore announced essential to obtain a review of a judgment in an action at law, in which a jury is waived and the case tried to the court.

[1] In *Mercantile Trust Co. v. Wood*, *supra*, Judge Sanborn, writing the opinion, said:

"When a case comes to this court upon a writ of error, this is a court for the correction of the errors of the court below solely. To enable us to review those errors in a case tried by the court, it must appear that the legal propositions on which they rest were presented to that court and ruled upon before the trial ended."

[2, 3] And in the same opinion it is stated:

"There are only two methods by which questions of law can be so presented to the court that tries the facts that this court can review them by writ of error. These methods are: First, by seasonable objections and exceptions to the rulings of the court upon the admission or rejection of evidence; and, second, by requesting the court, before the trial is ended, to make declarations of law, and excepting to its refusal to do so, and to its declarations of law, if any, that do not accord with the propositions asked, in exactly the same way as instructions to a jury would be requested, and the rulings of the court giving or refusing them would be excepted to, if the trial was before a jury. The finding of the court, whether general or special, performs the office of a verdict of a jury. When it is made and filed, the trial is ended."

Again, in *United States Fidelity & G. Co. v. Board of Com'rs*, *supra*, the same judge said:

"The question whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action is a question of law which arises in the progress of the trial. In a trial to a jury it is reviewable on an exception to a ruling upon a request for a peremptory instruction. In a trial by the court without a jury it is reviewable upon a motion for a judgment, a request for a declaration of law, or any other action in the trial court which fairly presents this issue of law to that court for determination before the trial ends. The trial ends only when the finding is filed, or, if no finding is filed before, when the judgment is rendered."

These statements of the mode in which the judgment of the court, in an action at law when a jury has been waived, may be reviewed, seem plain and specific. All that it is necessary for counsel to do in the trial of an action at law to the court, when a jury is waived, is to bear in mind that the judge trying the case is acting in a dual capacity: First, as a trier of questions of law, the same as if the case were being tried to a jury; second, as a trier of facts, in the place of a jury. If the case was tried to a jury, to enable the appellate court to pass upon the question as to whether or not there is substantial evidence to sustain a finding in favor of a party, it is necessary to request the court to direct a finding. Upon the court's refusal, and

an exception being taken, that question may be reviewed. So, too, when a case is tried to a court without a jury.

[4] If a party desires to have the appellate court review the question as to whether there is substantial evidence to support the final judgment, he must request the trial court to make a finding or enter a judgment in his favor, and if there arise questions of law applicable to the case in the trial of a case before a jury, a party must request the court to instruct the jury in respect thereto, and upon the court's refusal, and an exception taken, the correctness of the questions of law so requested, and the effect of their refusal, may be reviewed; or an exception to propositions of law which the court gives to a jury may in like manner be reviewed. So, when a case is tried to the court, requests should be made to the court to find and announce the propositions of law which it is claimed are applicable to the facts in the case. If the court refuses to so find, and an exception is taken, the questions may be reviewed in the appellate court; or, if the court makes findings of law, and they are duly excepted to, they may be reviewed.

We have thus restated the rule for the reason, before given, that cases are being constantly brought to this court for review which simply request this court to try the case de novo, when its jurisdiction is confined to the correction of errors only which may have been committed by the trial court. As no such questions are presented in this case, the assignments of error simply seeking to have this court try the case de novo upon the evidence, the judgment is affirmed.

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**WHITE v. CHASE et al.**

(Circuit Court of Appeals, Eighth Circuit. November 11, 1912.)

No. 3,782.

**1. APPEAL AND ERROR (§ 846\*)—PRESENTING QUESTIONS IN LOWER COURT—NECESSITY.**

The Circuit Court of Appeals being without jurisdiction in an action at law to try the case de novo, and being authorized to review only errors of law, where no request was made of the court at the close of trial by plaintiff for a finding or judgment in this favor or for any findings of law or fact whatever, the Circuit Court of Appeals can review nothing except a ruling on a motion to remove the cause to the state court made after a general finding for the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3347-3362; Dec. Dig. § 846.\*]

**2. COURTS (§ 309\*)—JURISDICTION—DIVERSITY OF CITIZENSHIP—NOMINAL PARTIES.**

In an action of ejectment a defendant in possession of the premises not as tenant or lessee, but merely as caretaker for the other defendant, was merely a nominal party, whose citizenship did not affect the question of jurisdiction of the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 857; Dec. Dig. § 309.\*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



**3. REMOVAL OF CAUSES (§ 86\*)—PROCEEDINGS—WAIVER OF OBJECTIONS.**

Imperfections in a petition for removal of a cause to the federal court which are formal and modal only are waived where no objection has been made to them.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.\*]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by C. W. White against John B. Chase and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Allen & Webster, of Denver, Colo., for plaintiff in error.

Edwin Van Cise, Frank L. Grant, and Philip S. Van Cise, all of Denver, Colo., for defendants in error.

Before SANBORN and CARLAND, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. This was an action of ejectment brought by plaintiff in error against defendants in error in the district court of Sedgwick county, Colo., to recover possession of certain described real estate, for damages, etc. The defendant Chase was served with process, and answered therein, among other things disclaiming all interest in the described premises. The defendant Harriet A. Fowler, being a nonresident, was not served with process, but subsequently entered her appearance and filed a petition for removal of the action into the Circuit Court of the United States, on the ground that the controversy was wholly one between plaintiff, a citizen and resident of Colorado, and herself, a citizen and resident of the state of Illinois; that the defendant Chase had no interest whatever in said property, and that he had filed his answer disclaiming any interest therein; that the controversy was wholly between plaintiff and the defendant Harriet A. Fowler. The state court granted the order of removal, a transcript of the record was duly filed in said Circuit Court, and defendant Fowler filed her answer therein, alleging her ownership of the premises in question. Plaintiff in no manner challenged the jurisdiction of the federal court, but filed a replication to the answer of Harriet A. Fowler, and upon issues thus joined between the plaintiff and the defendant Harriet A. Fowler testimony was taken, a jury waived in writing, and the cause tried to the court. At the close of the evidence the court made a general finding for the defendant. Thereafter plaintiff filed his motion for a rehearing, subsequently withdrew the motion for a rehearing, and filed a motion to remand the cause to the state court, giving as reason therefor that it appeared "from the answer of the defendant John B. Chase, and from the evidence introduced upon the trial of said cause, that said John B. Chase was not a nominal defendant in said cause, but in the possession of the premises sought to be recovered, and in the actual physical control of the same, and that the plaintiff and said defendant John B. Chase are not residents and citizens of different states so as to give jurisdiction to this court on the ground of diverse citizenship, and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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for the further reason that there exists no other cause for the removal of said cause from the state court to this court or for the jurisdiction of this court attaching in said cause." The motion was overruled, and judgment entered for defendants. Plaintiff brings the case here on error, assigning as the first ground that the court erred in overruling the motion to remand the case to the state court, "for the reason that the defendant John B. Chase is affirmatively shown to be a citizen and resident of the state of Colorado, of which the plaintiff is a citizen and resident, and that both of the same were such citizens and residents at the time this action was commenced, and because it appeared upon the trial of said cause and by the evidence introduced therein for and on behalf of the defendants that the said John B. Chase was a necessary party and not a nominal party, as alleged and set forth in the application to remove said cause from the state to the federal court." Other assignments of error relate to the finding and judgment of the court, all to the effect that such finding and judgment of the court that the premises in question belong to the defendant Harriet A. Fowler, and not to the plaintiff, and that the statute of limitations had been tolled was erroneous.

[1] No request was made of the court at the close of the trial by plaintiff for a finding or judgment in his favor, or for any findings of law or fact whatever. As this court in an action at law is without jurisdiction to try the case *de novo*, and can only review errors of law, there is nothing in the assignments of error which we can review, excepting the ruling upon the motion to remand. *Nat. Surety Co. v. United States, for the Use, etc.* (C. C. A.) 200 Fed. 142, and *Seep v. Ferris-Haggarty Copper Mining Co.*, 201 Fed. 893 (both decided at this term), and cases therein cited.

[2] From the record it clearly appears that the defendant Chase had no interest whatever in the premises in question. He was not a tenant or lessee, but merely in the custody of the premises as caretaker for defendant Fowler. He clearly was merely a nominal party to the action, the same as would be, in a similar action of ejectment, the housemaid left in charge of premises during a temporary absence of the real and actual defendant. So that it clearly appears from the record that the controversy was wholly and solely between the plaintiff and defendant Fowler, who were citizens and residents of different states. The federal court, therefore, had jurisdiction both of the subject-matter and of the parties.

[3] There appear some imperfections in the petition for removal. No objection, however, has been made with respect thereto, and these, being formal and modal only, were waived. *Guarantee Co. of North Dakota v. Hanway*, 104 Fed. 369, 44 C. C. A. 312, and cases therein cited.

The judgment is affirmed.

## HUXLEY v. HAYES.

(Circuit Court of Appeals, Third Circuit. January 21, 1913.)

No. 58.

**RECEIVERS (§ 104\*)—PROPERTY—WRONGFUL CLAIM—DAMAGES.**

An insolvent automobile corporation having transferred certain machines in storage to plaintiff by assigning the warehouse receipts, the insolvent's receiver notified the warehouse company that the insolvent's estate was the owner of the machines, and directed the warehouseman not to deliver on the receipts. Such claim was ultimately decided against the receiver; but the delay disabled plaintiff from selling the machines, as he would otherwise have done, and also caused loss to him by reason of their depreciation in value. *Held*, that the receiver, having asserted his ownership of the machines in good faith, was not liable for the damages resulting to plaintiff therefrom.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 191; Dec. Dig. § 104.\*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge.

Action by Norman S. Huxley against James A. Hayes, Jr. Judgment for defendant (191 Fed. 943), and plaintiff brings error. Affirmed.

Rudolph M. Schick, of Philadelphia, Pa., for plaintiff in error.

A. M. Beitler, of Philadelphia, Pa., for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges.

**PER CURIAM.** This case arises on defendant's demurrer to the plaintiff's statement of claim. The demurrer was sustained by the court below, and the decision of the case depends upon the facts alleged in the statement of claim. These allegations are, briefly, as follows:

That on March 24, 1908, the plaintiff was the owner of six automobiles, made by the Dragon Automobile Company, together of the value of about \$6,600; that these automobiles were, at the time stated, in the warehouse of the Pennsylvania Warehousing Company, in the city of Philadelphia, on storage, and the said Warehousing Company had issued to the said Dragon Automobile Company its negotiable certificates for each of said automobiles, in each of which it agreed to deliver the automobile described therein to the order of the said Automobile Company, upon payment of storage and charges, and the surrender of the certificate properly indorsed; that these six certificates were afterwards properly indorsed by the Automobile Company and delivered to the plaintiff, and the said certificates were owned by him and in his possession on the said 24th day of March, 1908.

That on or about the 23d day of March, 1908, a petition in bankruptcy was filed in the District Court of the United States for the said district, against the Automobile Company, and on or about the same day, the defendant was duly appointed receiver of the estate

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the said company, the alleged bankrupt; that afterwards the said company was duly adjudged a bankrupt, and the defendant was duly appointed trustee of its estate; that after the appointment of defendant as receiver, as aforesaid, on or about the 24th day of March, 1908, the said defendant unlawfully and wrongfully notified the said Warehousing Company that the said automobiles, as aforesaid, stored with it, belonged to the estate of the Automobile Company, and that it should not deliver the same to the plaintiff; that afterwards, on or about the 26th day of March, 1908, the plaintiff demanded the said automobiles of the Warehousing Company, offering to pay, etc., and to surrender the warehouse certificates, but the said company, because of the said notice given it by the defendant, refused to deliver the said automobiles to the plaintiff and kept the same in its possession.

That thereafter the court below (presumably in a suit by plaintiff against the Warehousing Company—see *Huxley v. Pa. Warehousing & Safe Dep. Co.*, 170 Fed. 587, 95 C. C. A. 667; also s. c., 184 Fed. 705, 106 C. C. A. 659) “ordered a feigned issue to be framed and filed, in which the said Automobile Company and the defendant herein, receiver of the Dragon Automobile Company, in bankruptcy, be made the plaintiff, and the said Norman S. Huxley, the plaintiff herein, be made the defendant, to determine the right of property to the six automobiles on the 22d day of May, 1908; that afterwards, \* \* \* the said feigned issue having been framed and filed, the same came on to be tried, and a verdict thereon was rendered for the defendant therein, the said Norman S. Huxley, and judgment on said verdict was afterwards duly entered in favor of the said Norman S. Huxley,” pursuant to which, the said Warehousing Company delivered the said automobiles to the said Huxley, the plaintiff in error.

Plaintiff then avers that by reason of the said refusal of the Warehousing Company to deliver the said automobiles to him, the plaintiff, he was prevented from selling them on or about the 26th day of March, 1908; that for about two months thereafter automobiles made by the Dragon Automobile Company became of much less value, and when the automobiles were, as aforesaid, delivered to the plaintiff, were of little value to him, “wherefore plaintiff avers that he has suffered injury and claims damages to the amount of six thousand dollars, which he seeks to recover in this suit.”

To this statement of claim the defendant demurred, and the following causes of demurrer, among others, were assigned:

First. Because the claim sets forth no cause of action against the defendant individually, but discloses that plaintiff's action, if he has any, should have been brought against him as receiver of the Dragon Automobile Company; the only ground of liability disclosed in the statement being an alleged unlawful notice to the Warehousing Company not to deliver certain automobiles to the plaintiff, and the statement disclosing that such notice was given by the defendant solely as receiver.

Second. Because the plaintiff's statement of claim sets forth no cause of action against the defendant, as it discloses that the interpleader, which resulted in a verdict for the plaintiff herein, was di-



rected by the court to be framed between the plaintiff herein and the defendant herein, as receiver of the Dragon Automobile Company.

Fifth. The plaintiff's statement of claim is not sufficient in law to maintain the present action, since the only pretense of liability on the part of the defendant is a notice to a third party not to deliver certain goods, and such mere notice has never been held to constitute a use or abuse of legal process. It did not operate as an attachment to tie up the automobiles, or as a legal restraint upon the Warehousing Company. It is not alleged that there was any falsehood in the demand, want of probable cause, malice in the defendant, or an actual arrest of the person or seizure of property.

We have carefully examined the elaborate argument and cases cited by the learned counsel for the plaintiff in error, and agree with the learned judge of the court below, upon whose opinion its judgment is hereby affirmed. That opinion is as follows:

"The cases referred to by the plaintiff in support of his statement do not, I think, go as far as he supposes. If a trespass has been committed upon either person or property, he who procures or helps, even at a distance, may be liable equally with him who applies the injurious force. But I do not understand it to be the law that he who in good faith asserts his ownership of property that is in the custody of a bailee, or of some indifferent person, may not give notice of his claim to the bailee, except at the risk of being cast in damages if the assertion turns out afterwards to be mistaken. Nothing else appears in the present case, and in my opinion, therefore, the action cannot be sustained. The question has been decided in favor of the defendant by the Supreme Court of Pennsylvania. *Norcross v. Otis*, 152 Pa. 481, 25 Atl. 575, 34 Am. St. Rep. 669.

"The fifth ground of demurrer is sustained."

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## GRAINGER & CO. V. RILEY.

### In re GLOBE PRINTING CO.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1913.)

No. 2,271.

#### 1. BANKRUPTCY (§ 192\*)—MECHANICS' LIENS—EXISTENCE—STATE LAW.

Whether claimant was entitled to a mechanic's lien on assets of a bankrupt for labor and materials furnished in the performance of certain alterations in the place where the bankrupt conducted its business depended on the statutes of the state.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 294; Dec. Dig. § 192.\*]

#### 2. MECHANICS' LIENS (§ 1\*)—EXISTENCE—STATUTES.

A mechanic's lien for labor and material is unknown to the common law, and exists only by virtue of statute, a substantial compliance with which is essential to the existence of the lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 1; Dec. Dig. § 1.\*]

#### 3. MECHANICS' LIENS (§ 118\*)—STATUTES—CONSTRUCTION—LEASEHOLD.

Ky. St. § 2463, as amended by Sess. Laws 1910, c. 64, provides for the creation of mechanics' liens, and declares that no person shall acquire such a lien unless he shall notify the owner of the property to be held,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or his authorized agent, in writing, immediately after the last item of the material or labor is furnished, of his intention to hold the property liable, and the amount for which he will claim a lien. *Held* that, where claimant was employed by the bankrupt lessee of certain premises to refurnish and repair an elevator thereon, claimant was not entitled to a mechanic's lien on the leasehold estate, in the absence of notice to the bankrupt of its intention to claim a lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 161; Dec. Dig. § 118.\*]

Appeal from, and Petition to Revise, an Order of the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

In the matter of bankruptcy proceedings of the Globe Printing Company; William E. Riley, trustee. From an order sustaining a referee's findings, denying the application of Grainger & Co. for a lien against the bankrupt's assets for work and materials furnished for the bankrupt as lessee of certain premises on which it conducted its operations, claimant appealed, and filed a petition to revise. Affirmed.

Gifford & Steinfeld, Fred Forcht, Jr., and Benjamin F. Washer, all of Louisville, Ky., for appellant.

Graddy Cary, Henry Burnett, and H. W. Batson, all of Louisville, Ky., for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

McCALL, District Judge. On the 23d day of May, 1910, the Globe Printing Company entered into a written contract with one George Looms, by the terms of which certain premises in Louisville, Ky., were leased by Looms to the Globe Printing Company for a period of 20 years from September 1, 1910. The lessee took possession of the premises, and afterwards employed the appellant, Grainger & Co., to rearrange and repair an elevator thereon. This work was completed prior to December 21, 1910. The contract price was \$1,046. The Printing Company paid \$100 on account. No further sums having been paid, a balance of \$946 remained.

On March 20, 1911, the Globe Printing Company was adjudged a bankrupt, and shortly thereafter the appellee, William E. Riley, was elected trustee of the bankrupt's estate. On the 19th of May, 1911, Grainger & Co., with the view of perfecting a lien upon the leased premises, and also upon the bankrupt's leasehold interest therein, filed in the office of the clerk of the county court of Jefferson county, Ky., a statement that a lien was claimed by it to secure the payment of said account. Subsequently, appellant filed its claim with the referee against the bankrupt's estate, and asserted its said lien.

The referee, without notice to the trustee, allowed the claim as a secured one, on the day it was filed. Thereafter exceptions were filed by the trustee of the bankrupt, and, upon hearing, the order allowing the claim as a secured one, was set aside, and it was allowed as a general claim. Upon review by the District Court, the findings of the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

referee were affirmed. In due season, Grainger & Co. perfected an appeal to this court, and also filed its petition for review.

Under the ruling of the Supreme Court of the United States in the Matter of the Petition of Loving, trustee, the petition for review must be dismissed. 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725.

[1] The sole question involved is whether the appellant held a secured claim against the bankrupt's estate. The answer of the question depends upon section 2463 of the Kentucky Statutes, as amended in 1910 (Laws 1910, c. 64), and which is as follows:

"A person who performs labor or furnishes material in the erection, altering or repairing a house, building or other structure, or for any fixtures or machinery therein, or for the excavation of cellars, cisterns, vaults, wells, or for the improvement, in any manner, of said real estate by contract with, or by the written consent of the owner, contractor, subcontractor, architect, or authorized agent, shall have a lien thereon, and upon the land upon which the said improvements shall have been made or any interest such owner has in the same, to secure the amount thereof, with cost; and said lien on the land or improvements shall be superior to any mortgage or encumbrance created subsequent to the beginning of the labor, or the furnishing of the material; and said lien, if asserted, as herein provided, shall relate back and take effect from the time of the commencement of the labor or the furnishing of the materials; provided, that no person shall acquire a lien under this section unless he shall notify, in writing, the owner of the property to be held liable or his authorized agent, immediately after the last item of said material or labor is furnished, of his intention to hold the said property liable, and the amount for which he will claim a lien."

The last clause of the section, beginning with the words, "that no person," etc., is an amendment added to the original section in 1910 (Session Acts Ky. 1910, p. 201), and it has not been considered by the Court of Appeals of Kentucky, and we therefore must determine the question before us unaided by the opinion of that court.

It is agreed that no notice was given immediately after the completion of the work as provided in the section of the Kentucky statute just quoted, *supra*. It is not sought here to enforce a lien against the leased premises, but only as against the leasehold estate, and the contention of the appellant is that under a proper construction of section 2463, as amended, it was not necessary for Grainger & Co. to notify the lessee, the Globe Printing Company, of an intention to claim a lien on the leasehold, upon the ground that it was the party with which the contract was made.

Quite an array of authorities are cited in support of this contention, which we deem it unnecessary to consider, further than to say that we do not think they are in point. The statute authorizes a lien in favor of mechanics, laborers, and materialmen, and provides that no person shall acquire this lien, unless he shall notify in writing the owner of the property to be held liable or his authorized agent immediately after the last item of material or labor is furnished, of his intention to hold the property liable, and the amount for which he claims a lien. Nothing is left to inference or conjecture. A compliance with this provision is, as we think, *conditio sine qua non*.

[2] A lien, such as is sought here, for labor performed or material furnished, is unknown to the common law, and is purely a statutory

one. That there must be a substantial compliance with the terms of such statutes is everywhere maintained, and the right created thereunder can only be availed of in the manner and upon the conditions provided for in the act giving the lien. *Withrow Lumber Co. v. Glasgow Inv. Co.*, 101 Fed. 863, 42 C. C. A. 61; *Tischendorf-Creste Lumber Co. v. Hegan*, 134 Ky. 1, 119 S. W. 163; *Hardin v. Marble*, 76 Ky. (13 Bush) 58; *General Fire Extinguisher Co. v. Chaplin*, 183 Mass. 375, 67 N. E. 321; *Minor v. Marshall*, 6 N. M. 194, 27 Pac. 481; *Shackleford v. Beck*, 80 Va. 573.

The language of the statute under consideration is clear and unambiguous and leaves no room for construction. As was said in *U. S. v. Ninety-Nine Diamonds*, 72 C. C. A. 9, 139 Fed. 961, 2 L. R. A. (N. S.) 185:

"Construction and interpretation have no place or office where the language of a statute is unambiguous and its meaning evident."

And again in *Brun v. Mann*, 80 C. C. A. 513, 151 Fed. 145, 12 L. R. A. (N. S.) 154, it is said:

"It is only when the terms of a statute are ambiguous and their significance is uncertain that the rule of liberal construction has any function. \* \* \* They [the courts] may not assume or presume purposes and intentions that the terms of the statute do not indicate, and then enact or expunge provisions to accomplish these supposed intentions. \* \* \* There is a conclusive presumption that the legislative body intended what it declared; the statute must be held to mean what it clearly expresses, and no room is left for construction."

[3] From these considerations we deem it unnecessary to enter into the field of construction and interpretation, but we must accept the plain, simple, and unambiguous terms of the statute as we find them. If its terms are harsh, the remedy rests with the Legislature of Kentucky, and not with the courts. In order to have secured the lien provided by section 2463, as amended, the appellant should have given notice to the bankrupt or his authorized agent immediately after the last item of material or labor was furnished, as provided in the statute. This was not done. The case is affirmed, with costs.

#### VINING v. REXFORD.

(Circuit Court of Appeals, Third Circuit. January 18, 1913.)

No. 1,686.

##### 1. DEATH (§ 18\*)—RIGHT OF ACTION—"CHILDREN."

Under Act Pa. April 15, 1851 (P. L. 674) § 19 (Purdon's Dig. [13th Ed.] p. 3240, par. 3), and Act Pa. April 26, 1855 (P. L. 309) § 1 (3 Purdon's Dig. [13th Ed.] p. 3241, par. 4), authorizing an action for death occasioned by unlawful violence or negligence for the benefit of a husband, widow, children, or parents of the deceased, "children" are entitled to sue for the wrongful killing of their parents, whether the children are adults or minors, and though they were not a part of the household at the time of the killing.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20; Dec. Dig. § 18.\*

For other definitions, see Words and Phrases, vol. 2, pp. 1115-1141; vol. 8, p. 7601.]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



**2. DEATH (§ 18\*)—KILLING OF MOTHER—ACTION BY ADULT SON—DAMAGES.**

An adult son, who had not been a member of his mother's household for several years, could not recover damages for her wrongful death, under Act Pa. April 15, 1851 (P. L. 674) § 19 (Purdon's Dig. [13th Ed.] p. 3240, par 3), authorizing the maintenance of an action for death occasioned by unlawful violence or negligence, for the benefit of a husband, widow, children, or parents of the deceased, but allowing damages only to the extent of pecuniary loss, where there was no proof, either of the decedent's manner of life, habits of expenditure, or sources of bounty, or the amount reasonably to be expected.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20; Dec. Dig. § 18.\*]

**3. DEATH (§ 18\*)—RIGHT TO SUE—PECUNIARY LOSS.**

Where an adult son, who had not been a member of his mother's family for many years, was under no obligation to reimburse third persons for advances by them for funeral expenses after she had been negligently killed, the fact that they expected him to reimburse them, and that he intended to do so, was insufficient to show a pecuniary loss by him as the result of his mother's death, so as to entitle him to maintain an action therefor.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20; Dec. Dig. § 18.\*]

**4. DEATH (§ 18\*)—ACTION—RIGHT TO SUE—NOMINAL DAMAGES.**

An adult son, who had not lived with his mother for many years at the time she was wrongfully killed, and had not suffered any substantial pecuniary loss by reason of her death, could not maintain an action in Pennsylvania therefor in order to recover nominal damages.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20; Dec. Dig. § 18.\*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Charles P. Orr, Judge.

Action by Archie C. Vining against William F. Rexford. Judgment for defendant, and plaintiff brings error. Affirmed.

Walter C. Longstreth, of Philadelphia, Pa., for plaintiff in error.

Reynolds D. Brown, Francis Gallagher, and Malcolm Lloyd, Jr., all of Philadelphia, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. In this action of trespass an adult son, 28 years of age, seeks to recover damages for the death of his mother, although he had not been a member of the household for several years. A compulsory nonsuit was entered upon two grounds: (1) That the plaintiff's evidence on the subject of damages was so imperfect that a verdict in his favor would be a mere guess; and (2) that the evidence would not justify a finding of the defendant's negligence. Believing that the first ground was properly taken, we shall not discuss the second.

[1] The Pennsylvania act of 1851 (section 19, P. L. 674; Purdon [13th Ed.] p. 3240, par. 3; 3 Pepper & Lewis' Statutes [2d Ed.] 5332) and the act of 1855 (section 1, P. L. 309; 3 Purdon, p. 3241; 3 Pepper & Lewis' Statutes, 5333) are the foundation of the suit. In case of death "occasioned by unlawful violence or negligence," they authorize an action for the benefit of the husband, widow, children, or parents of the deceased, but do not allow dam-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ages except for pecuniary loss. The "children" may be adults or minors, and they need not have been part of the household at the time of the death. As was said in *Schnatz v. Railroad*, 160 Pa. at page 606, 28 Atl. at page 953:

"The act itself makes no distinction between children over age and those under, between those married or single, between those having homes and families of their own and those still members of the parents' household. Such distinctions may have significance in determining the amount of damage peculiarly suffered, \* \* \* but they do not affect the statutory right on the part of children to a standing in court as claimants or suitors."

But the court goes on to say (page 607 of 160 Pa., page 954 of 28 Atl.):

"It may be assumed, then, that the existence of the parental relation, while it would give the children a standing in court as parties, without more would not sustain this judgment; but if there was evidence from which the jury could find a reasonable expectation of pecuniary advantage from the continued life of the mother they might assess as damages the actual money loss of the children."

[2] Thereupon the court proceeded to examine the evidence in that case, and pointed out, not only the pecuniary benefits received by the children during their mother's life, but also (and this is especially important now) the sources from which these benefits were derived. The mother owned a house and four acres of ground in a Pennsylvania village among the mountains. She was a thrifty woman, a storekeeper in a small way, as well as the cultivator of her land. Two of her three daughters (one of the two being in bad health) came regularly year by year and spent the summer, paying no board and also profiting physically by the change of climate and scene. She gave money and clothing at times to one of her daughters, furnished potatoes gratuitously to the family of another for 16 years, nursed, sewed, and performed other services from time to time without charge; and the court held that a jury "might find from such evidence a reasonable expectation of future benefits of like value and character, and thereby approximate a money loss."

The only other case cited from Pennsylvania upon the right of adult children to recover (*Stahler v. Railway*, 199 Pa. 383, 49 Atl. 273, 85 Am. St. Rep. 791) turns upon another question; but we may note in passing that "the plaintiff's testimony showed conclusively that the deceased had for about 10 years contributed in the aggregate to the three sons about \$2,500 yearly," and that he "carried on a large wholesale and retail drug business and an agency for the sale of powder, [and that] he owned real estate in Norristown and Bridgeport."

Clearly a child may be as much bound to prove the sources of a parent's bounty as to prove the amount. Whether the gifts come from income or from principal, from a salary or from wages, from an established business or from a precarious venture, from abundance or from narrow means, is evidently of much consequence. And, moreover, since gifts are usually made from surplus, the parent's manner of life and habits of expenditure must ordinarily be

taken into account. In the present case, however, there was not a word of evidence on these matters, and we agree with the learned judge that without some light thereon a verdict would have had little to support it.

[3] The plaintiff's testimony about the funeral expenses did not strengthen his case. He did not contract for them, directly or indirectly, and he had not paid them, or even promised to pay them. They had been paid by two other persons (but for what reason did not appear), and the plaintiff's testimony goes no farther than to say that these persons "certainly expect [him] to reimburse them therefor." He does not even say that he intends to reimburse them; but, if we assume that he means as much as this, it is still true that he is under no obligation to make the payment.

[4] The testimony about the telegrams is too meager and unsatisfactory to call for discussion. And only a word need be added on the subject of nominal damages. The plaintiff did not ask that the jury might be permitted to render such a verdict, and it is manifest that the subject was neither raised nor decided at the trial. But if it is properly before us on this writ we may say that no Pennsylvania case has been cited to support the proposition that a plaintiff in such an action as this has a definite right to recover nominal damages at least, although he may fail to prove a substantial loss. So far as we are advised, it is not the practice in this state (whatever it may be elsewhere) to allow such a verdict in a suit of this kind. Sometimes a nominal verdict may be of real value—for example, where it settles a disputed right—but where the only object of the action is to redress a pecuniary loss such a verdict would seem to be of no use, except, perhaps, to carry costs, and we may leave the state courts to weigh that consideration; for in the federal courts a nominal verdict in such a case could not carry costs, because it would necessarily be less than \$500

The judgment is affirmed.

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CITIZENS' WHOLESALE SUPPLY CO. v. SNYDER et al.

(Circuit Court of Appeals, Third Circuit. February 1, 1913.)

No. 1,672, October Term, 1912.

**MONOPOLIES (§ 12\*)—COMBINATIONS—VIOLATION OF FEDERAL ANTI-TRUST LAW.**

Citizens of a municipality, who in good faith combine to enforce an ordinance thereof, believing on reasonable grounds that it is valid, while in fact invalid as interfering with interstate commerce and so finally adjudged in the litigation instituted by them, are not guilty of violating Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and are not liable for damages sustained by the person prosecuted by them for violating the ordinance.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Middle District of Pennsylvania; Joseph Buffington, Judge.

Action by the Citizens' Wholesale Supply Company against Dennis H. Snyder and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

A. A. Vosburg, of Scranton, Pa., Philemon S. Karshner, of Adelphi, Ohio, and John C. Nissley, of Harrisburg, Pa., for plaintiff in error.

Harry S. Knight, of Sunbury, Pa., and M. H. Taggart, of Northumberland, Pa., for defendants in error.

Before GRAY and McPHERSON, Circuit Judges, and RELL-STAB, District Judge.

J. B. McPHERSON, Circuit Judge. In this action the Supply Company, an Ohio corporation, charges certain citizens of Sunbury, Pa., with violating the Anti-Trust Act of 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). The statement of claim avers that the defendants, an unincorporated association of merchants and business men, combined to restrain the interstate trade of the Supply Company in groceries and other merchandise. The trial judge nonsuited the plaintiff, and adhered to that ruling upon the subsequent motion required by the state practice. The facts are as follows:

Since the early years of the state the subject of "peddling"—selling at retail from house to house or on the streets of a municipality—has been much considered in Pennsylvania, both by the Legislature and by the councils of cities and boroughs. And the courts have often been called upon to determine the scope and validity of numerous ordinances dealing with this persistently agitated matter. Among recent decisions of the appellate courts is the case of *North Wales Borough v. Brownback*, 10 Pa. Super. Ct. 227, in which an ordinance drawn in a particular form was held to be valid by the Superior Court; this ruling being afterwards affirmed by the Supreme Court. 194 Pa. 609, 45 Atl. 660, 49 L. R. A. 446. The decision of the Superior Court was announced in April, 1899, and in the following December the borough of Sunbury passed an ordinance essentially the same as the ordinance of North Wales. Section 1 provided:

"That after the passage of this ordinance it shall be unlawful for any person or persons to sell at retail by sample or otherwise, or to solicit orders at retail, or to solicit orders for, sell, or deliver at retail, either on the streets or by traveling from house to house within the limits of the borough of Sunbury, any books, paintings, foreign or domestic goods, wares, merchandise, or fruits, not of their own manufacture or production, without first obtaining from the chief burgess of the borough of Sunbury a license for such purpose."

In April, 1902, the Supply Company (whose agents had been soliciting orders and delivering goods in the borough without a license) undertook by the hands of Rearick, one of these agents, to deliver certain brooms in fulfillment of previous orders. The secretary of the merchants' association believed that the original packages had been broken, and that the brooms were no longer protected by the com-



merce clause of the federal Constitution. Accordingly he directed the captain of the borough police to prosecute Rearick for violating the ordinance, and a fine was imposed by a justice of the peace. Upon appeal the quarter sessions of the county affirmed the conviction, and the Superior Court in a careful and elaborate opinion (*Commonwealth v. Rearick*, 26 Pa. Super. Ct. 384) affirmed the judgment of the quarter sessions. The Supreme Court of Pennsylvania refused permission to appeal (practically affirming the Superior Court), and the case was thereupon removed to the Supreme Court of the United States, where the judgment was reversed in December, 1906. *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Sup. 159, 51 L. Ed. 295. The details of the controversy are not important. It is enough to say that the transport of the brooms for the purpose of filling the orders was held to be protected commerce. After several years of litigation it thus appeared that four tribunals of the state held one opinion, while the Supreme Court held a different, but, of course, the dominant, opinion, concerning the same transaction. The association had no doubt been wrong, but certainly no one can affirm that the question was not fairly debatable. Two years later the present suit was brought charging certain members of the association with combining to restrain interstate commerce. It is argued that the combination was sufficiently proved—or at all events that a jury might so find—by the facts that the secretary directed the arrest of Rearick under the ordinance and that the association defended the proceeding before every tribunal that considered it. No evidence was offered to show impairment of the Supply Company's trade in Sunbury, and the claim for damages was limited to three times the fees and other expenses of the litigation.

This situation does not call for extended comment. So far as appears, the defendants had nothing to do with the passage of the ordinance (even if this were important in the present case). The single allegation is that as they combined to enforce it against the Supply Company they combined necessarily to restrain commerce unlawfully between the states in question. It may perhaps be noted that the company's general right to make interstate shipments was not denied by the defendants. They merely attacked the particular shipment of brooms, because in their opinion these articles had lost the protection of the original package and had become part of the general mass of property in the borough, over which the ordinance could exercise control. Of course, an ordinance that conflicts with the commerce clause must ultimately give way; but we cannot assent to the proposition that two persons cannot combine in good faith to take action in the courts under such an ordinance without being exposed to the sanctions of the Anti-Trust Act. A citizen has a right to act in good faith upon the belief that a law or an ordinance passed by constituted authority is valid. *Prima facie* it is valid, and although his belief may no doubt be erroneous now and then, and he may have his labor and cost for his pains, we think it clear that even then he is not to be treated as a deliberate wrongdoer. We cannot suppose that the general words of the Anti-Trust Act were intended to include an agree-

ment in good faith to test a municipal ordinance in the courts. Such a construction would impose an extraordinary burden upon the citizen, and could only be justified by unmistakable language. It would require very plain speaking to make us believe that Congress had said, in effect, that citizens while acting in good faith to redress the violation of an ordinance *prima facie* valid, or even of fairly doubtful validity, must anticipate the decision of some ultimate tribunal, and must do so at the risk of being fined or imprisoned if their forecast should be wrong. The policy of the law encourages the peaceful settlement of disputes, and we see nothing in the conduct of the merchants' association that was deserving of blame. In good faith and on plausible grounds they believed the law to be with them, and they had a right to try out such a controversy in the courts, although the litigation might be expensive for their antagonist as well as for themselves.

No precedent has been cited that supports the plaintiff's position; but on the analogous subject of false imprisonment there are numerous cases to the contrary. Plaintiffs have often been denied the right to recover damages, although they have been actually imprisoned for violating an invalid law or ordinance. 19 Cyc. 345; *Gifford v. Wiggins*, 50 Minn. 401, 52 N. W. 904, 18 L. R. A. 356; *Tillman v. Beard*, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215; and other cases referred to in these citations.

The judgment is affirmed.

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### A. WACHS & CO. v. SWEENEY.

(Circuit Court of Appeals, Third Circuit. February 4, 1913.)

No. 1,631.

#### 1. SALES (§ 382\*)—CONTRACTS—BREACH—EVIDENCE—ADMISSIBILITY.

Where, in an action for the refusal by a buyer of five car loads of eggs to receive three car loads, after receiving and paying for two car loads, the issue was whether the two car loads received were "current receipts eggs," as stipulated in the contract of sale, and the evidence showed that the five car loads formed a part of a larger quantity accumulated in a cold storage warehouse and gathered from many sources of supply, evidence that the eggs composing the three car loads refused were "current receipts eggs," together with the price received on a sale thereof for the buyer's account, was admissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1096; Dec. Dig. § 382.\*]

#### 2. SALES (§ 381\*)—BREACH BY BUYER—ACTION—EVIDENCE.

A seller, who sold goods for the account of the buyer, refusing to accept them, and who sued for the loss sustained on the resale, must show the price received on the resale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1095; Dec. Dig. § 381.\*]

#### 3. TRIAL (§ 252\*)—INSTRUCTIONS—REQUESTS—SUFFICIENCY.

A requested instruction, in an action for breach of contract to purchase "current receipts eggs," inaccurate in the statement that "current

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

receipts eggs" meant "fresh eggs," while the jury under the evidence could not find that fact, was properly refused on that ground.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

Gray, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; James B. Holland, Judge.

Action by Frank Sweeney against A. Wachs & Co. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Julius C. Levi and M. Hampton Todd, both of Philadelphia, Pa., for plaintiffs in error.

Samuel W. Cooper, of Philadelphia, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This controversy arises in the following manner:

On January 18, 1911, Sweeney, a Chicago dealer in eggs, sold 5 car load lots "current receipts eggs" to Wachs & Co., the defendants, who were produce merchants of Philadelphia. The contract was signed in Chicago on the day named. Two cars left that city on the 19th, reached Philadelphia on the 24th, and were paid for on delivery. On the 25th the defendants telegraphed:

"Two cars run very bad; not like sample. Will not take other three cars."

Further communications passed between the parties, but the defendants persisted in their effort to rescind, and finally the plaintiff sold for their account the remaining three lots in Chicago at market prices. These prices were lower than in January, and by this suit he seeks to make good his loss. At the trial the defense was that the two cars contained a grossly large percentage of eggs that were moldy and otherwise unfit for sale. The ground was taken that the eggs were not "current receipts," and not only was the rescission of the contract defended, but a certificate against the plaintiff was asked for to compensate the defendants' loss. The vital question, therefore, was a question of fact: "Did the two cars contain current receipts eggs?" If they did, the whole defense fell to the ground, and the plaintiff was entitled to recover in full. This question the jury answered in the affirmative, and the verdict has therefore settled the dispute, unless material errors were committed in the conduct of the trial.

The plaintiff's theory was that this was a sale after inspection, and that the maxim of caveat emptor bound the defendants, no matter what the quality of the eggs may have been. The contract in full is this:

"1/18/1911.

"Frank Sweeney sells to A. Wachs & Co. 5 cars current receipts eggs stored in the Chicago C. S. & W. Co. Shipment 2 cars this week, Nos. 40006 and 40038; 3 cars shipment next week; the 5 cars to be selected by Mr. Fayer by the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

19th of January, 1911, and accepted by him. Messrs. A. Wachs & Co. agree to pay on arrival of goods. Price 16½ c. per dozen at mark.

"[Signed] Frank Sweeney.

"A. Wachs."

Fayer made the customary inspection; i. e., he examined certain cases taken at random from each of several car load lots (more than five), and out of these he selected and accepted five lots as satisfactory. No attack was made upon his good faith or the adequacy of the inspection; but the defendants insisted that the transaction was in no sense a sale by inspection, but was a sale by sample—the corollary being that the rescission was justified because the goods did not come up to the sample. The trial judge accepted the defendants' theory, and they are in no position to complain of his instructions on this subject. It is true that an acute criticism of a few sentences in a careful and extended charge may disclose some inconsistency; but the charge as a whole is so plain and clear that its central thought could hardly have been misunderstood. We do not believe that harm could have been done by an undesigned discrepancy that is not to be detected without some effort, even in cold blood. Much of the defendants' argument in this court rests upon the unwarranted assumption that the two cars did not contain "current receipts eggs" at all, but a much inferior quality. No doubt, if that assumption should be granted, the argument is not without force; but, as we have already pointed out, this was the vital fact in dispute, it was the precise question to which almost all of the evidence was directed, and it is only fair that the rulings of the learned judge should be examined in the light of that situation, and not in the light of the defendants' present assumption.

[1, 2] Certainly, as it seems to us, it was relevant in such an inquiry to prove that the eggs in the other three lots were "current receipts eggs." These five lots formed part of a much larger quantity belonging to Sweeney that had accumulated in a cold storage warehouse and had been there for several months. The mass had been gathered from many sources of supply, and we may reasonably suppose that its quality was generally uniform. At least, such was probably the fact, and the likelihood would be properly reinforced by evidence that three out of the five lots measured up to the standard. The testimony complained of was therefore admissible, its value being for the jury. Moreover, it was relevant to show at what prices the three lots were sold. If for no other purpose, this was competent, indeed it was essential, in order to show the amount of the plaintiff's loss; but the testimony was relevant also, because market price always has some bearing upon quality, and is often as good evidence on this subject as can be had. The plaintiff, therefore, was properly permitted to prove the prices obtained for the three lots; and, if prices had gone down since January 18th, and if the falling market also offered a possible explanation why the defendants had repudiated the contract, that incidental result could not be avoided.

It may be admitted that there is some vigor about the learned judge's instructions concerning the value of some of the defendants' evidence, but we cannot say that he overstepped the line. The books



that he excluded, declaring them to be unreliable, were not book entries at all; they were merely hearsay memoranda, and even as such they were not satisfactory.

[3] The defendants' sixth point was properly refused. Under the evidence the jury were not at liberty to find that "current receipts eggs" meant "fresh eggs," and this inaccuracy in the point justified the refusal.

Finding no material error in the record, the judgment is affirmed.

GRAY, Circuit Judge, dissents.

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KOC SIS v. AMERICAN CAR & FOUNDRY CO.

(Circuit Court of Appeals, Third Circuit. January 28, 1913.)

No. 1,606.

**MASTER AND SERVANT (§ 201\*)—INJURY TO SERVANT—NEGLIGENCE—LIABILITY.**

Where an employer was guilty of negligence in failing to properly maintain overhead tracks for a crane in its plant, and thereby prevent the crane from falling between the tracks, and the negligence contributed to the injury of an employé by the fall of the crane, it was not relieved from liability merely because a coemployé was concurrently negligent in starting the crane.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.\*]

In Error to the District Court of the United States for the Middle District of Pennsylvania.

Action by Joseph Kocsis against the American Car & Foundry Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Robert Snodgrass, of Harrisburg, Pa., and Fred. Ikeler, of Bloomsburg, Pa., for plaintiff in error.

C. B. Little and Morgan S. Kaufman, both of Scranton, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Kocsis, a subject of Austria, brought an action of trespass and recovered a verdict against his employer, the American Car & Foundry Company, a corporation of New Jersey, for damages caused to him by its alleged negligence. Defendant then moved for judgment notwithstanding the verdict on its reserved point for binding instructions. On refusal by the court of such motion, and entry of judgment for the plaintiff on the verdict, defendant sued out this writ.

The sole question involved is whether the court committed error in denying defendant's motion for binding instructions. The plaintiff's statement of claim alleged, the proofs tended to show, and the verdict

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 201 F.—58

established, the facts that plaintiff was a machine operative in defendant's car-building plant; that running the length of the building, and over the place plaintiff worked, were two parallel, suspended rails, forming the track for a small overhead crane; that previous to the accident these tracks had been so spread and out of parallel alignment as to allow the crane to fall between them; and that on the day of the accident the spread was such that when the crane, which was standing some three or four yards up the track, was accidentally pushed to a point above the plaintiff, it permitted the crane to drop entirely through, and fall upon and injure the plaintiff. "As to the condition of the tracks upon which the traveler was operated," as stated in defendant's argument, no contention is made, as, "for the purposes of the case, it must be conceded that they were out of repair." The divergent views of the parties are clearly outlined in the charge as follows:

"The plaintiff charges the defendant with failure and neglect to keep in proper repair the track or traveling way on which was run and operated the smaller crane or hoist, alleging that this track was crooked, loose, and shaky, and by reason of its defective condition the rails or track spread apart, causing the truck of the said crane to become dislodged, leaving the track, and falling between the same down and upon the plaintiff, causing such injury. To this the defendant replies, without admitting that this be true, that if you should so find as contended by the plaintiff, nevertheless they should not be held accountable for the occurrence, since the moving cause that occasioned the accident was the negligent manner in which the plaintiff's coemployé moved the steel beams or sills or operated a large or overhanging crane, which set the carrier on the smaller crane in motion, pushing it along until it left the track. I cannot affirm this contention of the defendant. The employé is not obliged to examine into the employer's method of transacting his business, and he may assume, in the absence of the contrary, that reasonable care will be used in furnishing the necessary appliances to carry on the business in which he is engaged. This duty of the master of providing a reasonably safe place for the carrying on of the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character. Did the master, the defendant company here, exercise such reasonable care for the safety of all of its employés and did it use due skill and care to make the place and appliances safe in and about the place where the defendant was employed? If not, and you find that the negligence of the master, the defendant company, in failing to provide and maintain this track upon which the carrier of the small crane was moving, by reason thereof contributed to the injury received by the plaintiff, the defendant will be liable, notwithstanding the concurring negligence of those performing the work in moving the steel beams in manner as stated. The matters of fact for you to determine, therefore, are whether or not the track or traveling way of this carrier was in such defective condition as charged by the plaintiff, and, if so, whether such was the means of causing the carrier to leave the track and drop upon the plaintiff, thereby causing the injury, and, furthermore, whether the defendant had or should have had knowledge of such defect by use of due care."

Under the proofs, we think the court rightly refused to take the case from the jury, and under the authorities (*Grand Trunk Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; *Gila Valley, etc., Ry. Co. v. Lyon*, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. Ed. 276; *Clyde v. Railroad* [C. C.] 59 Fed. 394; *City of Manchester v. Landry* [C. C. A.] 199 Fed. 883) was justified in charging that if the defendant was guilty of negligence in failing to properly main-

tain the overhead tracks, and such negligence contributed to the plaintiff's injury, it was not relieved of liability for such negligence because another employé, as was the case in *Gila Valley, etc., Ry. Co. v. Lyon*, supra, was concurrently negligent in starting the crane. The jury having so found, we see no grounds for vacating the judgment entered on their verdict.

The judgment is therefore affirmed.

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ROYAL INS. CO. OF LIVERPOOL, ENG., v. STODDARD et al.

(Circuit Court of Appeals, Eighth Circuit. November 11, 1912.)

No. 3,731.

**1. COURTS (§ 328\*)—FEDERAL COURTS—JURISDICTION—JURISDICTIONAL AMOUNT.**

Under Judiciary Act March 3, 1887, c. 373, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), limiting the jurisdiction of Circuit Courts of the United States in civil actions based on diversity of citizenship to cases where the amount or value of the matter in controversy "exceeds" \$2,000, exclusive of interest and costs, the court had no jurisdiction of an action on a contract of insurance for \$2,000 even; and this, though plaintiffs' complaint alleged that the amount in controversy, exclusive of interest and costs, exceeded \$2,000, and defendant admitted such fact in its answer.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890–896; Dec. Dig. § 328.\*]

Jurisdiction of federal courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent–Stribling Shoe Co. v. Roper*, 36 C. C. A. 459; *O. G. Lewis Mercantile Co. v. Klepner*, 100 C. C. A. 288.]

**2. APPEAL AND ERROR (§ 185\*)—WANT OF JURISDICTION—DUTY TO NOTICE.**

Where lack of federal jurisdiction appeared on the face of the record, it was the duty of the Circuit Court of Appeals to notice the same, and to reverse and remand, with directions to dismiss, though the question was not raised by counsel either in the trial court or on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166–1178, 1375; Dec. Dig. § 185.\*]

In Error to the Circuit Court of the United States for the District of Wyoming; John A. Riner, Judge.

Action by M. B. Stoddard and another against the Royal Insurance Company of Liverpool, England. Judgment for plaintiffs, and defendant brings error. Reversed and remanded, with directions to dismiss.

Timothy F. Burke, of Cheyenne, Wyo. (Charles B. Obermeyer, of Chicago, Ill., on the brief), for plaintiff in error.

A. M. Stevenson, of Denver, Colo. (Raymond W. Beach, of Chicago, Ill., on the brief), for defendants in error.

Before SANBORN and CARLAND, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. This is an action brought by defendants in error, who will be designated as plaintiffs, against plain-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tiff in error, designated as defendant, to recover the full amount of a policy of fire insurance, issued upon a two-story frame building in the sum of \$2,000. The plaintiffs alleged that there was due them from the defendant, upon said policy of insurance and the loss of the property therein described, the sum of \$2,000, with interest thereon at the rate of 8 per cent. per annum from December 10, 1909, and prayed judgment for the sum of \$2,000 and interest thereon, and for costs. The complaint alleged that the matter in dispute exceeded, exclusive of interest and costs, the sum or value of \$2,000. This allegation was specifically admitted by defendant in its answer. Upon the issues joined a trial was had, which resulted in a verdict and judgment for the plaintiffs in the sum of \$2,000 and interest thereon from December 10, 1909, and costs of suit, from which judgment defendant brings error to this court.

[1] The jurisdiction of the court below was invoked on the ground of diversity of citizenship. The Judiciary Act of 1887, as amended in 1888, expressly limits the jurisdiction of the Circuit Courts of the United States, in civil actions based upon diversity of citizenship, to cases where the amount or value of the matter in controversy, *exceeds*, exclusive of interest and costs, the sum of \$2,000. The language of the act, that the value of the matter in controversy must *exceed* the sum of \$2,000, exclusive of interest and costs, is plain and unambiguous, and it needs no argument or citation of authorities to show that \$2,000 even does not *exceed* \$2,000. However, cases directly in point are the following: *Walker v. U. S.*, 4 Wall. 163, 18 L. Ed. 319; *Lazensky v. Supreme Lodge (C. C.)* 32 Fed. 417; *New York I. & P. Co. v. Milburn Gin & Machine Co. (C. C.)* 35 Fed. 225; *Thompson v. Butler*, 95 U. S. 694, 24 L. Ed. 540; *Alabama Gold Life Ins. Co. v. Nichols*, 109 U. S. 232, 3 Sup. Ct. 120, 27 L. Ed. 915; *First Nat'l Bk. of Omaha v. Redick*, 110 U. S. 224, 3 Sup. Ct. 640, 28 L. Ed. 124; *District of Columbia v. Gannon*, 130 U. S. 227, 9 Sup. Ct. 508, 32 L. Ed. 922.

It is very clear that the court below did not have jurisdiction of the subject-matter. The allegation in plaintiffs' complaint that the amount in controversy, exclusive of interest and costs, exceeded the sum of \$2,000 in value, is not controlling as against the statement of fact that the action is based upon a contract of insurance for the payment of \$2,000 even; and the admission by defendant in its answer that the amount in controversy exceeded that sum is not availing, as it is a fundamental proposition that consent of parties alone cannot give the court jurisdiction of the subject-matter.

[2] The question of jurisdiction was not raised in the court below, nor by counsel in this court, yet jurisdiction of the subject-matter is always open for consideration, and when lack of such jurisdiction affirmatively appears upon the record it is the duty of the appellate court to notice the same.

For these reasons, it follows that the judgment must be reversed, and the cause remanded to the court below, with directions to dismiss the action for want of jurisdiction.



## In re NEWFOUNDLAND SYNDICATE.

## Appeal of HECKSCHER.

(Circuit Court of Appeals, Third Circuit. January 18, 1913.)

No. 1,689.

**BANKRUPTCY (§ 250\*)—CORPORATIONS—ASSESSMENT OF STOCKHOLDERS.**

While an order of a court of bankruptcy determining the necessity of assessing the stock of a bankrupt corporation and levying an assessment thereon does not deprive a nonresident stockholder, not within the jurisdiction of the court, of the right to contest his individual liability in a plenary suit against him to enforce the assessment, if he appears and contests the assessment, he is bound by the result of such contest as to all matters determined.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 235, 350; Dec. Dig. § 250.\*]

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

In the matter of the Newfoundland Syndicate, bankrupt. From an order of the District Court, August Heckscher appeals. Modified.

For opinion below, see 196 Fed. 443.

Justus P. Sheffield, of New York City, for petitioner.

Elbridge L. Adams and Nelson S. Spencer, both of New York City, for respondent.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

**PER CURIAM.** The order appealed from and the opinion supporting it are reported in 196 Fed. 443, where the facts connected with Heckscher's present holding of stock are sufficiently stated. We need not repeat them, and, indeed, the substantial agreement of counsel during the argument before this court relieves us from discussing or deciding any controverted question. As we understand the statements of counsel, it was agreed that the order of the District Court should be so modified as to leave no doubt, if doubt can be avoided, concerning the scope of the appellant's rights. The trustee concedes that the notice by mail, given to the appellant in New York, did not confer jurisdiction of his person; and it is not disputed that the appellant must have his day in court somewhere and at some time, in order that he may make such defenses as the law permits. His right to a hearing is undoubted, and we shall endeavor to preserve it; but he must understand that ordinarily a suitor may not demand more than one opportunity to be heard, and that if he appear before the referee in New Jersey and contest the assessment there he must take the consequences of such a contest.

We direct that the order of the District Court, dated May 23, 1912, be modified, so as to read as follows:

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(a) The order of the referee dismissing the trustee's petition is reversed, and the proceedings are remanded to the referee, who is hereby directed to proceed with the proofs and to determine (1) whether, in view of the debts and the assets of the bankrupt (not counting as an asset the liability on stock that is averred to be unpaid, either in whole or in part), it is necessary to assess all or any part of the capital stock of the bankrupt company for the purpose of paying debts and necessary expenses; (2) if an assessment be necessary, then to determine the rate thereof, and to levy the same upon whatever stock may appear *prima facie* to be subject to assessment.

(b) Such assessment, if made, shall be without prejudice to the right of any person that may hereafter be sued thereon in any court of competent jurisdiction to make such defense thereto as may affect his individual liability thereon; but such defense shall not attack the administrative action of the referee in making the assessment, or in determining the rate thereof, or in levying the same.

(c) The foregoing paragraph (b) of this order shall not be used to protect any stockholder if he shall appear, and shall thus have the opportunity to contest the amount or rate of the assessment, or the liability of his stock to be assessed. The rights of such appearing stockholder in a subsequent plenary suit on such assessment shall be as they would have been if paragraph (b) had been omitted from this order.

The costs of this appeal to be paid by the bankrupt estate.

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#### HEROLD v. MUTUAL BENEFIT LIFE INS. CO.

(Circuit Court of Appeals, Third Circuit. January 27, 1913.)

No. 1,693.

#### INTERNAL REVENUE (§ 9\*)—CORPORATION TAX—LIFE INSURANCE COMPANIES —PREMIUM DIVIDENDS.

So-called "dividends" paid annually to policy holders by a mutual life insurance company doing business on the level premium plan, which arise from the excess of premiums collected during previous years over actual ascertained requirements, are not taxable as part of the company's "net income . . . received by it . . . during such year," under Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), having been once taxed as a part of the income of the year when received.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.\*]

In Error to the District Court of the United States for the District of New Jersey; Joseph Cross, Judge.

Action by the Mutual Benefit Life Insurance Company against Herman C. H. Herold, Collector of Internal Revenue. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 198 Fed. 199.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

H. P. Lindabury, of Newark, N. J., and John B. Vreeland, of Morristown, N. J., for plaintiff in error.

John O. H. Pitney, of Newark, N. J., George Wharton Pepper, of Philadelphia, Pa., and John R. Hardin and David Kay, Jr., both of Newark, N. J., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

PER CURIAM. Certain taxes for 1909 and 1910 were levied against the insurance company by two supplementary assessments under the act of 1909 (Act Aug. 5, 1909, c. 6, § 38 [U. S. Comp. St. Supp. 1911, p. 946]). The company paid under protest, and afterwards recovered judgment against the collector for practically the whole amount levied. Several questions were raised and decided below, but in this court only one question needs attention: Does the act tax the so-called "dividends" awarded annually to policy holders? The answer must be in the negative, unless such "dividends" form a part of the company's "net income \* \* \* received by it \* \* \* during such year." If they do not arise from income received during the tax year, but from income received during a previous year, Congress has not taxed them; or, perhaps, it is more correct to say Congress has not taxed them more than once. Concededly, they have been taxed once with the other net income of the particular year during which the company actually received them in cash. If, therefore, they are to be taxed more than once, it is well settled that the language imposing such an exceptional burden should be clear and unambiguous. But we need not discuss the subject; that duty has been performed by Judge Cross with such fullness and ability that we cannot do better than adopt his opinion. The case in the District Court is reported in 198 Fed. at page 199, and the discussion we refer to extends from page 200 to page 212, inclusive. But we do not adopt what is said on page 212 concerning dividends on full-paid participating policies, nor what is said on the same page concerning stock companies, not because we wish to suggest disapproval, but merely because no opinion about these matters is called for now, as they do not seem to be directly involved.

The judgment is affirmed.

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WESTERN UNION TELEGRAPH CO. OF ILLINOIS v. LOUISVILLE  
& N. R. CO.

(Circuit Court of Appeals, Seventh Circuit. November 15, 1912.)

No. 1,022.

1. COURTS (§ 508\*)—FEDERAL COURTS—PROCEEDING IN STATE COURT—INJUNCTION.

Where, after the institution of proceedings in a state court by a telegraph company to condemn a right of way for a telegraph line along the right of way of a railroad company, the railroad company instituted a suit in a federal court to restrain the condemnation of such right of way,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and, before an order granting a temporary injunction against the condemnation proceedings was entered, such proceedings were removed to the federal court, and prior to an appeal from the order granting a temporary injunction complainant's bill was amended so as to show that the condemnation proceeding had been in fact removed and that the state court had no longer any jurisdiction, the injunction was not objectionable as within Judicial Code, § 265 (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]), prohibiting the federal courts from enjoining proceedings in a state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1430; Dec. Dig. § 508.\*]

Enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

**2. INJUNCTION (§ 136\*)—TEMPORARY INJUNCTION—TELEGRAPH COMPANY—RIGHT OF WAY—CONDEMNATION.**

Complainant railroad company filed a bill alleging that defendant telegraph company, a New York corporation, had for a long period theretofore operated a telegraph line along complainant's right of way under a contract which had served its requirements, but that it had canceled the contract and refused to arrange for a continuance of the service, and had caused its employes to organize a domestic corporation, which had commenced condemnation proceedings in a state court to acquire an independent right of way along complainant's railroad for a telegraph line; that complainant's right of way was a post road, and had been designated as such for the transportation of United States mail and troops; that it was necessary for complainant to operate a telegraph line along its right of way for the transaction of its own business as a railroad and for the accommodation of the general public; and that the condemnation of a separate right of way by such telegraph company would obstruct and interfere with interstate commerce, and would also interfere with the performance of complainant's duties under its charter, and would be dangerous to employes and passengers in the operation of complainant's railroad. *Held*, that such facts warranted the issuance of a temporary injunction in the exercise of the trial court's discretion.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.\*]

Appeal from the District Court of the United States for the Eastern District of Illinois; Francis W. Wright, Judge.

Suit by the Louisville & Nashville Railroad Company against the Western Union Telegraph Company of Illinois. From a decree awarding a preliminary injunction restraining defendant from proceeding to condemn a right of way for a telegraph line along the right of way of the lines of complainant railroad company, defendant appeals. Affirmed.

The Western Union Telegraph Company of Illinois appeals from an order of the District Court denying its application to dissolve an interlocutory injunctive decree (pendente lite), allowed under a bill filed by the appellee, Louisville & Nashville Railroad Company, to restrain the appellant's proceedings, in a state court, for condemnation of a right of way for a telegraph line upon and along the appellee's right of way for its lines of railroad. The injunctive decree referred to contains the following recitals and provisions:

"The court finds that the complainant is an interstate carrier of passengers and freight and of the United States mails; that it is absolutely necessary in conducting its said business that it construct, maintain, and operate a magnetic telegraph line upon and along its right of way, and that if

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



the defendant, Western Union Telegraph Company of Illinois, is permitted to pre-empt such line on the complainant's right of way as proposed, the complainant will thereby be prevented from having a telegraph to conduct its own business, which would be an irreparable injury to it. And the court further finds that said proposed line of telegraph of defendant will interfere with the safety of ordinary travel on such railroad. And the court further finds as a matter of law that the Telegraph Company has no authority to construct, maintain, and operate a telegraph line upon or along the complainant's right of way without its consent, and any judgment of a state court to the contrary in a condemnation suit would be void and of no effect, such court being without jurisdiction of the subject-matter. This court is prohibited by law from granting the writ of injunction to stay proceedings in a state court.

"Therefore, on consideration of the premises, it is ordered, adjudged, and decreed, by the court, that the motion of the complainant for a temporary writ of injunction herein be and the same is allowed in part, and in part denied. And it is further ordered, adjudged, and decreed that the writ of injunction do issue herein against the said defendant the Western Union Telegraph Company of Illinois, restraining and enjoining it, its officers, directors, agents, owners, operators, employes, and attorneys, and each and every of them, from entering upon any part of the right of way of the said Louisville & Nashville Railroad Company, or branches thereof, described in the complainant's bill of complaint filed herein, for the purpose of surveying, locating, constructing, maintaining, or operating the line of telegraph described in said bill of complaint, or any other line of telegraph proposed to be constructed by said Western Union Telegraph Company of Illinois upon or along the said right of way of complainant, and all persons hereinbefore described be, and they are, enjoined, restrained, and prohibited from entering upon any part of the right of way of the said complainant described in said bill of complaint for the purpose of aiding, assisting, and abetting said Western Union Telegraph Company of Illinois in surveying, locating, relocating, constructing, maintaining, or operating the line of telegraph described in said bill of complaint, proposed to be constructed by said Western Union Telegraph Company of Illinois on the right of way of the main line and branches of the said Louisville & Nashville Railroad Company described in the said bill of complaint, and the said defendant, the Southeast & St. Louis Railway Company, be, and it is, enjoined from permitting the Western Union Telegraph Company of Illinois to do the things, or any of them, that have been and are enjoined herein."

West & Eckhart, of Chicago, Ill., for appellant.

J. M. Hamill, of Belleville, Ill., Henry L. Stone, of Louisville, Ky., C. P. Hamill, M. W. Schaefer, and F. H. Kruger, all of Belleville, Ill., for appellee.

Before BAKER and SEAMAN, Circuit Judges, and CARPENTER, District Judge.

SEAMAN, Circuit Judge (after stating the facts as above). The appellee Railroad Company, a Kentucky corporation, filed its bill against the appellant, an Illinois corporation and other defendants, to restrain proceedings instituted by the appellant, in a state court, for condemnation of a right of way for a telegraph line to be placed upon and along the right of way owned and used by the appellee, in Illinois, for its lines of railroad; and this appeal is from an order (in effect) continuing a temporary injunction granted thereunder against the appellant, upon due hearing. The bill avers, among other matters, that the appellee owns and operates railroads extending through various states, and is engaged in interstate transportation of freight,

passengers, and mail; that it is authorized to erect and operate telegraph lines upon and along its right of way for the transaction of its own business as a railroad and for the general public; that its right of way is now devoted to public use, and that it is necessary to have use of the entire right of way for its present tracks and proposed double tracks and the necessary provisions for telegraph systems; that the proposed condemnation and use for the benefit of the appellant would interfere with performance of appellee's duties under its charter, and would be dangerous to employes and passengers in operation of the railroad; that the appellee's lines have been designated as mail routes, under an act of Congress, for transportation of United States mail and troops; and that the suit involves a controversy, for an amount exceeding \$3,000, between citizens of different states, and also a controversy arising under the Constitution and laws of the United States, because the attempted condemnation and use would obstruct and interfere with interstate transportation, as specified. It is further averred, in substance, that the defendant Western Union Telegraph Company, a New York corporation, had long theretofore operated a telegraph line upon the right of way under contract with the appellee, which had served its requirements, but had canceled such contract and refused to arrange for continuance of the service; that such foreign corporation had caused its employes to organize the appellant as an Illinois corporation, and furnished all the money invested therein, for the purpose of obtaining the proposed right of way for ownership and operation of these telegraph lines, as independent lines "free of any rights of appellee"; and that in pursuance thereof the appellant had commenced condemnation proceedings, under assumed authority of a state enactment, averred to contravene the federal rights and powers.

[1] The chief contention for reversal of the temporary injunction rests on the twofold assumption: (1) That section 265 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. L. pp. 1087, 1162 [U. S. Comp. St. Supp. 1911, p. 236]), prohibiting stay of proceedings in a state court, is applicable thereto; and (2), in substance, that the statutory purpose is violated notwithstanding the limitations expressed in the terms of the injunction. We believe, however, that the record establishes the first-mentioned assumption to be untenable, so that the contention is without force on this appeal from the order containing the injunction. It appears of record (and is uncontroverted) that prior to the entry of this order on May 23, 1912, the condemnation proceedings, referred to in the bill as pending in the state court, were removed to the United States District Court by the filing of petition and bond for removal pursuant to statute; and presumptively no jurisdiction over the cause remained in the state court, as the jurisdiction of the District Court immediately attached (*Steamship Co. v. Tugman*, 106 U. S. 118, 122, 1 Sup. Ct. 58, 27 L. Ed. 87; *Traction Co. v. Mining Co.*, 196 U. S. 239, 244, 25 Sup. Ct. 251, 49 L. Ed. 462), and became operative for all purposes involved in the injunctive decree. Furthermore, prior to the taking of this appeal, an amended (or supplemental) bill had been filed and allowed showing that the state court had granted the removal, after a hearing, and

caused a transcript of the record to be filed thereupon in the District Court, placing the proceedings beyond question within its cognizance. The inquiry, therefore, which is raised and discussed in the arguments of counsel, whether the original injunction, in any sense, disturbed the jurisdiction of the state court over the proceedings when it was entered, is not open for consideration, as that jurisdiction had terminated when the order was made from which the appeal is brought. The subject-matter of the order was then within the control of the District Court, and the contentions in reference to the prior status of those proceedings involve mere abstract or moot questions, not reviewable on this appeal, and the various assignments of error for want of jurisdiction are overruled.

[2] All further propositions of error relate alone to the issues tendered by the bill upon the merits of the controversy, which require hearing in conformity with the rules of equity for determination of all issues both of fact and law. The bill states, as we believe, entertainable cause for a hearing in equity, so that the appeal from the interlocutory order raises this single question: Was judicial discretion exceeded in staying the condemnation proceedings pending such hearing?

Under the impressions of fact stated in the ruling of the trial court, founded on the preliminary affidavits, we believe the discretion was rightly exercised, and the order accordingly is affirmed.

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**In re McCARTHY PORTABLE ELEVATOR CO.**

**Appeal of KEENEY.**

(Circuit Court of Appeals, Third Circuit. January 27, 1913.)

No. 1,688.

**CORPORATIONS (§ 308\*)—COMPENSATION OF OFFICERS—LEGALITY OF ACTION OF DIRECTORS.**

Under the laws of California, a resolution of the board of directors of a corporation fixing the salary of its president is void where the presence of such president as a director was necessary to constitute a quorum at the meeting.

[Ed. Note.—For other cases, see Corporations, Cent. D.g. §§ 1334-1349; Dec. Dig. § 308.\*]

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

In the matter of the McCarthy Portable Elevator Company, bankrupt. From an order of the District Court, Fred. C. Keeney appeals. Affirmed.

For opinion below, see 196 Fed. 247.

McDermott & Enright, of Jersey City, N. J., for appellant.

George H. Gilman, of New York City, for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**PER CURIAM.** We approve the order appealed from, without committing ourselves to all the reasons given by the learned judge to support it. It is enough to say, we think, that Keeney, who was the assignee of McCarthy's claim for services as an officer of the company, could only recover on McCarthy's right, and that this right did not have the proper legal support. McCarthy certainly would have had no standing under the void resolution of September 28, 1905; and, if we assume (without deciding) that he might have had some standing upon a quantum meruit, the testimony concerning the value of his services is not satisfactory. Upon this point the referee and the district judge disagreed, and we incline to take the judge's view.

The value of the services being thus uncertain, it follows that the order appealed from should be, and it hereby is, affirmed.

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**UTICA DROP FORGE & TOOL CO. v. C. E. BONNER MFG. CO.**

(Circuit Court of Appeals, Seventh Circuit. October 2, 1912.)

No. 1,893.

**PATENTS (§ 328\*)—INVENTION—STAPLE PULLER.**

The Russell patent No. 545,537 for a staple puller *held void* for lack of invention, in view of prior art.

Appeal from the Circuit Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Suit in equity by the Utica Drop Forge & Tool Company against the C. E. Bonner Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

Richard R. Martin, of Utica, N. Y., for appellant.

Minturn & Woerner, of Indianapolis, Ind. (Joseph A. Minturn, of Indianapolis, Ind., of counsel), for appellee.

Before BAKER and SEAMAN, Circuit Judges, and ANDERSON, District Judge.

ANDERSON, District Judge. Appellant, complainant below, filed its bill to restrain infringement of letters patent No. 545,537, granted to Albert H. Russell September 3, 1895, and assigned to appellant. One of the defenses urged to the bill was that the invention did not possess patentable novelty, in the light of the prior art as shown by earlier patents and printed publications. The bill was dismissed for want of equity, and complainant appealed.

The patent in suit consist of five claims, and complainant alleged that each of these claims was infringed by appellee. The claims are as follows:

"(1) A staple puller consisting of the pivoted members, the oppositely disposed jaws thereon and recesses in said jaws of such depth that when the jaws are closed the opposing edges of the recesses will close upon and grasp

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



the prong of the staple before the meeting edges of the jaws come together, substantially as set forth.

"(2) A staple puller adapted to grasp a single prong of the staple above or below the wire and consisting of the pivoted members, the oppositely disposed jaws thereon, the recesses in said jaws of such depth that when the jaws are closed the opposing edges of the recesses will close upon and grasp the prong of the staple before the meeting edges of the jaws come together, and the points on the jaws beyond the recesses to press the wire aside and permit engagement with the prong of the staple, substantially as set forth.

"(3) A staple puller adapted to grasp a single prong of the staple above or below the wire and consisting of the pivoted members provided with the oppositely disposed jaws recessed to such depth that when the jaws are closed the opposing edges of the recesses will close upon and grasp the prong of the staple before the meeting edges of the jaws come together and points formed on said jaws by the excision of said recesses adapted to press aside the wire and permit engagement of the prong of the staple in said recesses, substantially as set forth.

"(4) A staple puller consisting of the pivoted members provided with oppositely disposed jaws and points on said jaws formed by the excision of recesses in the meeting edges of the jaws whereby it is adapted to engage the prong of the staple above or below the wire substantially as set forth.

"(5) A staple puller consisting of the members 5 pivoted together at 6, the oppositely disposed jaws 7 on said members, the recesses 8 in the meeting edges of said jaws of such depth that when the jaws are closed the opposite edges of the recesses will close upon and grasp the prong of the staple before the meeting edges of the jaws come together, and the points 10 formed on said jaws by the excision of the recesses and adapted to press aside the wire and permit the engagement of the prong of the staple in said recesses, substantially as set forth."

From these claims it abundantly appears that the invention claimed for the Russell patent consists in taking an old and well-known device, pincer tongs, and cutting into the meeting edges recesses which shall be (a) deep enough to cause the claws to grip or grasp the wire of the staple, and (b) near enough to the edges of the claws to provide points to press the fence wire aside, so as to permit the tool to grasp the staple. Appellant's expert, Workman, in his testimony says:

"I find from examining the patent in suit that the invention thereof comprises two features. These two features are (1) the provision of recesses in the meeting edges of the jaws of the tool to engage the prong of the staple, and (2) points to press the fence wire aside to permit of a tool engaging the staple."

Both of these features are old, and appear in the prior art. It will be sufficient to refer to two instances which appear in the record.

Defendant's expert, Stoddard, in his evidence said:

"On page 2588 of Knight's Mechanical Dictionary, Riverside Press, Cambridge, 1884, there is a figure marked 'Figure 6511,' and in this figure is an illustration marked 'c.' I have before me an enlargement of this figure, marked 'Defendant's Exhibit, Enlargement of Fig. c, Knight's Mechanical Dictionary, page 2588.' Upon page 2589 occur the following words referring to this figure: 'c, pincer tongs, for similar use.' The preceding paragraph reads as follows, referring to another figure or subfigure: 'b, auger-bit tongs: useful for holding round or square bars, and also bolts, the heads being placed within the swell of the jaws.' This figure, with the accompanying description, shows an instrument having pivoted members with oppositely disposed recessed jaws thereon."

Defendant's exhibit illustrating this shows an instrument having pivoted members with oppositely disposed recessed jaws thereon. It

is such an instrument as has been used time out of mind for grasping bolts or bars and holding them for various purposes. One of the peculiar features claimed by appellant for the recesses in the jaws—i. e., that they should be deep enough and yet not too deep to grasp the wire without the meeting edges of the jaws coming together—is one of the features of the pincer tongs shown in Knight's Mechanical Dictionary. Otherwise these pincer tongs would not *grasp* the bars or bolts spoken of, but the bars or bolts would lie loosely in the recesses.

In patent No. 477,005, granted to Thomas Heard June 14, 1892, the other alleged novel feature of the patent in suit clearly appears, viz., the placing of the recesses near enough to the edges of the claws to provide points to press the fence wire aside, so as to permit the tool to grasp the wire of the staple. Heard, in his specification, says:

"The abutting faces of the nipper jaws have considerable portions of their abutting surfaces left full and square and roughened, if desirable, as shown at 15, to seize and compress any piece of wire or other object, or to twist together the free ends of wire. Other portions, however, are cut away so as to form recesses, leaving two opposite sharp pointed projections 13 and 14, which can be pressed into the surface of a post to seize a staple or piece of wire embedded therein."

Heard shows the recesses placed just near enough to the edges of the claws to form pointed projections, precisely as are shown in the patent in suit; and they are described as operating in the same way, and accomplishing precisely the same result.

The patent in suit is without invention, and the bill was properly dismissed. The decree of the court below is affirmed.

## ROSE MFG. CO. v. E. A. WHITEHOUSE MFG. CO. et al.

(District Court, D. New Jersey. January 6, 1913.)

### 1. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—LAMP BRACKET.

The Rosenbluth patent, No. 883,973, for a lamp bracket, designed for use on automobiles or other vehicles, comprising a base by which it may be attached to the vehicle and two arms, one of which carries a number plate or license panel and the other a lamp by which the plate may be illuminated, is as to claims 7, 8, and 10 void for lack of invention in view of the prior art; also *held* not infringed, if conceded validity.

### 2. PATENTS (§ 328\*)—VALIDITY AND INVENTION—LAMP BRACKET.

The Hughes patent, No. 962,220, for a lamp bracket for vehicles, *held* as to claims 5 and 6 void for lack of invention, in view of the prior art.

### 3. PATENTS (§ 28\*)—DESIGNS—VALIDITY.

It is essential to the validity of a design patent that it should disclose invention, and also, under Rev. St. § 4929 (U. S. Comp. St. 1901, p. 3398), as amended by Act May 9, 1902, c. 783, 32 Stat. 193 (U. S. Comp. St. Supp. 1911, p. 1457), that the design be ornamental as well as new and original.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 33; Dec. Dig. § 28.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**4. PATENTS (§ 328\*)—VALIDITY—DESIGNS FOR VEHICLE NUMBER PLATE SUPPORTS.**

The Rosenbluth design patents, No. 41,388 and No. 41,389, for designs for vehicle number plate supports, are void, for the reason that the articles shown are mechanical and functional, and not ornamental.

In Equity. Suit by the Rose Manufacturing Company against the E. A. Whitehouse Manufacturing Company and the Le Compte Manufacturing Company. On final hearing. Decree for defendants.

See, also, 193 Fed. 69.

Francis C. Lowthorp, of Trenton, N. J. (Arthur E. Paige, of Philadelphia, Pa., of counsel), for complainant.

Besson, Alexander & Stevens, of Hoboken, N. J. (T. Hart Anderson, of Boston, Mass., and Charles A. Munn, of New York City, of counsel), for defendants.

CROSS, District Judge. [1] There are four patents involved in this suit, two of which are mechanical patents and two design patents. The bill of complaint alleges that they are all owned by the complainant, and have all been infringed by the defendants. The defendants, not only deny this, but deny their validity. The mechanical patents are Nos. 883,973 issued April 7, 1908, to one E. M. Rosenbluth, for a lamp bracket; and No. 962,220 issued June 21, 1910, to one W. B. Hughes, for a number plate support for vehicles. The design patents were both issued to E. M. Rosenbluth May 16, 1911, for vehicle number plate supports, and are numbered, respectively, 41,388 and 41,389. The mechanical patents in suit will be briefly considered in the order above named, and the design patents together. Patent No. 883,973 contains 13 claims, 3 of which, 7, 8, and 10, only are involved. They read as follows:

"7. In a lamp bracket, the combination with a plate provided with an arm arranged to detachably support a lamp, and an arm arranged to detachably support a license panel, co-operatively connected so that said panel is illuminated by said lamp; of flexible means arranged to pivotally secure said panel to said bracket, substantially as set forth.

"8. In a lamp bracket, the combination with a base plate, of a vertical pivotal support, and a horizontal pivotal support, carried by said base plate; a lamp detachably secured to said vertical support; and a license panel detachably secured to said horizontal support, substantially as set forth."

"10. In a lamp bracket, the combination with a base plate provided with an arm arranged to adjustably support a lamp, and an arm arranged to adjustably support a license panel, co-operatively connected so that said panel is illuminated by said lamp; of flexible means arranged to secure said panel to said bracket, substantially as set forth."

The general object of the invention is stated by the patentee in the following language:

"In the form of my invention hereinafter described the bracket comprises a base plate which is arranged to be conveniently attached to a vehicle body and has two arms in unitary relation. One of said arms is arranged to detachably hold the lamp, and the other arm carries an adjustable rod from which the license panel is detachably suspended and a spring clip arranged

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to engage the free lower portion of said panel whereby it is prevented from swinging."

In behalf of the defendants, it is strenuously argued that this patent is invalid for various reasons, but especially in view of the prior art. It is quite apparent that, if it discloses invention, it is of a low order. Briefly stated, the device consists of a bracket, comprising a base, by which it may be affixed to an automobile or other vehicle, and two arms, one of which carries a number plate or sign and the other a lamp whereby the plate or sign may be illuminated when desired. These arms are made relatively adjustable with each other. There would apparently be no more invention in attaching to an automobile body a bracket having an arm for carrying a number sign than there would be in attaching a bracket to a tree or post in front of a hotel or store, having an arm to which was attached a swinging signboard; nor would the problem of illuminating such sign involve invention, since its solution would merely require the attachment of another standard for carrying a lamp sufficiently in advance of the sign to illumine its face. It is hard to understand why a problem of that character should have proved knotty, if it did, in the first instance; but, however that may have been, all difficulty was resolved, when Rosenbluth undertook its solution, by the teachings of the prior art which showed similar devices of various kinds. For instance, a bracket attached to a bed, one arm of which carried a table and the other a lamp which illuminated the table; and another, also a bracket having two arms, one of which carried a bookrack and the other a lamp which illuminated it. The art also showed various other devices whereby different articles, including signboards and numbers, were illuminated by lamps affixed to adjustable brackets. It is not deemed necessary to review the art in detail. As above stated, the idea embodied in the patent under consideration, taken by itself, is of the simplest character and of questionable patentability, but when in addition to that fact the prior art, in analogous matters, is considered, it becomes manifest that the attempt further to dilute this simple idea, and then protect it by means of a patent, should not be fostered. Rosenbluth, giving him the utmost credit to which he is entitled, merely took what was simple and old and commonplace in analogous arts, and applied it to a new use. Everything that he did had already been done in substantially the same way, although the device had not been applied to an automobile.

But, aside from what has just been said, and admitting the validity of the patent, the defendants have not infringed the claims in issue. Those claims, in view of the extreme simplicity of the structure and the revelations of the prior art, in order to be upheld, would have to receive a strict construction, and, so construed, could not be held to embrace either the article which the complainant itself is manufacturing and placing upon the market ostensibly under its patent, or the alleged infringing devices of the defendants, which, although they may be duplicates of the articles manufactur-



ed by the complainant, nevertheless do not trench upon the device described and embraced in the specification and claims of the patent under consideration.

[2] The patent to Hughes, claims 5 and 6 of which are in controversy, shows no patentable advance upon Rosenbluth, hence, whether that patent were valid or invalid, the one to Hughes could not be upheld. Rosenbluth's patent of itself would defeat it. Claim 5 reads as follows:

"5. A device of the character set forth comprising a base having at one end a lamp support and having at its opposite end a horizontal socket, said socket being provided at the end adjacent to the lamp support with a stop, a rod for said socket, and clamping means carried by said socket."

That claim is so fairly illustrative of claim 6 as not to require the reproduction of the latter. The only advance, if it be an advance, called for by those claims over those of the Rosenbluth patent, as substantially admitted by complainant's expert, lies in the fact that the horizontal socket therein referred to is provided at the end adjacent to the lamp support with a stop. The usefulness of this stop is not clearly apparent, but granting it that quality, its insertion did not involve invention. Stops of so many varieties are in such common use in mechanics that, once the propriety or necessity of having one in any given piece of mechanism were established, any person skilled in the art could readily introduce it, and its introduction would not constitute an inventive act.

[3, 4] The design patents are both invalid. The statute (Rev. St. § 4929 [U. S. Comp. St. 1901, p. 3398], as amended by Act May 9, 1902, c. 783, 32 Stat. 193 [U. S. Comp. St. Supp. 1911, p. 1457]), authorizes the issue of such a patent under certain conditions to "any person who has invented any new, original and ornamental design for an article of manufacture." Hence, it appears that a valid design patent demands, as has uniformly been held, an exercise of the inventive faculty the same as a mechanical patent. The design, however, thus invented must be not only new and original, but ornamental. It must exhibit something which appeals to the æsthetic faculty of the observer. *Rowe v. Blodgett & Clapp Co.*, 112 Fed. 61, 50 C. C. A. 120; *Williams Calk Co. v. Kemmerer*, 145 Fed. 928, 76 C. C. A. 466. A valid design patent does not necessarily result from photographing a manufactured article and filing a reproduction of such photograph properly certified in the patent office. The designs of the design patents in suit are for the most part alike. No. 41,389 differs, however, from No. 41,388 in having braces which unquestionably strengthen the arm, to which the number plate is attached. It is not only apparent that this is their function, but it is also established to be such by the evidence. Indeed, every feature of these patents is mechanical and functional, and not ornamental. Even ordinary rivet heads are made to appear as beautiful circles in this scheme of ornamentation. If, moreover, the braces or supports of patent No. 41,389 were intended for ornamentation, they apparently failed in their mission, but, if otherwise, then every piece of mechanism can, with the aid of photogra-

phy and the machinery of the Patent Office, be readily crystallized into a design patent. In the foregoing discussion no reference has been made to the fact that the manufactured article sought to be protected by the design patents in suit is, when in use, for the most part concealed, while such portions as are exposed are subject to at least partial obscuration by dust or mud, as the case may be.

The bill of complaint will be dismissed, with costs.

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ROSE MFG. CO. v. COX BRASS MFG. CO.

(District Court, S. D. New York. January 21, 1913.)

PATENTS (§ 328\*)—INFRINGEMENT—LAMP BRACKET.

The Rosenbluth patent, No. 883,973, for a lamp bracket for use on automobiles, having arms to support a license panel and a lamp for illuminating the same, conceding that it discloses invention, must be strictly construed in view of prior devices of similar nature and limited to the precise construction shown. As so construed, *held* not infringed.

In Equity. Suit by the Rose Manufacturing Company against the Cox Brass Manufacturing Company. On final hearing. Decree for defendant.

John D. Morgan, of New York City, N. Y. (Cyrus N. Anderson, of Philadelphia, Pa., of counsel), for complainant.

Charles A. Munn, of New York City, N. Y. (T. Hart Andersen, of Boston, Mass., of counsel), for defendant.

HAZEL, District Judge. The patent in suit, No. 883,973, granted to Edwin M. Rosenbluth on the 7th day of April, 1908, relates to an improvement in lamp brackets, and the claims in controversy are the seventh, eighth, and tenth. It will suffice to set forth claim 7.

"7. In a lamp bracket, the combination with a plate provided with an arm arranged to detachably support a lamp, and an arm arranged to detachably support a license panel, co-operatively connected so that said panel is illuminated by said lamp; of flexible means arranged to pivotally secure said panel to said bracket, substantially as set forth."

Claim 8 specifies a horizontal pivotal support, while claim 10 describes the flexible means for securing the panel to the lamp bracket somewhat differently from claim 7. The defenses are noninfringement and lack of patentable novelty.

Upon reading the claims, it will be observed that a license number plate is included in the construction of complainant's lamp bracket; the combined structures when in use being suitably mounted upon the body of an automobile. The drawings and specification show that the lamp is supported on a shaft integral with the arm of the bracket in such a way as to enable turning the lamp angularly and securing it in the desired position, while the license panel is supported by a rod at the upper end of the bracket, and held by two straps buckled to the supporting rod at opposite ends. The straps are prevented from slid-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing off the rod by a knob at the outer end, and the panel, when suspended, is held stationary by a spring clip which engages the lower edge thereof.

Subsequent to the issuance of the Rosenbluth patent, the construction described in the specification was modified, and means were provided for clamping the lamp bracket to the vehicle. The patentee abandoned the specific strap and spring clip arrangement for holding the panel in position, and substituted an arrangement not unlike the defendant's but he claims to have been a pioneer, and that his patent is entitled to a broad construction which will include the defendant's lamp bracket. The proofs, however, show that he did not originate constructions of this description, as similar lamp brackets were very old, and had theretofore been commonly used in diverse ways. For instance, brackets supporting a lamp close to an article to enable the rays thereof to illuminate such article are shown in the patent to Brule, No. 519,301, to Stokes, No. 252,908, to Lemon, No. 325,845, to Harris & Clark, No. 270,791, to Milliken, No. 521,961, and to Spillinger, No. 321,545.

In the patent to Hoffman, No. 435,696, is shown a detachable sign for advertising purposes which is suspended from an arm in such a way as to permit it to swing. Such swinging arrangement of the lamp on a bracket is thought to correspond to the pivotal support of the claims in suit. That the devices described in the earlier patents were used for different purposes is immaterial. Although the patentee seems to have been the first to employ a combination of a lamp bracket and number plate as an automobile accessory, still it is doubtful whether such combination required the exercise of the inventive faculty in view of the use to which lamps and lamp brackets had previously been put in illuminating signs or other articles placed in close proximity thereto. The only perceivable novel feature is the particular method by which the number plate was suspended from the arm and secured to the lamp bracket. There is no patentably different operation or result achieved by complainant's device, and it has many times been held that it is not invention to use old means for accomplishing the same end. But, assuming invention, the patent is entitled to only a strict construction of the claims in controversy; that is, a construction limiting it to the precise means adopted and the arrangement disclosed. The claims cannot be broadened to include the defendant's device, although such device is used for the same purpose and in the same way.

The defendant's lamp bracket is quite different from complainant's, in that there are no flexible means—i. e., strap and buckle arrangement—to pivot or secure the license panel to the bracket; said panel being secured to the arm of the bracket by bolts and screws without pivotal support. It is true that bolts with split washers which impart a slight resiliency are used by defendant, but they are used to prevent injuring the enamel on the panels, and not to swing or secure the panel. Such split washers are not the equivalent of the flexible means of the patent in suit. A similar conclusion on the patent in suit was reached by Judge Cross in the case of *Rose Mfg. Co. v. Whitehouse*

Mfg. Co. et al., 201 Fed. 926, but it may be stated that my conclusion that the defendant's lamp bracket does not infringe the claims in suit was reached before my attention was called to said decision.

The bill is dismissed, with costs.

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WESTERN UNION TELEGRAPH CO. v. LOUISVILLE & N. R. CO. et al.

(District Court, E. D. Tennessee, N. D. August 10, 1912.)

No. 1,658.

**1. REMOVAL OF CAUSES (§ 12\*)—FEDERAL QUESTION—EFFECT OF NONRESIDENCE OF DEFENDANT.**

Under Jud. Code, § 51 (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]), which provides that, with certain exceptions, no civil suit shall be brought in any District Court in any other district than that whereof the defendant is an inhabitant, a suit not within any of the exceptions is not removable from a state court on the ground that it is one arising under the Constitution or laws of the United States, where none of the defendants are inhabitants of the district, unless plaintiff consents to the jurisdiction, or waives objection thereto.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. § 12.\*]

**2. COURTS (§ 269\*)—REMOVAL OF CAUSES (§ 12\*)—FEDERAL QUESTION—JURISDICTION OF FEDERAL COURT—"SUIT TO ENFORCE CLAIM TO PROPERTY."**

A proceeding under the eminent domain statutes of a state to condemn a right of way for a telegraph line is not a suit to enforce a "legal or equitable . . . claim to" property within the meaning of Jud. Code, § 57 (Act March 3, 1911, c. 231, 36 Stat. 1102 [U. S. Comp. St. Supp. 1911, p. 152]); and, assuming that such a suit would be excepted by section 51 from the general requirement that suits must be brought in the district of which the defendant is an inhabitant, such a proceeding is not removable from a state court on the ground that it is one arising under the Constitution and laws of the United States, where none of the defendants are residents of the district, unless plaintiff waives objection thereto.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. § 269;\* Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. § 12.\*]

**3. REMOVAL OF CAUSES (§ 102\*)—GROUNDS FOR REMAND—DOUBTFUL JURISDICTION.**

Jurisdiction of a removed cause should be retained only where the federal jurisdiction is clear; and, if there is any substantial doubt, the cause should be remanded.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218-220, 223, 224; Dec. Dig. § 102.\*]

Proceedings under power of eminent domain as civil suits under laws relating to removal of causes to federal courts, see note to South Dakota C. Ry. Co. v. Chicago, M. & St. P. Ry. Co., 73 C. C. A. 183.]

At Law. Proceeding by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company and others. On motion to remand to state court. Motion sustained.

Shields, Cates & Mountcastle, of Knoxville, Tenn., for complainant. J. B. Wright and J. G. Johnson, both of Knoxville, Tenn., for defendants.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



SANFORD, District Judge. The Western Union Telegraph Co., a corporation organized under the laws of the State of New York, filed its petition in the Circuit Court of Knox County, Tennessee, a county within this division of the Eastern District of Tennessee, against the Louisville & Nashville Railroad Co., a corporation organized under the laws of the State of Kentucky, the Central Trust Company of New York, the New York Trust Co. of New York, and the United States Trust Co. of New York, corporations organized under the laws of the State of New York. This petition alleged that the petitioner was a telegraph company engaged in transmitting messages and news by wires; that the Louisville & Nashville Railroad Co., a railroad corporation, owned an easement or right of way extending through Knox County, Tennessee, upon which was constructed an interstate railroad operated by said defendant as a common carrier of freight and passengers, and for carrying United States mails, subject to the laws of the United States and the State of Tennessee; that the petitioner desired to operate and maintain an electric telegraph upon said railroad right of way through Knox County, and sought by its petition to condemn and acquire an easement for said purpose upon said right of way under and by virtue of the acts of Congress relating to telegraphs, contained in sections 5263 and 5268 (U. S. Comp. St. 1901, pp. 3579, 3581), inclusive, of the Revised Statutes of the United States, the provisions of which had been accepted by petitioner, and also under and by virtue of the statutes of the State of Tennessee; and that the defendant Trust Companies were made parties as being severally trustees under certain mortgages executed by the defendant railroad company upon its said right of way to secure certain issues of bonds. The petition prayed for process, that a writ of inquiry be awarded, a jury of inquest appointed to set aside the easement desired by metes and bounds and to assess damages, and that the easement so set apart be decreed to petitioner as a right of way; and for general relief.

The defendants, within the time allowed, filed their joint petition in the Circuit Court of Knox County for the removal of the cause to this court. This petition for removal alleged that the amount in controversy exceeded the sum of three thousand dollars, exclusive of interest and costs, and that the Telegraph Company asserted a right to appropriate the defendants' property under and by virtue of the act of Congress, and that the proceeding was a suit of a civil nature at law arising under the Constitution and laws of the United States. The petition for removal also alleged that the Railroad Company's right of way had been made a highway of interstate commerce by act of Congress of June 15, 1866, and a post road by acts of Congress of 1838 and 1878, and that the defendant Railroad Company had also become a telegraph company by amendment to its charter and acceptance of the act of Congress of July 24, 1866, and by virtue of the act of Congress of June 23, 1879, was authorized to transmit intelligence not only for its railroad purposes, but also for the United States and the general public, and that "while petitioner claims and asserts certain rights against the property of defendants

under the Constitution and laws of the United States, these defendants also claim certain rights, privileges and immunities under the same provisions of the Constitution and under the same laws of the United States." In an amended and supplemental petition filed by the defendants in the Circuit Court of Knox County, it was averred in greater detail that the controversy arose under the Constitution and laws of the United States, in that it necessarily involved the construction of clause 8, art. 1, of the Constitution of the United States, and the acts of Congress of June 15, 1866, and of July 24, 1866, in certain respects set forth in the amended and supplemental petition.

[1] The Circuit Court of Knox County granted the defendants' petition for removal as prayed, and a transcript of the record having been filed in this court, the Western Union Telegraph Co., the original petitioner, hereinafter called the plaintiff, moved to remand the case to the Circuit Court of Knox County on two grounds: 1st, that the suit was not one of which the United States District Court had original jurisdiction; and, 2nd, that the suit presented no Federal question involving any substantial controversy.

The sole ground for removal stated in the defendants' petition for removal is that this is a suit of a civil nature at law, arising under the Constitution and laws of the United States, in which the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00. The jurisdiction of this court must be determined by the provisions of the Judicial Code, which was enacted March 3, 1911, and went into effect on January 1, 1912.

Section 28 of the Code, which is derived from section 2 of the act of March 3, 1875, c. 137, 18 Stat. 470, as amended by section 1 of the act of August 3, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 509), provides that:

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States \* \* \* of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State."

Section 29 of the Code, derived from section 3 of the act of 1875, as amended by section 1 of the act of 1888, provides that the party entitled to removal shall file his petition in the State court, "for the removal of such suit into the district court to be held in the district where such suit is pending."

The first subsection of section 24 of the Code, derived from section 1 of the act of 1875, as amended by section 1 of the act of 1888, vests the district courts of the United States with original jurisdiction of "all suits of a civil nature, at common law or in equity \* \* \* where the matter in controversy exceeds, exclusive of interest and

costs, the sum or value of three thousand dollars, and \* \* \* (a) arises under the Constitution or laws of the United States \* \* \* or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens or subjects."

Section 51 of the Code, derived from section 1 of the act of 1875, as amended by section 1 of the act of 1888, further provides, however, that:

"Except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

So far as the question now involved is concerned, these several provisions of the Code in reference to the jurisdiction of the District Courts of the United States are substantially the same as the provisions of the acts of 1875 and 1888 in reference to the jurisdiction of the Circuit Courts of the United States, and the decisions under said former jurisdictional acts are directly applicable.

I find it unnecessary to determine however whether the plaintiff's statement of its own cause of action sufficiently shows that this suit arises under the Constitution and laws of the United States within the "settled interpretation" stated in *Louisville & N. R. Co. v. Mottley*, 211 U. S. 149, 152, 29 Sup. Ct. 43, 53 L. Ed. 126, and *In re Winn*, 213 U. S. 458, 465, 29 Sup. Ct. 515, 53 L. Ed. 873, since I am of the opinion that even if it be a suit so arising, nevertheless, as the defendants are not inhabitants of this district, and the suit therefore, under section 51 of the Code, could not have been originally brought by the plaintiff against them in this court, without the consent of the defendants, it cannot be removed by the defendants to this court or jurisdiction acquired by this court under their removal proceedings, unless the plaintiff consents to the jurisdiction of this court or waives its objection thereto.

1. Following the decisions of the Supreme Court in *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, and *In re Moore*, 209 U. S. 491, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, it was uniformly held by the Circuit Courts of the United States, as a corollary of those two decisions, that a suit arising under the Constitution and laws of the United States when brought originally in a State court against a defendant who did not reside in the district in which the suit was brought, was not removable by the defendant to the Circuit Court of the United States for such district, and that, if removed, it must, unless the plaintiff waived objection to the jurisdiction of such Circuit Court, be remanded to the State court. *Clark v. Southern Pac. Co. (C. C.)* 175 Fed. 122, 127; *Hubbard v. Railway Co. (C. C.)* 176 Fed. 994; *Bottoms v. Railway Co. (C. C.)* 179 Fed. 318.

In *Ex parte Wisner*, supra, it was held by the Supreme Court that under the acts of 1875 and 1888 an action commenced in a State court of Missouri by a citizen of Michigan against a citizen of Lou-

isiana was not removable by the defendant to the Circuit Court of the United States in Missouri on the ground of diversity of citizenship, and should, on the plaintiff's motion, be remanded to the State court. The ground of this decision was, in substance: that it was "settled," in *Tennessee v. Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, *Mexican National Railroad v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672, and *Cochran v. Montgomery County*, 199 U. S. 260, 272, 26 Sup. Ct. 58, 50 L. Ed. 182, 4 Ann. Cas. 451, that no suit was removable under these acts unless it was one that the plaintiff could have brought originally in the Circuit Court; that as neither of the parties to the suit was a citizen of the State of Missouri, in which the suit was brought, it could not, under the limitations imposed by these acts, have been brought in the Circuit Court of the United States in Missouri in the first instance; that, although the defendant had by his petition for removal waived the objection so far as he was personally concerned that he was not sued in his district, "jurisdiction of the suit could not have obtained, even with the consent of both parties"; and that when the defendant by his petition for removal, which was in the nature of process transferring the case from the State to the Circuit Court, sought affirmative relief in another district than his own, the plaintiff, in resisting his application and moving to remand, denied the jurisdiction of the Circuit Court, and it had no jurisdiction to proceed.

In the subsequent case of *In re Moore*, *supra*, in which a suit brought in a State court in Missouri by a citizen of Illinois against a citizen of Kentucky had been removed by the defendant to the Circuit Court of the United States in Missouri, on the ground of diversity of citizenship, it was contended that both parties had consented to the jurisdiction of the Circuit Court, and that the case was hence not controlled on the facts by the decision in *Ex parte Wisner*. The Supreme Court held that this brought up "two questions: first, whether both parties did consent to accept the jurisdiction of the United States court; and, second, if they did, what effect such consent had upon the jurisdiction of the United States court" (209 U. S. page 496, 28 Sup. Ct. page 586, 52 L. Ed. 904, 14 Ann. Cas. 1164); that the defendant had obviously consented to accept the jurisdiction of the United States court by filing his petition for removal to that court, and that the plaintiff, after such removal, having, without making a motion to remand, filed an amended petition in that court and repeatedly recognized its jurisdiction, had likewise consented to accept the jurisdiction of that court; and that the jurisdiction of the Circuit Court was hence "settled by the proceedings had by the two parties" (209 U. S. page 508, 28 Sup. Ct. page 591, 52 L. Ed. 904, 14 Ann. Cas. 1164), the dictum in the *Wisner* Case that "jurisdiction of the suit could not have obtained, even with the consent of both parties," being overruled (209 U. S. page 507, 28 Sup. Ct. page 591, 52 L. Ed. 904, 14 Ann. Cas. 1164). After citing various cases in which, in suits within the general jurisdiction of the Circuit Courts, objection to the jurisdiction of a particular Circuit Court had been held to be waived, the court



said (209 U. S. page 506, 28 Sup. Ct. 591, 52 L. Ed. 904, 14 Ann. Cas. 1164):

"It is true that in most of the cases the waiver was by the defendant, but the reasoning by which a defendant is precluded by a waiver from insisting upon any objection to the particular United States court in which the action was brought compels the same conclusion as to the effect of a waiver by the plaintiff of his right to challenge that jurisdiction in case of a removal. As held in *Kinney v. Columbia Saving & Loan Association*, 191 U. S. 78 [24 Sup. Ct. 30, 48 L. Ed. 103], a petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the State to the Federal Court, and if when a defendant is brought into a Federal Court by the service of original process he can waive the objection to the particular court in which the suit is brought, clearly the plaintiff, when brought into the Federal court by the process of removal, may in like manner waive his objection to that court. So long as diverse citizenship exists the Circuit Courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a Circuit Court or one subsequently removed from a State court, and if any objection arises to the particular court which does not run to the Circuit Court as a class that objection may be waived by the party entitled to make it. As we have seen in this case, the defendant applied for a removal of the case to the Federal court. Thereby he is foreclosed from objecting to its jurisdiction. In like manner, after the removal had been ordered, the plaintiff elected to remain in that court, and he is equally with the defendant, precluded from making objection to its jurisdiction."

The result of the *Wisner Case*, as modified by the *Moore Case*, was to settle definitely a question as to which there had previously been a conflict of opinion in the Federal Courts, as shown in *Foulk v. Gray* (C. C.) 120 Fed. 156, 157, and to finally determine that a suit commenced in a State court in a district in which neither the plaintiff nor the defendant resided, was not removable by the defendant to the Circuit Court of the United States for such district on the ground of diversity of citizenship, and that where, after such removal, objection to the jurisdiction of such Circuit Court had not been waived by the plaintiff, the suit must be remanded to the State court. *Western Loan & Min. Co. v. Min. Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; *Greutter v. Telegraph & Telephone Co.* (C. C.) 181 Fed. 248, 255. And see *Kreigh v. Westinghouse Co.*, 214 U. S. 249, 253, 29 Sup. Ct. 619, 53 L. Ed. 984.

It is, however, clear, I think, when the decisions in the *Wisner* and *Moore Cases* are read together, that the principle upon which they rested was not limited to cases in which the general jurisdiction of the Circuit Court depended upon diversity of citizenship, but that it necessarily applied all cases in which there was a general jurisdiction in the Circuit Courts with a limitation as to the particular district in which an original suit might be brought. The broad doctrine of these cases is, as I read them, this: That no suit could be removed from a State court into the Circuit Court for the district in which the suit was pending unless it could have been originally brought in such Circuit Court; that in a case within the general jurisdiction of the Circuit Courts, but not within that of a particular Circuit Court, jurisdiction could only be acquired by such particular Circuit Court, in

removed suits as well as in original suits, by the "consent of both parties," such consent being manifested in removed suits by the defendants' action in removing the case to the particular court and by the plaintiff's action in waiving objection to the jurisdiction of such court after the removal, just as in original suits it was manifested by the plaintiff's action in bringing the suit in such particular court and the defendant's action in waiving objection to the jurisdiction of such court after being sued; and that where a suit pending in a State court was within the general jurisdiction of the Circuit Courts, but could not have been brought originally by the plaintiff against the defendant in the particular Circuit Court of the district in which the suit was pending, without the consent of the defendant, it followed, conversely, that, as the petition and the bond for removal constituted process by which the plaintiff was brought by the defendant before such Circuit Court, such court could, in like manner, not acquire jurisdiction unless the plaintiff consented thereto; in other words, that the right of objection given to the defendant under the process in an original suit, and that given the plaintiff, as a quasi-defendant, under the process of removal, were correlative, and that the plaintiff had the same privilege of objecting to the jurisdiction of the particular Circuit Court, when brought before it by the removal process, that the defendant would have had of objecting to the jurisdiction of such particular court if brought before it by original process.

Clearly, however, if this be a correct view of the underlying principle upon which the decisions in the *Wisner* and *Moore* Cases were based, it followed necessarily that its application was not limited to cases in which general jurisdiction of the Circuit Courts depended upon diversity of citizenship, but that it applied with equal force in all cases in which the Circuit Courts had general jurisdiction of the suit, but in which the Circuit Court of the particular district in which the State suit was pending would not have had jurisdiction of the suit originally except by the consent of the defendant, and that under this principle it was correctly held in *Hubbard v. Ry. Co.*, *supra*, and other cases above cited, that since a suit arising under the Constitution and laws of the United States could not be brought originally in a district in which the defendant did not reside (*Macon Grocery Co. v. Atlantic Coast Line*, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300), except by consent of the defendant, such suit, if brought in a State court in a district in which the defendant did not reside, was not removable by the defendant to the Circuit Court of such district or the jurisdiction of the Circuit Court maintainable under such removal unless the plaintiff waived his objection thereto. As was said by Newman, District Judge, in *Bottoms v. Railway Co.*, *supra* (C. C.) 179 Fed. at page 319:

"If the plaintiff can make the question, and object to the jurisdiction of the particular Circuit Court of a particular district over a case, where the removal is because of diversity of citizenship only, why may not the plaintiff object, and make the question as to jurisdiction where the case is removed because brought under an act of Congress?"

And so conversely, as was said by Lowell, Circuit Judge, in *Corwin Mfg. Co. v. Washer Co.* (C. C.) 151 Fed. 939:

"If, where the process is the plaintiff's, the defendant may give this court jurisdiction by consent, it would seem to follow that where the process is the defendant's, the plaintiff may give jurisdiction by consent."

This conclusion also finds inferential support in the *Matter of Dunn*, 212 U. S. 378, 384, 29 Sup. Ct. 299, 53 L. Ed. 558, in which in determining whether a suit brought in a State court in the Northern District of Texas against the Texas and Pacific Railway, a corporation created by act of Congress, and two residents of Texas, had been properly removed to the Circuit Court of the United States for that district, as one arising under the Constitution or laws of the United States, the court said:

"The right to remove, under the statute, depends upon whether the suit could originally have been brought in the Circuit Court of the United States. *Traction Company v. Mining Company*, 196 U. S. 239, 245 [25 Sup. Ct. 251, 49 L. Ed. 462]; *Cochran, etc., v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, 4 Ann. Cas. 451. The question then is whether the United States Circuit Court for the proper district (Northern District of Texas) would have had jurisdiction of a suit commenced in that district by the plaintiffs against the railway company and the two individual defendants."

See, also, in *In re Winn*, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873, in which a suit claimed to arise under the Constitution and laws of the United States had been brought in a State court in a district in which the defendant did not reside and removed to the Circuit Court, the incidental reference suggesting that if the suit had in fact been one of the character claimed, the plaintiff would have had the "right to object to the jurisdiction" of the Circuit Court. 213 U. S. page 469, 29 Sup. Ct. 519, 53 L. Ed. 873.

So in a recent opinion of the Circuit Court of Appeals for the Sixth Circuit, in *Garrett v. Railroad Co.*, 197 Fed. 715, in which an action based upon a Federal statute had been removed from the State court to the Circuit Court and there tried without motion to remand or other objection on the part of the plaintiff, although the defendant was not a resident of the district, the court said, citing among other cases *Hubbard v. Ry. Co.*, *supra*, that "since the parties could and did accept the jurisdiction of the court below \* \* \* the removal cannot be and is not questioned," thus implying that the removal could not have been sustained if the plaintiff had not accepted the jurisdiction of the Circuit Court after the removal.

This view is also directly supported by various cases, arising since the decisions in the *Wisner* and *Moore* Cases, in which, contrary to the view generally entertained by the Federal Courts, before these decisions, it has been held, in accordance with the decisions in those cases, that since, under the acts of 1875 and 1888, an alien could not sue a citizen of the United States except in a district in which the defendant resided, a suit brought by an alien against a citizen of the United States in a State court in a district in which the defendant did not reside, was not removable by the defendant to the Circuit Court for such district or jurisdiction of the suit maintainable by the Circuit

Court unless objection thereto was waived by the plaintiff. *Mahopoulus v. Railway Co.* (C. C.) 167 Fed. 165, and 167 Fed. 171 (on rehearing); *Odhner v. Railway Co.* (C. C.) 188 Fed. 507 (Coxe, Circuit Judge); *Sagara v. Railway Co.* (C. C.) 189 Fed. 220; and *Zerba v. Asphaltum Co.*, an unreported opinion by Marshall, District Judge, cited in *Sagara v. Railway Co.*, supra, 189 Fed. at page 221. *Mahopoulus v. Railway Co.*, supra, is furthermore cited with apparent approval in *Shawnee Nat. Bank v. Railway Co.* (C. C.) 175 Fed. 456, 461.

And, by parity of reasoning, it was held in *Tierney v. Ins. Co.* (C. C.) 163 Fed. 82, 83, 90, that since an alien could only be sued by a citizen in a district in which valid service may be made upon the defendant, where an alien was sued by a citizen in a State court in a district in which valid service could not be made on the defendant within the Federal rule, the Circuit Court of such district did not acquire jurisdiction of the cause through removal proceedings by the alien defendant, and the cause must be remanded to the State Court.

In the original opinion in *Mahopoulus v. Railway Co.*, supra (C. C.) 167 Fed. at page 171 the court said:

"As has been seen, the privilege of plaintiff to have brought her action originally in this court is coupled with a condition that defendants should consent thereto. Over this condition plaintiff has no control, and this court no power. \* \* \* In view of this condition of the law, she sought the state forum where she could, under its forms, compel attendance by defendants and compliance with its mandates. Defendants being thus pursued in a forum where they must appear, and the orders of which they must obey, by the petition and bond for removal filed therein have invited plaintiff to litigate her cause with them in this forum, in which she could not have compelled their attendance. To this invitation she declines her consent, preferring, as shown by her motion to remand, to proceed with her controversy where she began it. This, I think, she may do."

And on the rehearing in this case the court, after quoting from the opinion in the *Moore Case* the language above cited showing that the first question brought up was "whether both parties did accept the jurisdiction of the United States Court," said ([C. C.] 167 Fed. at page 173):

"It was found in that case both parties had consented to the exercise of the jurisdiction of the federal court over their controversy, and notwithstanding the doctrine of the *Wisner Case*, as the court had jurisdiction over the subject-matter of the controversy by reason of the diverse citizenship of the parties, the consent to the exercise of its jurisdiction over the persons of both parties made the jurisdiction of the court full and complete. However, in this case the plaintiff has given no consent to the exercise of jurisdiction by this court over her person, and has taken no step in this case since the removal taken by defendants which has not been by her expressly and intentionally opposed to the exercise of jurisdiction by this court over her person. How, then, can she be said to have given her consent, which, as has been said, is essential to the obtaining of full and complete jurisdiction over both the subject-matter and the parties to the action. She did consent to the exercise of jurisdiction by the state court in which she brought her action over both her person and her controversy, but she had no choice of forums. She could not have commenced her action in this court without consent of defendants. How can it be held her resort to a court of this state, the only one in the state to which she could resort, is tantamount to a consent to the exercise of jurisdiction over her person by this court, a court to which she could not have resorted in the first instance of her



own will, had she felt so inclined, without consent of defendants, is beyond my comprehension, and to my mind such reasoning is both illogical and unsound."

It is true that it has been held to the contrary in removed suits brought by aliens against nonresident defendants, in *Barlow v. Railway Co.* (C. C.) 164 Fed. 765, (C. C.) 172 Fed. 513 (petition for rehearing), *Bagenas v. Southern Pac. Co.* (C. C.) 180 Fed. 887, and *Decker v. Southern Ry. Co.* (C. C.) 189 Fed. 224. And see, obiter, *Fribourg v. Pullman Co.* (C. C.) 176 Fed. 981. In *Bagenas v. Railway Co.*, supra, however, the opinion was rested entirely, and in *Decker v. Southern Ry. Co.*, supra, partly, upon the action taken by the Supreme Court in *Matter of Tobin*, Petitioner, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061, in which an application for a writ of mandamus to a Circuit Court to remand a case of this kind to the State court, was denied, without comment. The effect of the *Matter of Tobin* is, however, I think, correctly stated in *Sagara v. Railway Co.*, supra (C. C.) 189 Fed. at page 223, in which the court said:

"But it is earnestly insisted that the *Tobin Case*, 214 U. S. 506 [29 Sup. Ct. 702, 53 L. Ed. 1061], \* \* \* and *Nicola's Case*, 218 U. S. 668 [31 Sup. Ct. 228, 54 L. Ed. 1203] \* \* \* must be taken as an approval of the contrary view. I do not so regard them. To do so would, in effect, be to say that the mere fact that the Supreme Court declines to take jurisdiction a petition for the writ of mandamus is equivalent to an express approval by that court of the correctness of the acts complained of. It would seem that the correct interpretation of the action of that court in those cases is that it but followed the principle announced in *Ex parte Hord*, 105 U. S. 578 [26 L. Ed. 1176], \* \* \* wherein it is said 'jurisdiction has been given to the Circuit Court to determine whether the cause is one that ought to be remanded,' and 'no case can be found in which a mandamus has been used to compel a court to remand a cause after it has once refused a motion to that effect'; which principle was reannounced and adhered to in *Re James Pollitz*, 206 U. S. 323 [27 Sup. Ct. 729, 51 L. Ed. 1081], \* \* \* and in *Ex parte Gruetter*, 217 U. S. 586 [30 Sup. Ct. 690, 54 L. Ed. 892]. \* \* \* That this is the proper construction to be placed upon the action of the Supreme Court in the *Matters of Tobin* and *Nicola* is made clear by the opinion of that court in *Ex parte Harding*, 219 U. S. 363 [31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392]."

And see to the same effect, *Odhner v. Railway Co.*, supra (C. C.) 188 Fed. at page 508.

Nor can I agree in the view suggested in *Decker v. Southern Ry. Co.*, supra, that the doctrine of the *Wisner* and *Moore Cases* is to be distinguished upon the ground that the provisions as to venue in suits by an alien against a citizen—which are the same as in suits arising under the Constitution and laws of the United States—are for the benefit of the defendant alone, while in suits in which Federal jurisdiction depends upon diversity of citizenship the provision limiting venue to the district of the residence of either the plaintiff or the defendant is for the benefit of the plaintiff also. It was well settled that under the acts of 1875 and 1888 the restriction as to venue in suits where diversity of citizenship existed was "a personal privilege of the defendant," which the defendant might either insist upon or waive at his election. *Central Trust Co. v. McGeorge*, 151 U. S. 129, 132, 14 Sup. Ct. 286, 38 L. Ed. 98; *Mexican Nat. R. Co. v. Davidson*, 157

U. S. 201, 208, 15 Sup. Ct. 563, 39 L. Ed. 672, 675; and *Interior Constr. Co. v. Gibney*, 160 U. S. 217, 219, 16 Sup. Ct. 272, 40 L. Ed. 401. This "personal privilege of the defendant" in such cases clearly differed in no respect from his like privilege in other cases of general federal jurisdiction, except in its extent; that is, in suits between citizens of different states he can object to being sued except in the district where either he or the plaintiff resided; and in other cases, except in the district in which he resided. And clearly I think neither of these provisions was in any sense a privilege of the plaintiff; on the contrary they were limitations upon his right of suit constituting a "privilege" that could be availed of by the defendant alone. The three cases last cited, showing that the limitation upon venue in suits between citizens of different states was a privilege of the defendant alone, were, with other earlier cases, to the same effect, quoted in the opinion in the *Moore Case*, and it was nowhere intimated or suggested in that opinion that the conclusion reached was derived in any manner from any privilege conferred upon the plaintiff in an original suit by the limitations upon venue provided by the acts as an exemption in the defendant's favor. On the contrary, as above stated, the decision rested, in my opinion, on the broad ground, which is decisive of the question now under consideration, that a plaintiff brought into the Circuit Court by the defendant's process of removal, had the right to object to the jurisdiction of the particular Circuit Court, since the defendant would have had such right of objection if brought into the same court under original process by the plaintiff.

Furthermore the case of *Rones v. Katalla Co.* (C. C.) 182 Fed. 947, which is cited in the *Decker Case*, is not, I think, in point, as in that case, after the defendant had removed the case to the Federal Court, under a misapprehension as to the citizenship of the plaintiff, the plaintiff had acquiesced in the jurisdiction of the Circuit Court, and after the plaintiff had obtained judgment in the Circuit Court, the defendant was itself attempting to have the judgment vacated and the cause remanded to the State court.

[2] 2. However, it is further insisted in behalf of the defendants that this is a suit to enforce a claim by the plaintiff to property of the defendants within this district, which, under the provisions of section 57 of the Judicial Code might have been originally brought in this court although none of the defendants are inhabitants of this district; and which is hence removable to this court.

Section 57 of the Code, which is derived from section 8 of the act of 1875, and which is one of the "six succeeding sections," specifically excepted from the limitations of section 51 of the Code above quoted, provides that: "When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought," one or more of the defendants shall not be an inhabitant of or found within the district, or voluntarily appear, an order directing such absent defendant or defendants to appear and make defence, may be served on him personally wherever found, or where this is not

practicable, by publication; and that in default of appearance and defence by such defendant the court may "entertain jurisdiction and proceed to the hearing and adjudication of such suit \* \* \* ; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

For present purposes it may be assumed, without determining, that as suits in reference to property coming within the provisions of section 57 of the Code are expressly excepted from the limitations of section 51 of the Code as to the district in which an original suit may be brought—a similar exception having apparently been implied in the analogous provisions of the acts of 1875 and 1888—a suit of this character coming within the general jurisdiction of the District Courts of the United States by reason of the diversity of citizenship of the parties, or because it arises under the Constitution and laws of the United States, or otherwise (*Greeley v. Lowe*, 155 U. S. 58, 72, 15 Sup. Ct. 24, 39 L. Ed. 69; *Tug River Coal & Salt Co. v. Brigel* [C. C. A. 6] 67 Fed. 625, 629, 14 C. C. A. 577; *Brigham v. Ludington*, 12 Blatchf. 237, 4 Fed. Cas. 124), may be brought in the district in which the property is situated, although the defendants are not inhabitants of such district. See the following cases arising under the analogous provisions of the Acts of 1875 and 1888; *Greeley v. Lowe*, 155 U. S. 58, 72, 15 Sup. Ct. 24, 39 L. Ed. 69; *Dick v. Foraker*, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. Ed. 201; *Citizens' Saving Co. v. Ill. Cent. R. R.*, 205 U. S. 46, 27 Sup. Ct. 425, 51 L. Ed. 703; *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208; *Ladew v. Copper Co.*, 218 U. S. 357, 31 Sup. Ct. 81, 54 L. Ed. 1069; *Perez v. Fernandez*, 220 U. S. 224, 31 Sup. Ct. 412, 55 L. Ed. 443; *Chase v. Wetzlar*, 225 U. S. 79, 32 Sup. Ct. 659, 56 L. Ed. 990; *Jones v. Gould* (C. C. A., 6) 149 Fed. 153, 80 C. C. A. 1; *Single v. Paper Co.* (C. C.) 55 Fed. 553; *Spencer v. Stockyards Co.* (C. C.) 56 Fed. 741; *Miller v. Ahrens* (C. C.) 150 Fed. 644; *Gillespie v. Coal & Coke Co.* (C. C.) 162 Fed. 742; *Ladew v. Copper Co.* (C. C.) 179 Fed. 245; *Elk Garden Co. v. Thayer Co.* (C. C.) 179 Fed. 556.

In the present case however, the citizenship of the parties is not diverse, so as to give the District Courts general jurisdiction upon that ground. And, after careful consideration, I am constrained to conclude that even if this suit be within the general jurisdiction of the District Courts as one arising under the Constitution and laws of the United States, a matter which is not determined, it is nevertheless not a suit to enforce a claim to property within this district within the meaning of section 57 of the Code, and hence could not have been originally brought in this court under the provisions of this section.

In *Ladew v. Tenn. Copper Co.* (C. C.) 179 Fed. 245, 250, 251, involving the construction of section 8 of the Act of 1875, I held, after careful consideration, that this section "does not extend either to all suits of a local nature or to all local actions in rem, but is definitely limited to suits brought for the enforcement of certain specific rights," and that the words "claim to property" used in the Act "relate only to

claims made to the property in the nature of an assertion of ownership or proprietary interest, or other direct right or claim to the property itself, \* \* \* and do not include the assertion of a right which is not based upon an interest in the property itself, but seeks merely to enforce a restriction which the law imposes upon the owner of the property in reference to its proper use." This case was affirmed generally in *Ladew v. Copper Co.*, 218 U. S. 357; 31 Sup. Ct. 81, 54 L. Ed. 1069.

In *Shainwald v. Lewis* (D. C.) 5 Fed. 510, it was held that the provisions of R. S. 738 in reference to suits in equity "to enforce any legal or equitable lien or claim against real or personal property" did not include a creditors' bill in equity seeking to appropriate the general property of a defendant to the payment of his debts. The court said:

"In my judgment this section was only intended to reach those suits in equity in which it has sought to enforce some pre-existing lien or claim, legal or equitable, upon or to some specific property, real or personal, and not cases in which it is sought to reach and appropriate the general property of a defendant to the payment of his debts."

In *Jones v. Gould* (C. C. A., 6) 149 Fed. 153, 157, 158, 80 C. C. A. 1, the court cited with apparent approval the definition of a claim to property given in *Shainwald v. Lewis*, supra, and said that section 8 of the act of 1875 contemplates that the action "must be one which relates to the title to real or personal property within the district," and that "evidently" its legitimate subject "must be the title to some property." And in *Central Trust Co. v. McGeorge*, 151 U. S. 129, 133, 14 Sup. Ct. 286, 38 L. Ed. 98, where a citizen of New York had filed in the United States Circuit Court in Virginia a bill to wind up the affairs of an insolvent New Jersey corporation carrying on business and owning property in Virginia, under which receivers of the defendant's property had been appointed, the court without referring to section 8 of the act of 1875, or suggesting that its provisions authorized the institution of such suit in Virginia, said, that "undoubtedly" if the defendant being sued in another district than that of its domicile, had properly sought to avail itself of its statutory exemption from suit in such district, the jurisdiction of the court could not have been sustained.

In *Dormitzer v. Bridge Co.* (C. C.) 6 Fed. 217, it was held that the provisions of section 8 of the act of 1875 did not give the Circuit Courts power to proceed by attachment of the property of an absent defendant in a suit for collecting moneys due for unpaid assessments of a stock subscription. The court, after citing the provisions of section 8 of the act, said:

"But this means a lien or title existing anterior to the suit, and not one caused by the institution of the suit itself."

It is furthermore significant that in *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; *Searl v. School District*, 124 U. S. 197, 8 Sup. Ct. 460, 31 L. Ed. 415; *Traction Co. v. Mining Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462; *South Dakota Ry. Co. v. Railway Co.* (C. C. A., 8) 141 Fed. 578, 73 C. C. A. 176; *Mineral*



Range R. Co. v. Copper Co. (C. C.) 25 Fed. 515; Colorado Midland Co. v. Jones (C. C.) 29 Fed. 193, and Deepwater Ry. Co. v. Coal & Lumber Co. (C. C.) 152 Fed. 824, the jurisdiction of the United States Circuit Courts in condemnation proceedings which had been brought under State statutes and removed from State courts, was sustained solely on the ground of the diversity of citizenship of the parties, without any intimation or suggestion in any of these cases that such jurisdiction might be sustained under section 8 of the act of 1875. And see Pacific Removal Cases, 115 U. S. 2, 5 Sup. Ct. 1113, 29 L. Ed. 319.

In the light of these decisions I conclude, that as the plaintiff in this suit asserts no right of ownership or proprietary interest, or other pre-existing right or claim to the defendants' property, but merely seeks to invoke the exercise of the State's power of eminent domain for the purpose of acquiring, through and by means of its suit, an easement in the defendants' property, it is not a suit to enforce a claim to the defendants' property within the meaning of section 57 of the Code; and that, therefore, it could not have been brought originally by the plaintiff in this court against the nonresident defendants under this section of the Code, even if it be a suit arising under the Constitution and laws of the United States.

3. It follows that, for the reasons above stated, it must be held that as this suit could not have been originally brought by the plaintiff against the defendants in this court, it is not removable by the defendants to this court over the plaintiff's objection, and that since the plaintiff has not waived its objection to the jurisdiction of this court, its motion to remand the suit to the State court must now be granted.

[3] I am strengthened in this conclusion by the well-settled rule, growing in part out of the great practical hardship of protracted and fruitless litigation resulting to litigants from a ruling by a Federal trial court erroneously retaining jurisdiction of a removed cause, as contrasted with the finality of its judgment remanding the cause and restoring jurisdiction to the State court (*Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556, 570, 16 Sup. Ct. 389, 40 L. Ed. 536), that if there be any substantial doubt as to Federal jurisdiction the cause should be remanded, and jurisdiction retained only where it is clear. *Black's Dillon on Removal*, § 216, p. 356; *State of Kansas v. Bradley* (C. C.) 26 Fed. 289, 292 (Mr. Justice Brewer, then Circuit Judge); *Fitzgerald v. Ry. Co.* (C. C.) 45 Fed. 812, 820; *Hutcheson v. Bigbee* (C. C.) 56 Fed. 329; *Concord Coal Co. v. Haley* (C. C.) 76 Fed. 883, 884; *Crane Co. v. Guanica Centrale* (C. C.) 132 Fed. 713; *Tierney v. Ins. Co.* (C. C.) 163 Fed. 82, 86. The State court will have undoubted jurisdiction of this litigation, and any rights which the defendants may have under the Constitution and laws of the United States may be fully and properly protected, not only in the State courts, but upon writ of error to the Supreme Court of the United States, in the event the final decision in the State courts is adverse to the rights claimed by them.

5. An order will accordingly be entered granting the plaintiff's motion and remanding this suit to the Circuit Court of Knox County, Tennessee, whence it was removed, and taxing the defendants with all the costs of this court.

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**WESTERN UNION TELEGRAPH CO. v. LOUISVILLE & N. R. CO.**

(District Court, W. D. Kentucky. December 28, 1912. On Motion to Dissolve Temporary Injunction, February 7, 1913.)

**1. INJUNCTION (§ 136\*)—PROCEEDINGS FOR DETERMINATION OF COMPENSATION—EQUITABLE RELIEF.**

Where a telegraph company installing and operating on a railroad company's right of way a telegraph system, pursuant to a contract permitting such use of the right of way for a specified period, sought to condemn as authorized by state statute the right of way of the company in the state for the use of the system after the expiration of the period and the inability of the parties to agree on a future arrangement, the court pending determination of compensation would maintain the status quo by enjoining the railroad company from interfering with the system.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.\*]

**2. COURTS (§ 266\*)—JURISDICTION—INJUNCTION—PROPERTY OUTSIDE OF STATE.**

Where a foreign telegraph company installed and operated on a domestic railroad company's right of way a telegraph system within and outside of the state as a single system, and it sought to condemn the property of the company in the state for use of the system in the state, the court pending determination of compensation would restrain the railroad company from interfering with the system outside of the state in view of the peculiar character of the property involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806-808; Dec. Dig. § 266.\*]

**On Motion to Dissolve Temporary Injunction.**

**3. EMINENT DOMAIN (§ 47\*)—ACQUISITION ON RAILROAD RIGHT OF WAY FOR TELEGRAPH SYSTEM—FEDERAL STATUTES.**

Rev. St. U. S. § 3904 (U. S. Comp. St. 1901, p. 2707), declaring that all railroads or parts thereof in operation are post roads, does not interfere with the right of a state to authorize a telegraph company to condemn a right of way for a telegraph system installed and operated on a railroad right of way pursuant to a contract for such use for a specified time; the right of way sought to be taken by the telegraph company not preventing the railroad company from operating its railroad and carrying the mail.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.\*]

**4. INJUNCTION (§ 136\*)—PROCEEDINGS FOR DETERMINATION OF COMPENSATION—EQUITABLE RELIEF.**

Where a foreign telegraph company, installing and operating on a domestic railroad company's right of way a telegraph system within and outside of the state as a single system, sought to condemn a right of way in the state for use of the system in the state, a temporary injunction restraining the railroad company from interfering with the system would not be dissolved, as applied to the system in other states, merely because of the situation there, as to condemnation there, especially where

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a severance, pendente lite, of the unified system at any point would injure the telegraph company's property in the state.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 138.\*]

**5. INJUNCTION (§ 175\*)—PROCEEDINGS FOR DETERMINATION OF COMPENSATION—EQUITABLE RELIEF.**

The court, seeking to maintain the status quo by injunction, pending proceedings by a telegraph company, installing and maintaining a telegraph system on a railroad company's right of way, to condemn the railroad company's right of way for the system, will enjoin the railroad company, in possession and alone operating the railroad lines as lessee, from interfering with the telegraph system.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 388; Dec. Dig. § 175.\*]

**In Equity.** Suit by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company. Temporary injunction granted.

A. E. Richards and A. P. Humphrey, both of Louisville, Ky., for complainant.

Henry L. Stone, Helm Bruce, and Albert S. Brandeis, all of Louisville, Ky., for defendant.

**EVANS, District Judge.** From the very interesting and helpful argument of the motion for a temporary injunction the court has not only derived much benefit, but has found that a great deal could be said upon both sides of certain of the propositions discussed.

An action was brought in this court on the 9th day of July, 1912, for the condemnation of certain property of the Railroad Company to the uses of the Western Union Telegraph Company. It was contended at the hearing of various demurrers in that action that the law of Kentucky on which that action was based is unconstitutional and void, but the court held that this contention was not maintainable upon any ground. The court expressed in that case the view that the one dominant question was: What is the reasonable and fair compensation to be paid to the defendant for the property which, in the language of the Kentucky Statute (Ky. St. § 4679a), was "desired" by the Telegraph Company for its purposes—purposes which the state of Kentucky had decided to be the public ones? At this stage and in aid of the other suit, this action was brought, and the pending motion was made for the purpose, broadly stated, of preserving the present status while the question of just compensation was being litigated.

We will consider the motion from two standpoints, namely: First, as it bears upon defendant's property in Kentucky, to which the previously brought suit applies; and, second, as it bears upon the defendant's conduct respecting property outside this state.

**1. As to Property in Kentucky.**

[1] The affidavits read at the hearing certainly cover a very wide range, but we have not been impressed with the conviction that a great part of what they contain is instructively applicable to any ques-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion involved in the motion now under consideration. As we view the first of the questions we have stated it is neither complex nor difficult. Indeed, it appears quite simple.

Acting under an agreement made with the Railroad Company over 25 years ago, the Telegraph Company from time to time at great expense installed upon defendant's right of way throughout Kentucky a large portion, to wit, about 1,500 miles, of its telegraph system. Under the same agreement the Telegraph Company has also, in actual and physical connection with its lines in this state, installed in other states upon rights of way of the defendant some 3,250 miles of its system. The system thus installed consists of continuous wires strung upon poles put in the ground probably about 160 feet apart. Various instruments and structures upon and along the lines of railway have been placed where necessary. The general character and appearance of complainant's plant is well known. Some months ago the contract between the parties pursuant to the manner it prescribes was terminated, and the parties have not been able to agree upon another arrangement nor as to the compensation to be given the defendant in the event any of its property should be taken. This condition, when reached, found all the poles, wires, apparatus, and structures actually remaining upon the Railroad Company's rights of way throughout Kentucky and various other states at the moment the contract terminated, and not only so, but all were then in active use and operation and apparently indispensable to the defendant as well as to the complainant. It is difficult to see how the Railroad Company could operate its line without the use for a considerable period of the Telegraph Company's property. Certainly it would have been disastrously inconvenient to the Railroad Company, if, at the precise moment of the termination of the contract, the plant of the Telegraph Company had ceased to be available or operative. In this situation and pending the suit, which seeks to condemn the very property so long in use under the agreement referred to, the Telegraph Company seeks to enjoin the Railroad Company from cutting, removing, or interfering with any part of the Telegraph Company's plant until the result of the condemnation suit shall be ascertained. If that suit shall result in a judgment for the Telegraph Company for the condemnation of the land it desires to take, then its own poles and other apparatus and structures will be ready for use just as they are now, provided reasonable compensation shall have been paid. For the purposes of the pending motion, we think we must assume that any just compensation due the Railroad Company will be ascertained and paid within a reasonable time. We say this because the condemnation action has been brought, and is now being actively prosecuted, and there is nothing in the law of Kentucky which forbids the result indicated. On the contrary, the law of the state expressly authorizes this public utility corporation to do exactly what it seeks to do in that suit. So, assuming that the complainant will acquire a right to the property it seeks to condemn, what will be the situation? If the Railroad Company is permitted in the meantime to remove the complainant's plant from the very ground which may be condemned, the Telegraph Company will be compelled



at vast expense to restore it after condemnation shall have taken place; whereas if, pending that suit, the plant is permitted to remain where it is, the Railroad Company will be awarded just compensation for any of its property which may be taken, including probably reasonable compensation for its use pendent lite, and in the meantime the defendant Railroad Company will derive great benefit from the presence of the Telegraph Company's plant on its right of way, for the reason that, in the absence of that plant, there would be serious if not insurmountable difficulties in operating the railroad, as it is obvious that the defendant could not in any short period construct a telegraph plant of its own. So that any removal or destruction of complainant's plant, so far as it is located on defendant's right of way in Kentucky, would be wanton and unnecessary, besides inflicting a damage that would be irreparable because there would be nobody who could well be compelled to make the loss good. There would, it seems to us, be neither justice nor reason in visiting upon complainant a loss of that character.

The suggestion that the defendant may want to devote the very part of its property which complainant seeks to condemn to the construction in the future of a telephone and telegraph line of its own was disposed of in an opinion recently delivered in the condemnation suit, where the defendant, in its answer, made a similar claim under section 1 of the Kentucky act authorizing condemnations by telegraph companies. While for other reasons overruling a demurrer to a paragraph of the answer which, among other things, set up this claim, the court said that in doing so it by no means intended to intimate that it yielded to "the defendant's contention that the defendant has the first right to choose what part of its right of way shall be taken by the plaintiff or a right to any preference in respect to what it may itself intend hereafter to use for its own telegraph or telephone lines. Our view rather is that no such right or preference exists. The last clause of section 1 of the act does not seem to confer any rights upon the defendant as to a nonexisting telegraph line. The peculiar conditions actually existing in this instance greatly emphasize the view we take. Indeed, there would seem to be no justice in allowing the defendant to exclude the plaintiff from keeping its own poles where they now are when the right of way it has had, and which it desires to hold, shall be fully paid for through this action. The party seeking to condemn appears to be given the right to take what it 'desires,' though this, of course, is subject to the other provisions of the act. That is the object of the suit. The statute does not require that its right to take shall be made subordinate to any purpose of the owner. The important thing is giving the owner compensation for what in fact is taken. The taking of one particular part of a thing may involve greater compensation including greater damages, but it does not otherwise affect or control the right to take what the plaintiff desires."

At all events, in the peculiar conditions surrounding this case, if this court may be permitted to exercise any discretion, it will be exerted in the direction of maintaining the present status until the con-

demnation suit shall be finally disposed of. Indeed, this seems to us to be the course dictated alike by common sense and a proper judgment.

What we have so far said applies specifically to that part of complainant's plant which is located in Kentucky.

## 2. As to Property Outside of Kentucky.

[2] The second of the propositions to be investigated is more difficult, and has been the subject of anxious consideration. In order to its solution, we must remember exactly what the general nature of the entire litigation is. Of course, the nature and object of the condemnation suit itself is obvious enough. This, the equity suit, is, to some extent, what may be called an adjunct to the other. While, however, the condemnation suit is necessarily limited to property actually located in the state of Kentucky, that property nevertheless is of a peculiar and exceptional nature. The complainant's plant and telegraph system largely depends for its value to those who put their capital into it, and for its efficiency in meeting the proper demands upon it by the public upon its consolidation into one whole. Divided into fragments and treated and operated separately as such, its value and efficiency would be greatly impaired. In considering the questions involved, we should not lose sight of these facts. If, while condemning property for its uses in Kentucky, the integrity of its plant as one entire and composite thing should be destroyed by the defendant in respect to those parts of the entire plant which, in fact, are located in other states, certainly very great and possibly irreparable injury might result to the complainant, not only elsewhere, but here, without any compensation or other benefit to the defendant. If, under existing conditions, the defendant should, in fact, exercise a right which it might suppose it had and sever continuous wires and thus cut off the use by the complainant of its property on defendant's rights of way at each state line of the many over which its right of way crosses, much unnecessary injury might ensue to complainant. If we were asked merely to aid courts in other states by an injunction here which might operate in terms upon property located there, and which is there sought to be condemned by complainant, we should decline the request, first, because it might be intrusive as well as beyond our power, and, second, because we must assume that those courts can protect themselves and their own jurisdiction. The matter before us, however, appears to have a much broader significance when we consider that we are asked to protect a unified property and plant extending through several states, including Kentucky, from dismemberment into fragments in any of them while the condemnation suit is being fought out here. We conceive that any great and useful end to be achieved by any injunction we may issue in this case must be founded upon principles strikingly analogous to those announced by the Supreme Court in *Muller v. Dows*, 94 U. S. 448, 449, 450, 24 L. Ed. 207, where the grounds were vigorously stated for holding that a court of the United States in one district might, in enforcing a single mortgage upon a line of railroad extending through several states, decree a sale of the entire property, regardless of state lines. The

disastrous results from selling one entire property in fragments were clearly pointed out. Without further elaboration or special mention of the various authorities read, we have reached the conclusion that we may apply similar or kindred considerations to those suggested in *Muller v. Dows* to the advantageous settlement of the questions now under consideration. True, as urged by the learned counsel for the defendant, we should not enjoin here the mere commission of a trespass upon real property in another state. If we had before us a simple proposition of that character, we should yield to that view readily enough. But the complainant's plant, whether real estate or not, is one entire thing, though it extends beyond Kentucky, and we have scriptural warrant for the conclusion that, if we cut off one part, the whole body suffers. It is upon grounds suggested by that most important fact that we may protect the one body of the complainant by enjoining here certain injuries to it elsewhere, and especially when we know that such injuries wherever committed will inevitably injure the plant in this state where we are certainly authorized to protect it.

While the complainant is a citizen of New York, the defendant is a citizen of Kentucky fully before the court, and subject to its power, and may be acted upon by its orders and processes. Any injunctive order in the premises would operate personally upon the defendant in this district and not upon its property elsewhere. We cannot doubt, having in view the extraordinary nature of this case, the peculiar character of the property involved and all the circumstances of the entire situation, that it is proper to grant complainant's motion. We are all the more willing to do this because we are satisfied that the defendant itself will be well nigh as much benefited by the injunction as will be the complainant. Indeed, it is difficult to see how either side could get along without it if active and hostile litigation should continue.

We shall, therefore, upon the grounds indicated, grant the motion to the full extent prayed for, and very earnestly suggest that the parties consent that the order to be entered shall contain certain other clauses similar to those agreed upon and embraced in the temporary restraining order now in force. In doing these things we think we exercise a wise discretion and reduce the disadvantages to the defendant to the minimum. We repeat that we think there will be none which will not to a large extent be counterbalanced by advantages to it.

We suppose this may be a case where, as a condition to the issuing of a temporary injunction, a bond should be required of the complainant to cover any damages that may result. The penalty of such bond may be the subject of consideration and settlement at this time if the defendant thinks a bond is necessary.

A proper decree may be prepared.

#### On Motion to Dissolve the Temporary Injunction.

On December 28, 1912, the court delivered its opinion in writing, in which it stated some, at least, of its reasons for granting a temporary injunction pendente lite, as prayed for in the bill of complaint.

Speaking generally, and without confining ourselves to what was said in the written opinion then delivered, the injunction was granted upon several grounds, among which were the following, namely: First, that the complainant had the right under the law of Kentucky, which was supreme in that connection, to condemn, pursuant to the provisions of section 4679a of the Kentucky Statutes, what was desired by it for its uses of the property of the defendant described in the petition in the action at law mentioned in the bill of complaint, using the word "desired" in its statutory sense, when taken in connection with the other provisions of section 4679a; second, that as the action at law was pending and, as the court knew, was being prosecuted with diligence, it would be discreet and proper to enjoin the threatened destruction or seizure by the defendant of any part of the existing telegraph system of the complainant; third, that this preventive measure was addressed only to the defendant, which was within the jurisdiction of the court, although it prevented that defendant from doing any of the threatened acts at any point where the line of the complainant was located on the right of way of the defendant; fourth, that as the complainant's system was one unified thing, extending as one whole through many of the states, and as its severance into fragments at any state line might greatly and irreparably injure the whole system in the several states, it was thought proper, under principles analogous to those expressed by the Supreme Court in *Muller v. Dows*, 94 U. S. 448, 24 L. Ed. 207, to enjoin the defendant, as was done on December 28, 1912; fifth, that both parties were greatly dependent upon the maintenance of the telegraph lines as now existing, and could hardly do without them, though the defendant was seeking an advantage by carrying into effect a purpose to seize or take exclusive possession of the lines on its right of way under a claim of title thereto arising out of the contention that a failure to remove the telegraph lines when the contract terminated had operated to transfer all of the complainant's property on the defendant's right of way to the defendant; and, sixth, that the situation was such that both parties to the controversy would be greatly injured if the injunction were refused, though neither party apparently could be hurt if it were granted, especially as the temporary injunction determined no right of either side, but only preserved the existing status until the question of right could be definitely disposed of.

On January 4th the defendant filed its answer in most elaborate, not to say argumentative, form, and thereupon moved the court to dissolve the temporary injunction. This motion was supported by further affidavits. The complainant, on January 10th, filed its replication, and thereby put the case at issue. We by no means hold that the motion to dissolve may not be admissible, notwithstanding the replication, although usually, after the replication has been filed, whereby the issues of fact are made up and the case ready for preparation for trial on the merits, the testimony must be taken upon notice which gives opportunity to cross-examine the witnesses. We did not pass upon the question at all, but on January 23d heard the motion to dissolve the temporary injunction upon the case as made by the bill and the answer there-



to and the affidavits read. Voluminous as the papers have become, we remain satisfied with the action of the court in granting the temporary injunction. With brevity we will state our reasons therefor.

[3] We by no means think that section 3964 of the Revised Statutes of the United States in any way interferes with, or was by Congress intended to interfere with, the right of the state to authorize telegraph companies to condemn the property sought to be condemned in this instance. Only a small part of the right of way of the defendant is involved. There is no pretense, and there could be none, that such part of the property of the defendant as is sought to be condemned here would prevent the Railroad Company from operating its railroad and carrying the mails over it while so operating it. We all know that such a result would not and could not come, because we know that the telegraph lines, precisely where they now are, have existed and have been operated for over 26 years, and that the presence of those lines at this point have greatly aided, rather than hindered, the safe and expeditious carriage of the mails. There is every reason, therefore, for believing that its presence will continue to aid in that way.

If we were right in supposing that the temporary injunction should be granted upon the reasons stated, or any others that might exist, we think the situation in the several states as now further developed indicates no reason for dissolving it. Surely it should not be dissolved as it applies to the lines in Kentucky, or Tennessee, or Georgia, or any other of the Southern states. As to Indiana and Illinois, the details of the situation *as to condemnation there* (we emphasize that phrase) are peculiar and somewhat curious, but it may at no distant day be changed by appellate proceedings. Besides, the telegraph system of the complainant, the severing or destruction of which is enjoined, extends from Kentucky over into Indiana, and through that state into Illinois, over which it passes into Missouri. The severance, *pendente lite*, of this unified system at any point would injure complainant's property in Kentucky, and, indeed, everywhere else where that system extends. As it appears to be manifest that the injunction can do no harm, but rather that it will do good to the Railroad Company, there does not seem to be any ground for dissolving the injunction on account of the condition of things in respect to condemnation in Indiana and Illinois. The complainant owns the telegraph system through those states, and, while those states must decide as to the right of *condemnation*, we see no reason why the complainant's property should be injured by the defendant pending the settlement of the matter.

[4] It was urged that the situation respecting certain railroads outside of Kentucky, which are operated by the defendant under leases from other railroad companies, should operate in favor of the pending motion. The lessor railroads are not parties to this suit, nor are they enjoined. The defendant is the party enjoined, and as it is in possession of the railroads it has leased, and as it alone operates those railroad lines, there is every reason, which has any potency, for enjoining it, as it is in a situation to do the threatened damage if any one is. The defendant controls the situation in respect to those leased roads, and the defendant is within the jurisdiction and control of this court.

[5] Some insistence was made upon the alleged fact that the complainant was incurring obligations for rentals of the telegraph lines. This was upon the theory that the ownership of the lines had been forfeited to the defendant by reason of the failure of the complainant to remove its property at the expiration of the previous contract between the parties. But we think that is a matter entirely foreign to the question before us, and is not ripe for consideration or determination at this time. It may be the subject of consideration at the trial of the condemnation proceeding, where it may be that the question of rental would constitute one of those which should be taken into account when ascertaining the value of the property; but this question would necessarily relate back to the time of the beginning of the condemnation suit. We think that it is out of place in this connection.

We have reached the conclusion that the motion to dissolve the temporary injunction should be denied and overruled, and an order accordingly may be prepared and entered.

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UNITED STATES v. KLINE.

(District Court, E. D. Pennsylvania. January 8, 1913.)

No. 8.

1. POST OFFICE (§ 48\*)—"MISUSE OF MAIL"—INFORMATION WITH REFERENCE TO ABORTION—INDICTMENT.

Cr. Code, § 211 (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]), prohibits the mailing of a letter giving information directly or indirectly where or by whom an operation to produce an abortion will be done or performed, etc. An indictment charged that defendant, a physician, having received a letter from H. stating that a young lady had become pregnant and requesting to know by return mail whether defendant could relieve her and as to defendant's charges, did pursuant to such request deposit in the mail, addressed to H., a letter entitled "Hernia," and, after acknowledging receipt of H.'s communication, advised that he see the defendant any day during the current week "concerning your rupture" and talk the matter over, alleging that defendant then and there well knew that the letter contained information where and by whom an act or operation for the procuring of an abortion would be done and performed. *Held*, that the indictment stated an offense under the statute with sufficient certainty to withstand a demurrer.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 66-80; Dec. Dig. § 48.\*]

2. POST OFFICE (§ 49\*)—"MISUSE OF MAIL"—EVIDENCE—MATERIALITY.

In a prosecution of a physician for depositing in the mail a letter informing H. how he could have an abortion performed, evidence as to a conversation between defendant and H., when he called at defendant's office pursuant to the letter, in which defendant, after inquiring the age, condition, and residence of the female, agreed to perform the operation for \$75 and the board of the girl in a private family, where defendant insisted she should go, and enjoining that the girl must not talk, because if she did she would likely get all the parties into trouble, was admissible.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84-86; Dec. Dig. § 49.\*]

Nonmailable matter, see notes to *Timmons v. United States*, 30 C. C. A. 79; *McCarthy v. United States*, 110 C. C. A. 548.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES—INTENT.**

In a prosecution of a physician for depositing in the mail a letter which on its face related to "Hernia," but which the government claimed related to abortion and was intended to inform the addressee where he could get an abortion performed on an unnamed female, evidence that in a conversation between defendant and the addressee, induced by receipt of the letter which related entirely to the performance of an abortion, defendant in enjoining secrecy asked the addressee whether he had seen a published report concerning trouble which defendant had previously had in L. county relating to an incident in which he had been brought into publicity by a young woman talking about having been in his office in relation to an operation, was admissible to show guilty knowledge and intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

Evidence in criminal prosecutions of other acts and offenses to show knowledge, see note to *Lobosco v. United States*, 106 C. C. A. 479.]

D. Frank Kline was convicted of mailing a letter giving information where and by whom an abortion would be performed and how and by what means it might be produced, in violation of Cr. Code, § 211. On motion for a new trial, denied.

Walter C. Douglas, Jr., Asst. U. S. Atty., and John C. Swartley, U. S. Atty., both of Philadelphia, Pa.

T. Walter Gilkyson, of Philadelphia, Pa., and John E. Malone, of Lancaster, Pa., for defendant.

THOMPSON, District Judge. The defendant was indicted and convicted under section 211 of the Criminal Code of March 4, 1909, upon the charge of depositing in the mail a letter giving information directly or indirectly where or by whom any act for the procuring or producing of abortion would be done or performed or how or by what means abortion might be produced.

The act declares unavailable:

"Every \* \* \* letter \* \* \* giving information directly or indirectly \* \* \* where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced."

And provides that:

"Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable \* \* \* shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

[1] The first count of the indictment charges that the defendant, having received the following letter addressed to him:

"Palmyra, Pa., Aug. 22, 1912.

"Dr. D. Frank Kline, 121 E. King St., Lancaster, Pa.—Dear Sir: Your name was given me by a party who informed me you could no doubt help me out of my trouble. I have been calling on a young lady in Lancaster Co. and on account of our indiscretion she has become pregnant. Of course we must get rid of this in some way and I would appreciate it if you would let me

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

know by return mail whether you could relieve her of her condition and what your charges would be. Please let me hear from you by return mail and oblige,

Yours truly,

A. R. Henry,

"Palmyra, Pa.

"Please use plain envelope."

—did, in pursuance of the request contained in and in reply to the letter, deposit in the mail a letter giving information where and by whom a certain act and operation for the procuring and producing of abortion would be done and performed, which said letter was as follows:

"D. Frank Kline, M. D.,

"121-123 East King St.,

"Lancaster, Pa.

"Hernia.

Medical and Surgical Consultations.

"A. R. Henry—Dear Sir: Yours received, and I advise that you see me any day this week concerning your rupture and talk the matter over. You will avoid Thursday as I might not be at home.

"Yours truly,

D. Frank Kline, M. D.

"Aug. 24, 1912."

And alleges that the defendant then and there well knew that the letter contained information where and by whom an act and operation for the procuring and producing of abortion would be done and performed.

The second count charges that having received the above letter of August 22, 1912, the defendant did, in pursuance of the request contained in and in reply to the letter, deposit in the mail the above letter of August 24, 1912, then and there giving information directly and indirectly how and by what means abortion might be produced, and concludes with an allegation that the defendant then and there well knew that the letter contained information as to how and by what means abortion might be produced.

Counsel for the defendant moves in arrest of judgment upon the ground that the indictment does not state facts sufficient to constitute an offense under the statute, in that the letter deposited in the mail by the defendant gives no information either directly or indirectly as to where or by whom the act or operation would be done or performed, nor how or by what means abortion might be produced, nor does it refer to the subject-matter of the letter to the defendant from A. R. Henry, but, on the contrary, refers to an entirely distinct subject, to wit, rupture, and can in no wise be construed as giving any information causing it to be nonmailable. At the argument defendant's counsel relied upon the case of *United States v. Grimm* (C. C.) 45 Fed. 558, in which it was held that, upon an indictment charging the mailing of a letter giving information where, how, or of whom and by what means obscene pictures might be obtained, the indictment was not sufficient where the letters set out did not contain anything to show that the letter charged to be nonmailable conveyed the information averred, and upon the case of *United States v. Pupke* (D. C.) 133 Fed. 243, where it was held that an indictment for depositing in the mail a letter giving information where, how, and of whom and by what means an article or thing designed and intended for the prevention of conception might be obtained, was insufficient in that the ar-



ticle or thing designed for the prevention of conception was not described in the indictment. The cases relied upon are, in my opinion, in no wise analogous to the present case. The letter addressed to the defendant, which is set out in the indictment, is perfectly clear in its terms as to what information is desired, and the letter deposited by the defendant, which is alleged to be in pursuance of the request contained in the letter to him and in reply thereto and with his knowledge that it gave the information desired, considered in connection with the letter received by him and the allegations in the indictment, is sufficient, in my opinion, to sustain a charge of the offense prohibited by the statute of giving the prohibited information "directly or indirectly."

The case at bar is ruled by the case of *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550. In that case the indictment (apparently drawn to meet the views of the Circuit Court in *United States v. Grimm* [C. C.] 45 Fed. 558) was under section 3893, Revised Statutes, as amended, which, further amended, has been incorporated into section 211 of the Criminal Code. The indictment set out that the defendant received a letter referring to some photographs and requesting information as to kind that could be obtained and price, and that he had in his possession obscene pictures, and, intending to give information of the character prohibited by the statute, wrote the following letter:

"Wm. Grimm, Photograph and Art Studio, N. E. cor. of Jefferson Avenue and Olive Street.

"St. Louis, July 22, 1890.

"Mr. Huntress, Richmond—Dear Sir: I received your letter this morning. I will let you have them for \$2.00 per doz. & \$12.50 per 100. I have about 200 negatives of actresses.

"Respectfully,

Wm. Grimm."

Mr. Justice Brewer in his opinion said:

"The sufficiency of the indictment is the first question presented. It is insisted that the possession of obscene, lewd, or lascivious pictures constitutes no offense under the statute. This is undoubtedly true, and no conviction was sought for the mere possession of such pictures. The gravamen of the complaint is that the defendant wrongfully used the mails for transmitting information to others of the place where such pictures could be obtained, and the allegation of possession is merely the statement of a fact tending to interpret the letter which he wrote and placed in the post office.

"It is said that the letter is not in itself obscene, lewd, or lascivious. This also may be conceded. But however innocent on its face it may appear, if it conveyed, and was intended to convey, information in respect to the place or person where, or of whom, such objectionable matters could be obtained, it is within the statute."

As to the contention that the indictment is insufficient in that it does not set out the offense with certainty, the established rule of criminal pleading is well stated in the opinion of the court in *Peters v. United States*, 94 Fed. on page 131, 36 C. C. A. on page 109, cited in the government's brief, as follows:

"The true test of the sufficiency of an indictment is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprised the defendant of what he must be prepared to meet; and, in case any other proceedings are

taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. U. S. v. Simmons, 96 U. S. 362 [24 L. Ed. 819]; U. S. v. Carll, 105 U. S. 612 [26 L. Ed. 1135]; U. S. v. Hess, 124 U. S. 483, 8 Sup. Ct. 571 [31 L. Ed. 516]; Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542 [37 L. Ed. 419]; Potter v. U. S., 155 U. S. 438, 15 Sup. Ct. 144 [39 L. Ed. 214]; Evans v. U. S., 153 U. S. 584, 587, 588, 14 Sup. Ct. 934, 939 [38 L. Ed. 830]; Batchelor v. U. S., 156 U. S. 426, 15 Sup. Ct. 446 [39 L. Ed. 478]; Cochran v. U. S., 157 U. S. 286, 290, 15 Sup. Ct. 628 [39 L. Ed. 704.]”

I think the indictment in this case fully meets the requirements of sufficiency and certainty, and the motion in arrest of judgment is denied.

[2] The third and fourth reasons in support of the motion for new trial relate to the alleged error of the court in the admission of evidence on the part of the government's witness as to a conversation with the defendant in his office when the witness called there after the mailing by the defendant of the letter. The conversation referred to was in relation to the proposed operation, and the evidence was offered by the government to show the intent of the defendant in sending the letter. The testimony was to the effect that the defendant, after inquiring as to the age of the girl, her condition, and her residence, agreed that she go to Lancaster, where she would be treated by the defendant, who would take care of her and keep her in a private family until she was cured. It was further testified that the defendant enjoined that the girl must not talk, because if she did she would be likely to get all the parties concerned into trouble, and that he had had some trouble on account of a girl talking. It was testified that the defendant stated that his price would be \$75 for the operation and the board of the girl while in Lancaster.

[3] The fifth reason is that the court permitted the witness upon re-examination to testify to a conversation in relation to a girl who had called at his office. The testimony adduced upon re-examination was to the effect that the defendant had asked the witness whether he had seen a published report about some trouble which the defendant had been in in Lancaster county and related an incident in which the defendant had been brought into publicity by reason of a young woman talking about having been at his office in relation to an operation.

I think all of the testimony of the witness as to the conversation with the defendant was relevant and admissible on the part of the government to show the intent of the defendant in mailing the letter. Counsel for the defendant, however, contended as to the conversation brought out on re-examination that it tended to show the connection of the defendant with another offense, and therefore was not admissible. The statements of the defendant as to the publicity caused by the visit described and the mentioning of his name by the girl afterwards were made by him for the purpose of showing the necessity of secrecy upon the part of the witness and the girl, who was the subject-matter of the correspondence. It was certainly relevant and material in showing the guilty knowledge and intent of the defendant in mailing the letter to prove that he enjoined secrecy, and as part of the conversation in relation to secrecy the reasons therefor were material and relevant. The burden was upon the government to show that the

letter, which upon its face standing alone related to a rupture, was in fact intended by the defendant and known by him to give information of the prohibited character.

Inasmuch as intent is a mental condition, it must ordinarily be implied from the acts and language of the person whose intent is in question. Therefore his statements and declarations either before or after the commission of the offense, from which, in connection with other evidence, an inference of guilt may be drawn, are admissible against him. *United States v. Larkin*, 26 Fed. Cas. No. 15,561; *United States v. Lumsden*, 26 Fed. Cas. No. 15,641.

Any fact which proves or tends to prove the particular intent is competent, and cannot be excluded because it incidentally proves an independent crime. *United States v. Kenney* (C. C.) 90 Fed. 257; *Spurr v. United States*, 87 Fed. 701, 31 C. C. A. 202; *United States v. Watson* (D. C.) 35 Fed. 359.

The declarations of the defendant upon the matter in question did not go so far as to constitute evidence of another offense, but, as the reasons alleged by him for enjoining secrecy, were admissible to show guilty knowledge and intent.

The seventh reason is based upon a part of the charge in which the jury were instructed that they might take into consideration the conversation in connection with the letter. For the reasons stated above for the admission of the conversation, I can see no error in these instructions.

The first reason, that the verdict was against the evidence; the second, that it was against the weight of the evidence; and the sixth, that the court erred in not giving binding instructions—are, in my opinion, based upon untenable grounds.

The motion for new trial is denied.

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### O'BOYLE v. NORWALK TOWING CO.

(District Court, D. Connecticut. January 2, 1913.)

No. 1,679.

#### TOWAGE (§ 11\*)—INJURY TO TOW—NEGLIGENCE OF TUG.

A tug *held*, on the evidence, not in fault for an injury to a barge laden with stone, which she towed near a temporary wharf and beached for unloading, and which was strained and injured because of a channel under her bottom.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 11-23; Dec. Dig. § 11.\*]

In Admiralty. Suit by Joseph E. O'Boyle, by Anthony O'Boyle, his next friend, as owner of the barge *Margaret A. Hayden*, against the Norwalk Towing Company, owner of the tug *Addie V.* Decree for respondent.

Hyland & Zabriskie, of New York City, for libellant.

John H. Light, of South Norwalk, Conn., for respondent.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MARTIN, District Judge. The complainant is the owner of a barge called Margaret A. Hayden, which, in August, 1911, he had loaded at Rondout, N. Y., with a cargo of between 350 and 400 cubic yards of crushed stone, to be delivered to one Arnold Schlaet, at Compo Beach, in the town of Westport, Conn., at a temporary wharf, 40 feet in width, built by said Schlaet for his own convenience. This said Schlaet had in his employ as superintendent Mr. Alfred Maddock, who leveled off a place in front of said temporary wharf, a space of the width of the wharf, and widening out therefrom until it was about 80 feet wide, and extending out into the Sound from 75 to 100 feet, for the beaching of scows and barges.

The plaintiff telephoned C. W. Crane & Co. for the towing of his barge from Wilson's Point to said Schlaet's wharf at Compo Beach, and Crane & Co. secured the services of the defendant, the Norwalk Towing Company. The defendant manned their tug, the Addie V., with Capt. Lockwood and Engineer and Manager Howard. They towed said barge to a point within 40 feet of the said Schlaet dock, and there she was beached.

The plaintiff claims that she was beached astride a channel about 60 feet in width, and so deep that the barge rested with her bow and stern upon the sand on either side of said channel; that when the barge was so beached it was about high tide. Upon the tide's receding, the weight of the load of the barge settled her somewhat in and about her center, so that she required docking for repairs, and the plaintiff in his libel claims that the said scow Margaret A. Hayden was badly strained and twisted, and her bottom, decks, sides, and seams damaged. I refer to Exhibit B, which is the survey of her injuries.

In support of this claim, the plaintiff testified that the barge was towed too far north, so that she could not be landed upon this space that had been leveled off by Mr. Maddock for the beaching of barges; that the defendant was at fault in not turning the course of the barge toward the said dock farther south, and, if he had done so, he could have landed her within 20 feet of the said dock, out of the reach of the channel, and upon the surface that had been leveled off, so that she would have rested upon her whole bottom. He was corroborated in this by Mr. John O'Boyle, his cousin (and his partner in other matters, but not in this).

The defendants claim that said barge was handled carefully, and was towed in the proper place, and beached as near the dock as she could be; that she was over the spot leveled off by said Maddock, and about in front of the said dock; that it was impossible to get her nearer, because of the depth of draft of the scow Margaret A. Hayden being 6 feet and 9 inches; that there was no channel on that beach, as claimed by the plaintiff, and no known defects on the beach at the point where said scow or barge was left, and so, in brief, the defendant claimed that its captain and engineer were without fault.

Captain Lockwood, Engineer Howard, and a Mr. Nash, called by the defendant, and said Alfred Maddock, called by the plaintiff, contradicted the evidence given by the plaintiff as to where said scow lay,



and as to there being a channel on that beach, and the captain and the engineer testified that they had never heard, and did not know, there was any channel there in fact, and insisted that there was no government survey, and no chart of any sort, which makes any reference to such a channel, and that upon careful inquiry they asserted that there was none. They were substantially corroborated by Maddock and Nash; but Nash and Maddock say that there is a mill pond a short distance inland, used as an oyster pond mainly, and there are some dams with drawgates, and when those gates were opened, and water coming out of that pond, it made a little depression in the sand. At low tide, when the gates are closed, that depression will have about 3 inches of water. When the gates are opened, there will be more water there, depending upon the fullness of the pond and the opening of the gate, sometimes a foot or more in depth. Nash testified that when the barge was beached it was across this outflow from said pond, and that while she lay there the gates were opened, and the result of it was a washing out from underneath the barge of the sand to a depth of 3 feet or more, and he estimated the width of that washout to be about 7 feet.

I find the facts to be as testified by Mr. Nash. I further find that the barge was not towed too far to the north, and did rest over this space that had been leveled off, and that, had it not been for this washout, there would have been no damage to the barge, unless by reason of its age and condition. I further find that if the barge was in a suitable state of repair, and not deteriorated by 22 years of service, she would have been uninjured by reason of the washout above described. I find there was nothing that amounted to what could be called a channel at the point described. I further find that the barge did not lie across the center of this waterway, as testified to by the plaintiff, but the washout came to within 5 to 10 feet of the stern.

The only corroborating witness for the plaintiff was his cousin, above mentioned, and he was in such a condition that counsel for the plaintiff, who put him upon the stand, later requested the marshal to eject him from the courtroom. His manner upon the stand, and his general demeanor in court, were of such a character that but little dependence could be placed upon his evidence. I am unable to find from this evidence any want of skill or competency or care on the part of the defendant's crew in charge of the tug, either in the towing or landing, and no defect in the beach at the point in question that the captain or engineer knew anything about, or should be charged with knowledge thereof.

The evidence was undisputed that they carefully sounded for the depth of water, and when within a short distance of the beach they sounded both on the tug and on the barge, and that the reason why she was not landed nearer the wharf, and out of reach of the spillway above mentioned, was that she drew too much water.

Let there be judgment for the defendant.

## In re WATSON.

(District Court, E. D. Kentucky. October 11, 1912.)

**1. BANKRUPTCY (§ 163\*)—VOIDABLE PREFERENCE—RECORDABLE TRANSFERS.**

The only effect of the amendments of Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1506), by the addition of the provision that, "where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required," was to carry forward the four months' period within which a recordable transfer which was in fact preferential might be attacked as voidable under subdivision "b," leaving the question whether or not the transfer constituted a voidable preference to be determined as of the date when it was actually made; and a transfer which was then made for a present consideration, and was not therefore preferential, does not become so because of delay in recording.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 163.\*]

**2. BANKRUPTCY (§ 163\*)—VOIDABLE PREFERENCE—RECORDABLE TRANSFERS.**

Nor did the amendment of Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506), change the effect of the act in that respect, it being essential to a preferential transfer, both before and after amendment, that it should have been to or for the benefit of a pre-existing creditor, who thereby gained an advantage over other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 163.\*]

**3. MORTGAGES (§ 175\*)—EFFECT OF DELAY IN RECORDING—KENTUCKY STATUTE—"CREDITORS."**

Ky. St. 1903, § 496, providing that "no \* \* \* mortgage \* \* \* shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors until \* \* \* lodged for record," in view of the construction placed thereon by the Court of Appeals of the state, by the word "creditors" includes only subsequent creditors without notice, who by their own activity have acquired a hold or lien on the property covered by the mortgage before it is lodged for record.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 417, 418; Dec. Dig. § 175.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1727; vol. 8, pp. 7622-7623.]

**4. BANKRUPTCY (§ 175\*)—MORTGAGE—SUFFICIENCY OF PROOF.**

Evidence considered, and *held* not to sustain the objections of a trustee to a mortgage executed by the bankrupt to his mother on real estate for a portion of the purchase price thereof, on the ground that it was not executed at the time it bore date, and that the mortgage and notes secured were for a larger amount than was due claimant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 175.\*]

**5. BANKRUPTCY (§ 184\*)—MORTGAGE—VALIDITY OF LIEN.**

The withholding from record of a mortgage given by a bankrupt to his mother for the purchase price of the mortgaged property, where it was not by agreement with or at the instance of the bankrupt, but on

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the advice of third persons to avoid what was deemed double taxation, held not to invalidate the mortgage as against the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.\*]

**6. MORTGAGES (§ 175\*)—IMPEACHMENT FOR FRAUD—FAILURE TO RECORD.**

The mere withholding from record of a mortgage does not invalidate it for fraud, unless it was pursuant to a fraudulent purpose to give the mortgagor a fictitious credit.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 417, 418; Dec. Dig. § 175.\*]

In the matter of Luther B. Watson, bankrupt. On review of order of referee allowing claim of Alice P. Watson as a secured claim. Order confirmed.

F. W. Schmitz, of Covington, Ky., for petitioner.

U. J. Howard, of Covington, Ky., for respondent.

COCHRAN, District Judge. This cause is before me on motion to reconsider an order, heretofore entered, on a petition for review, approving an order of the referee. The petition was filed and the motion is made by the trustee. The order complained of was the allowance of the mortgage of Alice P. Watson, the bankrupt's mother, as a preferred claim against a parcel of ground on the southwest corner of Latonia and Sanford avenues in the city of Covington, Ky., with a dwelling house, saloon, clubhouse, bowling alleys, and other improvements located thereon, near the Latonia race track, subject to a prior mortgage in favor of the Covington Savings Bank & Trust Company for \$6,000. The mortgage originated in this way. The real estate was acquired by the bankrupt from his mother. Prior to February 16, 1909, she had sold and, on that date, she duly conveyed it to him. The deed recites the consideration to be "\$1.00 and other consideration paid and to be paid." She claims that the purchase price of the property was \$10,800, of which \$4,000, part of a loan of \$4,500 made by the Farmers' & Traders' National Bank to the bankrupt with William Reidlin as surety, who was indemnified by a first mortgage on the property, was paid to her in cash, and for the remainder of which, to wit, \$6,800, the bankrupt gave his five notes, one for the sum of \$700 payable in one year, and four for the sum of \$1,525 each, payable, respectively, in two, three, four, and five years, each note bearing 5 per cent. interest, and, further, that on that date the bankrupt and his wife executed a mortgage to her on the property, subject to that in favor of Reidlin, to secure the payment of this unpaid purchase money. This mortgage was not recorded until August 16, 1910. In the meantime, to wit, on April —, 1910, the bankrupt obtained a loan from the Covington Savings Bank & Trust Company for the sum of \$6,000, out of which the loan for which Reidlin was surety was paid and secured same by a mortgage on the property which was at once recorded. It is this mortgage to claimant which the referee allowed as a preferred claim, subject to the \$6,000 mortgage, and of whose allowance complaint is

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

here made. On August 13, 1910, the bankrupt, having become hopelessly insolvent, fled the state to avoid his creditors, and on August 26, 1910, this proceeding was instituted.

The mortgage is attacked on several grounds. It is questioned whether the bankrupt really owes the claimant the amount of money thereby secured, and also whether he and his wife executed it at the time claimed. It is, however, very doubtful whether it is seriously urged that either of these things is so. It is urged seriously that the mortgage was fraudulently withheld from record, and is therefore void. Besides these, there are two grounds of attack not involving the meritoriousness of the debt or mortgage. I will dispose of them first. In dealing with them I assume that the purchase price of the property on the sale from the claimant to the bankrupt was \$10,800, of which \$4,000 was paid in cash and for the remainder of which, to wit, \$6,800, notes were given as hereinbefore stated, no part of which has ever been paid; that the mortgage to secure those notes was executed simultaneously with the conveyance of the property; and that the mortgage was not fraudulently withheld from record. Whether what is assumed is true will be considered after these two grounds of attack have been disposed of. The question, whether it is, has no pertinency to either of them.

One is, that the mortgage is a voidable preference. Is this so? We have seen that it was made February 16, 1909, and recorded August 16, 1910, 18 months afterwards. It was made, therefore, before the enactment, June 25, 1910, of the amendment to section 60b, relating to voidable preferences, and recorded subsequent thereto. This presents a question whether that amendment is applicable to this case. The trustee contends that it is, and that under it the mortgage is a voidable preference. He would, if necessary, contend that it is such under the act as it stood before the amendment, but, however this may be, he is quite sure that it is a voidable preference under that amendment, and that it applies. Of the two questions involved—i. e., as to whether under that amendment, if it applies, the mortgage is a voidable preference, and, as to whether it applies, the former is the more important, and, as I think that the mortgage is not a voidable preference under that amendment, I will limit the discussion thereto, and pass the other by.

[1] It will be helpful in determining whether the mortgage is a voidable preference under the amendment of 1910 to section 60b to approach it from a consideration of how the matter would stand under that section as it was before the amendment. I am clear, though the trustee would not have it so, that thereunder the mortgage cannot be a voidable preference. This is so, because it was not made to secure a then existing indebtedness, but one created simultaneously with its making. In other words, the consideration therefor was a present, and not a past, one. Certain federal courts have held that, though a recordable transfer was made to secure a present debt, yet if it was not then recorded, but is subsequent thereto, and at that time the maker is insolvent, and the other essentials of a voidable preference exist, it is a voidable preference, because under the amend-



ments of 1903 it should be judged as if it had then been made. I criticised this view and the cases which had taken it in the case of *Debus v. Yates* (D. C.) 193 Fed. 427. I held therein that the sole effect of the prolonging words as to recordable transfers, introduced by those amendments, was to prolong the time within which a recordable transfer which was a voidable preference, when made, might be attacked, and that they had no effect whatever in changing the time as of which it should be judged in determining whether it was a voidable preference. Criticisms of the position there taken have been made by the trustee herein, but the necessities of this case do not require my responding to them. It is sufficient to say that I have carefully considered them, and find nothing therein to cause me to change my opinion, and that the position I there took has been approved by the appellate court of this circuit in the case of *In re Klein* (C. C. A.) 197 Fed. 241. The same conclusion was reached by Judge Denison in the case of *Re Sayed* (D. C.) 185 Fed. 962, and the appellate court of the Seventh circuit in case of *Re Sturtevant*, 188 Fed. 196, 110 C. C. A. 68, both of which cases were decided subsequent to *Debus v. Yates*, but reported earlier. There was less reason for saying that a recordable preferential transfer, which had been recorded, should be judged as of the date when recorded, and not as of the date when made, in determining whether it has relation to a present consideration or a past one, than in determining whether the other elements of a voidable preferential transfer, to wit, insolvency of the bankrupt, preference, intent to prefer, and reasonable cause to believe on the part of the transferee that the bankrupt intended to prefer, were present.

In the Eighth circuit, where the view which I combated in *Debus v. Yates* has been much adopted, the application of it to a deed of trust to secure a present loan was expressly denied in the recent case of *In re Jackson Brick & Tile Co.* (D. C.) 189 Fed. 636. It was questionable whether the amendments of 1903 applied, as the deed of trust, though recorded August 8, 1906, and within four months of the filing of the petition in bankruptcy, had been given December 2, 1902, before the enactment of those amendments, which Judge Dyer in his opinion noted. He continued as follows:

"But, even if it be assumed that the amendment of 1903 is applicable to the transfer here in question, it still seems clear that the transaction cannot properly be treated as a voidable preference because the deed of trust was given to the bank as security for a present loan, and not for an antecedent indebtedness."

He said further:

"But, while the statute postpones the time within which the transfer can be attacked, the statute cannot properly be so applied as to materially alter the essential character of the transaction. If the transfer is one which is required to be recorded, the four-month period during which it may be attacked does not begin to run until the conveyance is recorded, but, if the transfer when made was based upon a present consideration, a delay in recording the instrument does not warrant us in treating the conveyance as if it were made as security for an antecedent debt, because to do so would be to create by construction a transaction different from the actual one."

The position that the amendments of 1903 did not authorize the creation by construction of a transaction different from the actual one was against the doctrine in toto; and, because of it, Judge Dyer balked at applying it to a mortgage transfer given for a present consideration.

The mortgage here, therefore, cannot be a voidable preference under the act as it was before the amendment of 1910 to section 60b, because made for a present consideration, and that, notwithstanding the introduction of the prolonging words by the amendments of 1903 to sections 60a and 60b. But why is this so? Why is it that under the act as it then was no transfer for a present consideration could be a voidable preference? It is important to understand just why this is so. This takes us back to the act as it was before the amendments of 1903 to sections 60a and 60b. Clearly before then no transfer for a present consideration could be a voidable preference. And this was so simply because a transfer for a present consideration did not come within section 60b. That section, then as now, was the only section of the act relating to voidable preferences. It contained a single sentence, and that a conditional one. The protasis thereof, on its surface, called for two things only—the giving by the bankrupt of a preference within a certain time, and the having, by the person to whom the preference was given, described as the “person receiving it or to be benefited thereby” or, his agent acting therein, reasonable cause to believe that it was intended to give a preference thereby. This latter thing has been held to imply a third one, to wit, the intending by the bankrupt thereby to give a preference. The apodosis was that in case of the existence of these things the preference should be voidable and recoverable. To understand what the first of these three things, from the existence of which this followed, was, it is necessary to go to the immediately preceding section 60a, the sole function of which was to define what should constitute the giving by the bankrupt of a preference. It, too, contained a single sentence, and that a conditional one. It recognized two kinds of preferences which might be given, to wit, judgment preferences, and transfer preferences. We have to do only with the latter, and hence any further reference to the former will be omitted. The protasis of the sentence as to transfer preferences also called for three things, to wit, the making by the bankrupt of a transfer of any of his property, insolvency on his part, and the enforcement thereof having the effect of enabling any one of his creditors to obtain a greater percentage of his debts than any other of such creditors of the same class. The apodosis was that, in case of the existence of these three things, the bankrupt would be deemed to have given a preference. In providing for the first of the three things called for it is not said to whom the transfer must be made. The underlying thought, however, is that it must be made to or for the benefit of the creditor, who, by the enforcement thereof, will be enabled to obtain the greater percentage; for not otherwise will he be so enabled. In the language of section 60b he must receive or be benefited by it. In 1 Loveland on Bankruptcy, p. 987, it is said that the transfer must be to a creditor. Of course, it is not meant thereby to exclude

a transfer to one not a creditor for the benefit of a creditor from being a preference. It was merely intended to emphasize the fact that the person to whom or for whose benefit the transfer is made should be a creditor. A preference, therefore, that is voidable, was, in this particular, the same as one that constituted an act of bankruptcy. Such a preference under section 3 (2) consists in the transfer by the bankrupt whilst insolvent of any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors. Here the letter is that the transfer should be to one or more of his creditors. But a transfer to another person not a creditor for the benefit of one or more of his creditors is within the provision just as much as a transfer to one or more creditors directly. In order, therefore, that there be a preference under section 60a, and hence that there be a voidable preference under section 60b, as well as in order that there be a preference under section 3 (2), it is necessary that the transfer be to or for the benefit of a creditor. The same thought is not always expressed exactly the same way in the act. Such is the case here. By section 1 (9) it is provided that the word "creditor" in the bankruptcy act shall, unless the same be inconsistent with the context, be construed to "include any one who owns a demand or claim provable in bankruptcy." It comes to this, then: That the transfer called for by section 60a, and through it by section 60b, is a transfer to or for the benefit of one who owns a demand or claim provable in bankruptcy; i. e., who then owns such a demand or claim. And it follows that it was only a transfer made by a bankrupt to an antecedent or pre-existing creditor, i. e., in payment of or as security for his debt, that could be a preference under sections 60a and 60b as they were originally enacted. If this is sound, then in no state of case could a transfer for a present consideration be a voidable preference under section 60b. If for cash or in exchange for other property, it could not be such because it would not be to or for the benefit of a creditor. If to secure an indebtedness then for the first time created—i. e., simultaneously with the making of the transfer—it would not be such because it would not be to or for the benefit of one who was theretofore a creditor. A sufficient reason, therefore, for the position that a transfer to secure a debt created simultaneously with its making could not be a voidable preference under sections 60a and 60b, as originally enacted, is that it did not come within them. They related only to transfers to pay or secure an antecedent or pre-existing debt. Consistent with this is the fact that section 67d provided, expressly, that in certain contingencies a lien given for a present consideration—i. e., a transfer as security—should not be affected by the act. Those contingencies were that the lien was given "in good faith, and not in contemplation of or in fraud upon" the act, and that it had been "recorded according to law if record was necessary in order to impart notice." The section itself does not affect liens given for a present consideration where either of the two contingencies named does not exist. It simply provides that liens so given where both contingencies exist shall not be affected by the act; and, so far as they are affected thereby, where either contingency does not exist, it is not by section

60b that they are affected. That this section to no extent made it so, that a transfer to secure a present debt was not a voidable preference, and that such was the case was due solely to the fact that the voidable preference section related only to transfers to pay or secure a past debt, is evident from the fact that the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) contained no such section, and yet it was held thereunder that in order to a preference it was essential that the transfer be to pay or secure an antecedent or pre-existing debt. *Tiffany v. Boatman's Savings Inst.*, 18 Wall. 375, 21 L. Ed. 868. But, though such was the case, the existence of that section rendered it impossible to construe sections 60a and 60b as including a transfer to secure a present debt. So to construe it would make the two sections inconsistent.

[2] Matters remained the same they had been in this particular after the enactment of the amendments of 1903 to sections 60a and 60b. The sole change, thereby made, in section 60b consisted in omitting from the protasis of the sentence, theretofore constituting the whole of the section, any reference to the time within which the preference was given, and adding a sentence in relation to the jurisdiction of suits to recover voidable preferences. The amendment to section 60a, upon which section 60b depended, consisted in inserting in the protasis of the sentence constituting it, in connection with the first thing therein called for, to wit, the making of a transfer, the time words which had been omitted from section 60b and adding a sentence by which it was provided that, in case of a recordable transfer, such time should not expire until four months after the date of the recording thereof. The sole effect of these amendments has been heretofore stated. As thus amended, therefore, these sections did not, any more than in their original state, include a transfer made to secure a debt created simultaneously with the making of the transfer. No change was then made in section 67d. Such, then, are the reasons why the mortgage here could not be a voidable preference under the act as it was before the amendment of 1910 to section 60b. This yields us a good standpoint from which to view that amendment and determine its effect. It gives us a Pisgah view thereof. How, then, does the matter stand under that amendment? Is it ever possible thereunder for a transfer to secure a debt so created, i. e., for a present consideration, to be a voidable preference? It merely substituted another sentence for the first of the two sentences of which it was constituted after the amendment of 1903. No amendment was made to section 60a. It remained exactly as it was under the amendment of that year. That substitution made affected, somewhat at least, the dependence that had theretofore existed on the part of section 60b upon section 60a. Seemingly it left section 60a high and dry, and performing no function. It still defined what should be the giving of a preference, but no consequence to a preference, as thus defined, is given to it elsewhere in the act. The new sentence substituted in section 60b is like the old, in that it is a conditional sentence. The protasis thereof calls for four things: The making of a transfer by a bankrupt of any of his property; insolvency on the part of the bank-



rupt; operation of the transfer as a preference; and the having by the person receiving it or to be benefited thereby, or his agent acting therein, reasonable cause to believe that the transfer would effect a preference. It requires that it be made within four months of the filing of the petition in bankruptcy, or, if it is a recordable transfer, that it be recorded within such time, and provides that if the insolvency, operation as a preference, and the having reasonable cause to believe that it would effect a preference exists either when made, or, in case of a recordable transfer which has been recorded, when it has been recorded, it is sufficient. The apodosis is that, if these four things exist, the transfer shall be voidable, and the property covered by it recoverable. It is thus seen that the giving of a preference as provided in section 60a constitutes no part of the protasis of the first and new conditional sentence of section 60b. It has been eliminated therefrom. The protasis thereof consists solely of the four things hereinbefore referred to, each of which is set forth therein specifically. The effect of the amendment has been to make it so, at least, that a recordable transfer, which has been made to secure an antecedent or pre-existing debt, and which has been recorded, may be judged as of the time when it was recorded, as well as when it was made, in determining the bankrupt's insolvency, whether the transfer operates as a preference, and whether the person receiving it or to be benefited thereby or his agent acting therein had reasonable cause to believe that it would effect a preference. In other words, in case of such a transfer, if at the time it is recorded the bankrupt is insolvent, it operates as a preference, and the transferee has such cause, however, it may have been when made, it is a voidable preference. In case the transfer has not been recorded, no other time for judging it in those particulars is provided than when it is made. Such I say at least has been the effect of the amendment. Has it had the effect, also, of making it so that a recordable transfer, which has been recorded, made to secure a debt created simultaneously with its making, is a voidable preference, if, at the time it is recorded, the three things referred to exist, on the idea that, though the consideration was a present one when the transfer was made, it has become a past one when recorded? The trustee contends that it has had this effect, and it is on this ground that he contends that under the amendment of 1910, however it is under the act as it stood prior thereto, the mortgage here is a voidable preference. I do not think that it has had this additional effect. I think its effect is limited to that conceded. The first thing called for in the protasis is the making of a transfer by the bankrupt of any of his property. It is not said to whom. It is in this particular exactly like the first thing called for in the protasis of section 60a as it was originally, and of the first sentence thereof after the amendment of 1903, which was not changed by the amendments of 1910. We have found that in that condition, though not so expressed, the underlying thought was that the transfer should be made to or for the benefit of a creditor; i. e., to a then existing creditor. There is no reason to hold otherwise as to this thing in the protasis of the first sentence of section 60b under the amendment of 1910. Though not expressed,

the underlying thought still is that the transfer is to be to or for the benefit of a creditor; i. e., to a then existing creditor. Certainly under section 60a as it now stands the transfer therein referred to must be to such a creditor. What possible reason is there for holding that the transfer referred to in section 60b, as it now stands, is not to such a creditor? The retention of section 60a in the act may have this possible effect, if none other; i. e., it may indicate that the transfer had in view in section 60b, as amended in 1910, is a transfer to or for the benefit of the same character of person as is had in view by section 60a not then amended. The argument here attempted to be made may be put this way: The first thing called for in the protasis of the amendment of 1910 is the making by the bankrupt of "a transfer of any of his property" not saying to whom. This indefinite phraseology has been carried into the amendment from section 60a as originally enacted, as it was after the amendment of 1903, and as it has continued to be since the amendment of 1910. As it was and is therein, we have seen that it means the making by the bankrupt of "a transfer of any of his property" to or for the benefit of a creditor. There is no reason why it should not be given the same meaning in the amendment. The underlying thought thereof in the amendment of 1910 as in section 60a, therefore, is that the transfer should be made to or for the benefit of such a creditor. If it had been so expressed, there could have been no room to claim that a transfer made to secure a debt then created—i. e. for a present consideration—could in any contingency be a voidable preference under section 60b as amended in 1910. Though it has not been so expressed, such must be taken to be its meaning, and the same result follows as if it had been so expressed. Two considerations, in addition to the one already alluded to, to wit, that the indefinite phraseology has been taken from a source where it had such meaning, exists for taking this to be its meaning. One is that the transfer had in view is a transfer to pay as well as one to secure. A transfer to pay cannot be other than to pay a pre-existing debt. A transfer for cash cannot possibly be a preference either when made or when recorded. If, then, the transfer had in view is a transfer to pay a pre-existing debt, so, one to secure must be to secure such a debt. The other is the fact that, except with a slight modification, which to no extent changed its effect, section 67d was allowed to remain in the act by the amendment of 1910. That provision, before those amendments, was to the effect that liens given for a present consideration should in certain contingencies not be affected by the act. The modification thereof made by the amendment of 1910 was to add the words "to the extent of such present consideration only." But this made no real change, for prior to that amendment the section had been given this construction. 1 Loveland on Bankruptcy, p. 952. This provision and the construction which the trustee would place on the amendment of 1910 of section 60b cannot stand together. It is to the effect that liens given for a present consideration shall in the contingencies named, to the extent of the present consideration, not be affected by the act. The construction which the trustee would place thereon is that if, at the time such a lien is recorded, the bank-

rupt is insolvent, the lien operates as a preference, and the transferee has such reasonable cause to believe, though both contingencies exist, the lien is affected by the act; i. e., it is a voidable preference. The presence of 67d thus clears the amendment of 1910 to section 60b of any ambiguity that may be in it, considered by itself, in this particular.

The trustee, proceeding upon the idea that the fact that section 67d was amended at the same time in 1910 as section 60b has no bearing on the matter, because the amendment thereto made no change, argues that the amendment of 1910 to section 60b, being the later law, impliedly repeals section 67d in so far as it conflicts therewith, citing Sutherland on Stat. Const. (1904) § 247. He would have it, therefore, that instead of every lien given for a present consideration in good faith and recorded according to law, if recordable, not being affected by the act as provided by section 67d, that this is so, provided at the time it is recorded it is not the case that the bankrupt is insolvent, the lien operates as a preference, and the lienholder has reasonable cause to believe that it would effect a preference, in which case it would be affected by the act, thus to this extent qualifying or modifying section 67d. But this argument begs the question, to wit, that there is a conflict between the two provisions. According to the Sutherland citation relied on, in order to an implied repeal, it is essential that the terms and necessary operation of the later act cannot be harmonized with the terms and necessary effect of the earlier one. Now the amendment of section 60b in 1910 in its terms says nothing whatever as to transfers to secure debts created simultaneously with the making of the transfer—i. e., for a present consideration—and it can be made to include such a transfer only by holding that where it calls for a transfer by the bankrupt of any of his property, without saying to whom, it was intended to include such a transfer as well as a transfer to or for the benefit of a then existing creditor, the only sense in which those words had theretofore been and were then used in section 60a. The necessary effect of the amendment is not to include such a transfer, and there is not the slightest indication that it was intended to include it. It is only by giving the words a broader meaning than given them in the source from which they were drawn that it can be made to include it, and the fact that thereby section 60b will be brought into conflict with section 67d is sufficient reason for not so doing. That it was not thought that the amendment of 1910 had any qualifying or modifying effect on section 67d is evident from the fact that it was amended at the same time so as to make it say in words what it had theretofore been held to mean, without any indication that it was thought to have any lesser effect after the amendments of 1910 than before.

The trustee in this connection has much to say on the question whether the mortgage in question here is protected by section 67d. He thinks that, because it was not promptly recorded, it does not come within its protection. But I am concerned here only with the question whether it is a voidable preference under section 60b, and the allusion to section 67d is to enforce the position that it is not, for thereby section 60b would be brought into conflict with it. I am not

now concerned with the question whether it is protected by section 67d. Nor do I think it will ever be necessary to determine that question. The only question that can come up is whether the act requires that it should be suppressed. If some provision thereof does not so require, it needs no protection from section 67d. I am therefore constrained to hold that the mortgage in question is not a voidable preference within section 60b, as amended in 1910. It is not thereby required that it be suppressed. In the case of *In re Soudan Mfg. Co.*, 113 Fed. 804, 51 C. C. A. 476, Judge Seaman, in referring to the act as it was originally, said:

"The policy of the bankrupt law respecting liens for a present consideration differs radically from its treatment of preferences generally or as security for an existing indebtedness."

I find no evidence in the amendments of 1903 and 1910 of any purpose to make any change in this difference so as to make it less radical. The amendments of 1903 to sections 60a and 60b indicate a purpose to prolong the time in which a recordable transfer in payment of or as security for an existing indebtedness may be attacked, and none other. And the amendment of 1910 to section 60b indicates a purpose to render such a transfer, which has been recorded, so that it can be judged as of the date when recorded, as well as when made, in determining whether it effects a preference and the transferee has reasonable cause to believe that it does so and none other.

[3] This brings us to the other ground of attack, not involving the meritoriousness of the mortgage or that of the debt which it was given to secure, heretofore referred to. It is based on section 496 of the Kentucky Statutes, which is in these words:

"No deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid as against a purchaser for a valuable consideration without notice thereof or against creditors until such deeds shall be acknowledged or proved according to law and lodged for record."

Most of the general creditors of the bankrupt became such subsequent to the making of the mortgage, and before it was recorded. I assume that they so became without notice of its existence, though it is arguable that they did not. Their debts exceed the surplus proceeds of the mortgaged property after satisfying the first mortgage. After the mortgage was recorded and before the proceeding was instituted—i. e., within the 10 days intervening between these two events—these creditors brought suit in the proper state court, and obtained attachments which were levied on the mortgaged property. These attachments were in full force at the time this proceeding was instituted. The trustee contends that by virtue of that statute, had this proceeding not been instituted, the mortgage would have been void as against these creditors because not recorded when the debts were created and they had no notice of its existence, and therefore that it is invalid as against the trustee, presumably, though he has not so expressed himself, for the benefit of all the general creditors. He has not made clear the exact basis upon which he is entitled to avail himself of this right of these creditors. He cannot do so through their attachments, because no order was made under section 67f of the



bankruptcy act preserving them for the benefit of the estate. It is questionable whether he can avail himself thereof under section 67a, as it is possible that it is limited to liens which are invalid as against all the general creditors of the bankrupt, which is not the case with the mortgage in question. As we shall presently see, the Kentucky statute quoted does not invalidate an unrecorded instrument of writing of the character called for as against all the general creditors of the maker thereof, but only as against certain of them. But, however this may be, it is certain that he can avail himself thereof under the amendment of 1910 to section 47a (2). Thereby the trustee, for the benefit of the estate, is given as to all the property in the custody of the bankruptcy court all the rights of a creditor holding a lien by legal or equitable proceedings therein—i. e., the same rights as those attaching creditors had—and this amendment is applicable to this case, however it may be as to the amendment to section 60b. In re Hammond (D. C.) 188 Fed. 1020. The fact that it does apply thereto is not conclusive of the fact that the amendment to section 60b applies, for different considerations are involved in the two cases.

It follows then that the correctness of this ground of attack depends entirely on the soundness of the trustee's contention that, had not bankruptcy intervened, the mortgage would have been invalid as to those creditors, and the property covered thereby would have been subject to their attachments free therefrom by virtue of that statute. To this contention I now direct my attention.

The soundness thereof depends on who are creditors within the meaning of the statute. As heretofore noted, it does not include all the general creditors of the maker of the instrument of writing whose validity is involved. It is well settled by decisions of the Court of Appeals of Kentucky that it does not include creditors who became such before its making, hereafter termed "antecedent" creditors. It is limited to creditors who became such subsequent to its making and before its recording, hereafter termed "subsequent" creditors. Nor does it include all subsequent creditors. It is further limited to such creditors who became creditors without notice of its existence. I will not now refer to the decisions by which these limitations upon the word "creditors" in the statute became established. That statute, substantially as it is now, has been in existence from an early period in the history of the state, and it is only until recent years that those limitations have become established. In the course of the discussion I will note when this came about. In so far, then, those creditors answer the description of the statute. They are subsequent creditors without notice. The question then comes to this: Does the statute include all subsequent creditors without notice, or is it further limited to subsequent creditors without notice who by their own activity—i. e., through an execution, attachment, or suit in equity on a return of nulla bona—have acquired a hold or lien on the property covered by the instrument of writing, and that before it has been recorded? If there is such an additional limitation, then the contention under consideration is not sound, for, though those creditors did by their attachments acquire a hold or lien on the property covered by

the mortgage, they did not acquire it until after the mortgage was recorded. This, then, is the crucial question on this branch of the case. It resolves itself into two. One is whether section 496 includes subsequent creditors without notice who have not acquired such a hold or lien or is limited to such as have. The other is whether, if it is so limited, does it include such creditors who have acquired such a hold or lien after the instrument in writing was recorded.

Considerable confusion exists as to just what is to be taken as the position of the Court of Appeals on the first of these questions. It is so great, and the task of clearing it up is one that so needs to be done, that I feel called on to make an effort to do so, though it will greatly extend this opinion. It necessitates a consideration of all of the decisions of that court dealing with that part of the statute, and an incisive criticism of each one of them.

At the outset I would note that before *Wicks Bros. v. McConnell*, 102 Ky. 434, 43 S. W. 205, the words "or against creditors" had been practically eliminated from the statute. This is how I make this out. The only possible way in which a general creditor can collect his debt is by subjecting his debtor's property to the payment thereof; i. e., causing it to be sold and its proceeds to be so applied. This he can do by a sale under an execution issued on a personal judgment against the debtor, or under a judgment of the court in furtherance of an attachment levied thereon, or in equity upon a return of nulla bona. Before *Wicks Bros. v. McConnell* it had been settled that a purchaser at an execution sale, whether the creditor or a third party, acquired no title as against an instrument of writing of the character called for in section 496, though the same had not then been recorded, if, at the time of his purchase, he had actual notice thereof. The hold or lien acquired by the levy of the execution was of no avail to protect him as against the instrument. And the fact that the execution creditor was a subsequent creditor without notice made no difference. It was sufficient to subordinate the rights of the purchaser to that of the holder of the instrument that he had actual notice thereof when he purchased. In such a case, therefore, the provision of the statute relating to creditors was of no force. And, where the purchase was made without notice of the instrument of writing, that portion of the statute was not needed to protect the purchaser. The other portion relating to a purchaser for valuable consideration without notice was sufficient to that end. Though there were no decisions involving sales under judgment of court, in furtherance of an attachment, or in equity upon a return of nulla bona, there was no reason for differentiating them from sales under execution, and hence it must be taken that they were subject to the same rule. And one decision went so far as to hold that actual notice to the purchaser was not required to subordinate his rights to that of the holder of the instrument of writing. Constructive notice, caused by recording the instrument after the hold or lien had been acquired by the creditor, was sufficient. So it is that I say that at the time of the decision of *Wicks Bros. v. McConnell* the decisions of the Court of Appeals had practically eliminated the words "or against creditors" from the statute. That court

did not start that way. And it is most interesting to note how it was that it got diverted from the path of truth.

The cases to be considered, in order to bring out what I have said as to the decisions before *Wicks Bros. v. McConnell*, are as follows, to wit: *Helm v. Logan's Heirs*, 4 Bibb, 78; *Campbell v. Moseby*, Litt. Sel. Cas. 359; *Graham v. Samuel*, 1 Dana, 166; *Morton v. Robards*, 4 Dana, 258; *Halley v. Oldham*, 5 B. Mon. 235, 41 Am. Dec. 262; *Righter v. Forrester*, 1 Bush, 281; *Low v. Blincoe*, 10 Bush, 331; *Baldwin v. Crow*, 86 Ky. 679, 7 S. W. 146. In *Helm v. Logan's Heirs* the subject of the controversy was negroes; in *Baldwin v. Crow*, a piano; and in the other cases land. In *Helm v. Logan's Heirs*, *Graham v. Samuel*, *Righter v. Forrester*, and *Baldwin v. Crow* the instrument in writing involved was a mortgage, though in *Graham v. Samuel* it was on its face an absolute deed. In *Morton v. Robards* and *Low v. Blincoe* the instrument was in reality, as on its face, an absolute deed, and in *Campbell v. Moseby* and *Halley v. Oldham* it was an executory contract or title bond. In each of these eight cases one party to the controversy was the holder of the particular instrument of writing there involved. In all but *Graham v. Samuel* and *Baldwin v. Crow* the other party to the controversy was a purchaser at sale under execution of the property covered by the instrument of writing. In each instance the instrument of writing had not been recorded at the time of the levy of the execution. This was the case, also, at the time of the sale except in *Righter v. Forrester*, where the mortgage had then been recorded, and in *Low v. Blincoe*, where such was the case as to the deed. The mortgages and deeds were not recorded, not at all in all cases but *Righter v. Forrester* and *Low v. Blincoe*, and not until after the levy of the execution in those cases, either purposely or through neglect, which not appearing. The execution purchaser in each case except *Halley v. Oldham* and *Righter v. Forrester* had actual notice of the instrument of writing at the time of his purchase. In *Halley v. Oldham* he had such notice at the time he received the sheriff's deed, but not at the time of his purchase, and in *Righter v. Forrester* it does not appear that he had notice as early as that. In *Helm v. Logan's Heirs* and *Graham v. Samuel* the purchaser was a third party, but in *Graham v. Samuel* it is probable that he was acting as agent for the execution creditor. Such was probably the case in *Righter v. Forrester*. In the other cases he was the execution creditor. In *Graham v. Samuel* and *Baldwin v. Crow* the party to the controversy other than the holder of the instrument of writing was the creditor himself. In *Graham v. Samuel* he had brought suit in equity upon a return of nulla bona to subject the land to the payment of his debt, and made the holder of the instrument a defendant, and sought to have it set aside. At the time he brought his suit, the mortgage, in form an absolute deed, had been recorded. The effect of this circumstance will be considered later, but until then it will be treated as if such had not been the case. In *Baldwin v. Crow* the holder of the mortgage brought suit against the sheriff who had levied on the piano and the execution creditor defended the suit. In *Graham v. Samuel* the creditor was a subsequent creditor without notice. In

Baldwin v. Crow he was an antecedent creditor. In none of the other cases does it appear whether the creditor was an antecedent or subsequent, though in Morton v. Robards it is most likely that he was antecedent. In Helm v. Logan's Heirs and Halley v. Oldham the execution purchaser and in Graham v. Samuel the creditor was held to have the better right. In the other cases the holder of the instrument of writing involved was held to have it. So much as to the resemblance and difference of these cases. They should now be considered separately.

Helm v. Logan's Heirs, the first case to arise under the statute, as stated, involved a controversy between an execution purchaser, not the creditor, and the holder of a mortgage, outstanding at the time of the levy, not then or thereafter recorded, but of which the execution purchaser had notice at the time of the sale as to which had the better right to certain negroes. It did not appear whether the creditor in the execution was an antecedent or subsequent creditor. It was just as likely that he was an antecedent creditor, or, if subsequent, that he was such with notice as that he was a subsequent creditor without notice. It was held that the execution purchaser had the better right. Judge Owsley said:

"As against Caldwell (the execution creditor), therefore, who is proven to have been the creditor of Ballinger (the execution debtor), that mortgage could have no probable effect. But it is contended that, although the mortgage may be void with respect to creditors, yet it cannot be so considered as to purchasers with notice; and, as Logan made his purchase from the sheriff with notice of the mortgage as respects him and his representatives, it is urged the mortgage must prevail. This doctrine cannot be admitted to be correct. Nothing could be more absurd than the recognition of such a principle. What would be the consequence? As to creditors the mortgage is void, but as to purchasers under the execution of the creditor with notice the mortgage it is contended is valid. The creditor cannot enforce the collection of his demand without execution. There must a purchaser intervene. If no other person becomes the purchaser, the creditor will be left to the alternative either to purchase himself or lose his demand; and, if he purchases, he thereby loses his character of creditor, and, according to the doctrine contended for, as a purchaser with notice cannot be protected. A doctrine fraught with such consequences we are not prepared to recognize. And we think the mortgage of Helm not only invalid as respects creditors, but must be so held with respect to purchasers under the execution of creditors."

It must be conceded that this reasoning is unanswerable, at least, in a case where the creditor is a subsequent creditor without notice. In such a case notice to the purchaser at the time of sale would be to no purpose. But in the light of the present position of the Court of Appeals Judge Owsley went too far, if the creditor in that case was an antecedent creditor or a subsequent one with notice. He decided the case as if this made no difference; and in so doing gave the words "or against creditors" too wide a scope.

In Graham v. Samuel, as stated, the controversy was between a creditor who had brought suit in equity upon a return of nulla bona to subject the land to payment of his debt and the holder of a mortgage in form an absolute deed outstanding at the time the suit was brought, which for the time being is treated as not then recorded. The holder



of the mortgage was made a defendant to the suit, and in it the mortgage was sought to be set aside as void under the statute as against plaintiff. The debt was created after the execution of the instrument and without notice of its existence. It was held that the statute rendered the mortgage void as against the creditor, and that he had the right to subject the land to the payment of his debt so that a purchaser at a sale would acquire a clear title, just as in *Helm v. Logan's Heirs* it was held that the mortgage there involved was thereby rendered void, and the purchaser acquired title to the negroes at the execution sale, notwithstanding his knowledge thereof. But a false note had been struck in the intervening case of *Campbell v. Moseby*. The opinion therein when delivered was not for publication. It came to be reported pursuant to the act of the Legislature to which we owe *Littell's Select Cases*. It was the false note struck thus that caused the diversion from the path of truth to which I have alluded. It had no effect on *Graham v. Samuel*, but it did have effect later. This is the second case reported in *Littell's Select Cases*, the reporting of which I have noted has brought disharmony in the decisions of the Court of Appeals. The other one is that of *Bryan v. Beckley*, *Litt. Sel. Cas.* 91, 12 *Am. Dec.* 276. I considered it somewhat in detail in *Davis v. Commonwealth L. & L. Co.* (C. C.) 141 *Fed.* 740, 765. The controversy in *Campbell v. Moseby* was between a purchaser under an execution sale and the holder of an executory contract or title bond outstanding at the time of the levy of the execution. As the holder of the bond he had an equity in the land. At the time of the sale the purchaser had actual notice of this outstanding equity. It was held that the right which he acquired was subordinate to that of the holder of the equity. In so holding there was no conflict whatever with the case of *Helm v. Logan's Heirs*. Nor did the case of *Graham v. Samuel* conflict therewith. The decision was undoubtedly sound. A title bond as the statutes then stood was not a recordable instrument. It was not such an instrument of writing as was covered by the statute in question. It covers only a deed or a deed of trust or mortgage and a title bond is neither. The statute, therefore, had no application whatever to the case. It was controlled by the general principles of law applicable in a contest between the holder of an outstanding equity in real estate and the holder of the legal title. If the latter acquires such title for a valuable consideration and without notice of the equity, he takes it clear of the equity, but with notice he takes it subject thereto. This applies as well to purchasers at involuntary sales under execution as at voluntary sales. The creditor in that case, therefore, has no right as against the equity of the holder of the title bond, in virtue of which the purchaser at the execution sale could acquire the better right. The opinion therein was delivered by Judge Owsley, who delivered the opinion in *Helm v. Logan's Heirs*. He makes no reference to the earlier case which was decided about six years before. The ground of the decision he put thus:

"But in this case the Bradleys must be admitted to have had notice of Moseby's equity when they purchased, and, as all other purchasers with notice, must hold the land subject to that equity."

He stated a possible objection to the decision arising from the statute thus:

"And it may possibly be thought by some that as the writing under which Moseby asserts his equity was not proved and lodged with the clerk to be recorded, according to the provisions of the act to which we have referred, his equity was not good against the creditors of Campbell, and ought not to prevail against the Bradleys, who are purchasers under an execution which issued in favor of a creditor of Campbell."

To this he answered most aptly:

"But it should not be forgotten that the statute has no application to executory contracts for land. \* \* \* According to the statute, the legal title as respects the interest of creditors will remain as though no conveyance had been made, unless the conveyance be made, proved, and lodged with the clerk to be recorded as directed by the provisions of the statute."

Had he stopped here, all would have been well. But this he did not do. He gave expression to this dictum, to wit:

"The mere failure to prove and record the deed of conveyance as required by the statute is not per se fraudulent, and if made on a valuable consideration, although not regularly proved and recorded, vests in the grantee a specific equity to have the title perfected, so as to be operative against all the world; and the holder of such an equity is always preferred in any contest with the general creditors of the vendor or subsequent purchasers with notice."

He was led to give expression to this dictum by a consideration of the English statute concerning the registration of certain deeds and adjudications of the English courts thereunder. That statute provided that deeds of a certain character should be adjudged fraudulent and void against any subsequent purchaser or mortgagee for a valuable consideration unless registered. Concerning it and the adjudications thereunder he said:

"It will be perceived that by this act nothing is said about the subsequent purchaser having notice of the prior conveyance; but the prior deed is expressly declared to be void, unless registered within the time prescribed by the statute. Under that statute, however, a question occurred whether a person buying an estate with notice of a prior incumbrance not registered should be bound by such incumbrance, although he had obtained priority at law by registering his deed. It was held that by force of the statute the subsequent purchaser was vested with the legal title, but, having notice of the prior incumbrance, he was not bound by it and in equity compellable to surrender his title."

But that statute had no provision as to the validity of such deeds as against creditors like the statute here. It concerned solely purchasers and mortgagees for a valuable consideration. It said nothing on the subject of notice as to them. The English courts held that, though the statute provided that an unregistered deed should be void as against any subsequent purchaser or mortgagee for a valuable consideration, it was not void as against such purchaser or mortgagee with notice of its existence. In effect, they construe the statute to mean this, though they did not put it that way. Thus construed, the statute was exactly the same as that part of the statute not involved here, which protects a purchaser for a valuable consideration without notice. In enacting that part of the statute the Legislature of Ken-

tucky put in force here the English statute so construed. To so argue, then, from this action of the English courts, is the same thing as to hold that the part of the statute not involved here rendered nugatory that part which is. Then as to Judge Owsley's statement that an unrecorded deed of conveyance for valuable consideration vests in the grantee "a specific equity" I would submit that such is not the case. It vests in him the legal title good except as invalidated by the statute. Were there no such statute, it could not be said that he had a "specific equity." He would have the legal title good as against all, and nothing else. Because of the statute, he still has no more than the legal title, but it is no longer good as against all. It is good against all except those as to whom it is invalidated. It was this action of the English courts and this notion of "a specific equity" which led to this dictum. Judge Mills dissented from the holding in *Campbell v. Moseby*. Seemingly his position was that, though a title bond did not come within the letter of the statute in that it was not a deed or deed of trust or mortgage, the only instruments covered by the statute, it did come within its spirit and intent. He said:

"A deed of conveyance, acknowledged or witnessed, and not deposited to be recorded or improperly placed on record, has I conceive in the contemporaneous construction of the act not been deemed valid against a *fiel facias*. How, then, can an instrument of less validity, of less force, either in law or equity, an executory contract only, be effected? It may be said that the first passes the legal estate, and is executed while the latter passes an equity only. To this it may be replied that the first described instrument passes the equity also and more; and the major will include the minor. If an instrument passing the equity only can be enforced, I see no reason why an unrecorded deed may not be valid against a sale under a *fiel facias*, not only in equity, but also at law."

He concluded with this argument *ab inconvenienti*, to wit:

"I cannot conceive of a more facile mode of placing land beyond the reach of creditors than that of placing the legal estate in the hands of one and the equity in another. The equity holder is safe for his estate cannot be touched, nor will a court of chancery according to the decision of this court in the case of *Buford v. Buford*, 1 Bibb, 305, compel him to bring his title into reach; and he runs no risk from the debts of his vendor, for, if his estate is sold, it is only to give notice to the purchaser in time, and make him surrender it. Thus both are safe, while one of them enjoys the estate and the creditors of both remain unpaid."

In the case of *Graham v. Samuel*, Judge Nicholas, who delivered the opinion therein, referred to the dictum in *Campbell v. Moseby* heretofore quoted. He responded to it thus:

"No authority is cited in support of this dictum, and it will be found on examination not to have been called for by the case then before the court. It would be difficult to reconcile the opinion thus intimated, or the reasoning adduced in its support with the case of *Helm v. Logan's Heirs*, 4 Bibb, 78, where the point was directly presented for adjudication, and it was expressly decided that neither the creditor himself nor a purchaser under his execution were affected by notice of an unrecorded deed. It is also there said that nothing could be more absurd than the recognition of a contrary principle."

As to the supposed analogy with the English decisions under the English statute, he argued that all that it required was that the creditor should have become such subsequent to the execution of the deed,

without notice, at the time of his so becoming, of its existence, which was the case there. He said:

"The principle upon which the English decisions on this subject are based is that the statute was made for the protection of innocent bona fide purchasers without notice, and that as a subsequent purchaser with notice of an unrecorded deed is not an innocent, but a mala fide, purchaser, he is not entitled to the protection of the statute. The principle is just in itself, and of undoubted equitable parentage. But it is far from warranting the taking from creditors indiscriminately the protection afforded them by the statute against unrecorded deeds, because they may have notice of such deeds at the time they come to enforce their demands, without reference to the time when the debt was contracted. On the contrary, if the principle be of pure equitable origin and indubitable justness that we admit it to be, it must require that the creditor should have had notice at the time the debt was contracted, when according to the intendment deducible from the whole scope and policy of the statute he was liable to be prejudiced by the nonrecording of the deed. Notice at any subsequent period could with no show of equity or propriety be considered so far to affect his conscience as to deprive him of the protection against a secret and unrecorded conveyance which is extended to him by the very letter of the act. We should make the law 'palter' with him and cheat him with the mere 'word of promise' were we to determine that, after having declared all unrecorded deeds should be void as against him, when he came to demand the benefit of this declaration, its whole fruition should be snatched from him by the production of notice of the unrecorded instrument. It would be mere mockery to hold out the idea of protection to creditors against secret conveyances, and yet, when they came to enforce their demands, to permit the secret purchaser to deprive them of protection by the exhibition of an unrecorded deed."

Though in response to the argument from analogy it is said that all that it required was that the statute should be limited to subsequent creditors without notice, and in that case the contesting creditor was such a creditor, it was not held that the statute should be so limited. *Helm v. Logan's Heirs*, where, as we have seen, it was not so limited, was approved without qualification. And it may be that the wide scope which these two cases gave the statute was not without some influence in causing the court in the cases subsequent thereto to go to the opposite extreme. A hint, however, of this limitation of the statute, was thus given in *Graham v. Samuel*, but it was never taken. As we shall see, it was not because thereof that the court finally made such limitation.

In *Morton v. Robards* the controversy was between an execution purchaser and the holder of a deed outstanding at the time of the levy of the execution, though not recorded. The purchaser was a third party, but possibly acted as agent for the execution creditor in the purchase. It does not appear when the execution debt was created, but it is most likely that it was created before the execution of the deed. The deed was made in execution of a title bond executed over 36 years before. It was held that the holder of the unrecorded title deed had the prior right. This holding was not based on the fact that the creditor in the execution was an antecedent creditor. As stated, it does not clearly appear that he was. It is clear, however, from a consideration of the reasoning upon which the decision was based that the fact that the creditor was a subsequent creditor, though without notice, would have made no difference in the decision. In



that the unrecorded deed had been made in execution of a title bond the case had a feature in it which may be said to differentiate it from *Helm v. Logan's Heirs*, and *Graham v. Samuel*, and to liken it to *Campbell v. Moseby*, and such as to require the conclusion reached. The argument may be put thus. The effect of the statute was to avoid the deed. The effect of the avoidance of the deed was to revive the title bond, and this to require that the case be decided as if no deed had ever been made. In that contingency the case would come within the doctrine of *Campbell v. Moseby*, and there would be no escape from the conclusion that the holder of the unrecorded deed should be given the prior right. Judge Ewing, who delivered the opinion, was undoubtedly affected to a considerable extent by this line of reasoning. He noted that the statute did not cover title bonds, and said: "The act concerns legal conveyances only." And he continued thus:

"A bond for a conveyance is not good as a legal title, yet valid as an equity. If it were the object of the Legislature to forfeit the equity, as well as the legal title for the benefit of purchasers and creditors, it could not well have escaped their observation that it was necessary to provide for the recording of secret bonds for a title and for the forfeiture of the equity of the holder in case of a failure, yet no provision is made with respect to bonds. We cannot conceive—whether we look at the language of the act or the evil existing and intended to be remedied—that it was the object of the Legislature to affect the equity of the holder in the one case or the other. It would be strange to contend that the equity of the holder of a bond is good, yet if he attempted to consummate his legal title, but failed, that he forfeits that equity, which he unquestionably would have held under his bond, in case no attempt had been made. We therefore conclude that the statute only takes from the holder of an unrecorded deed his legal priority or annuls his legal advantage over the general creditor, but leaves him to contest with him his prior equity."

Possibly the argument was not sound because by the execution of the deed the title bond became *functus officio*. Thereafter the rights of the holder of the deed were measured by his deed. He had such rights as it conveyed and none other, the avoidance of it by the statute not reviving the title bond. I am not concerned, however, to determine whether the argument is sound. I simply note that Judge Ewing seemed to think that it was, and was affected thereby. But had there been no previous title bond Judge Ewing would have held exactly as he did. The decision was not placed on this ground. It was held that the decisions in *Helm v. Logan's Heirs* and *Graham v. Samuel* were erroneous, not in giving too wide a scope to the statute, but in recognizing that in any contingency the purchaser in those cases would have had the better right, and that the dictum in *Campbell v. Moseby*, heretofore quoted, stated the true doctrine.

Judge Ewing said:

"There has been some oscillation in the decisions of this court on the question involved in the record."

He thereby indicated that he thought the question involved therein had been involved in the previous decisions. He then noted what had been decided in *Helm v. Logan's Heirs* and *Graham v. Samuel* on the one hand, and that, on the other hand, in *Campbell v. Moseby*, the court "had broadly asserted the opinion that the equity of the pur-

chaser by unrecorded deed was superior to and would prevail in a contest with the general creditor, or a subsequent purchaser under execution with notice," and then said:

"Upon a full review of these decisions and comparison of them with the English decisions upon their registration acts, we are inclined to the opinion expressed in *Campbell v. Moseby*."

The way in which he made out that the dictum in *Campbell v. Moseby* was sound was substantially the way in which it had been upheld therein. The holder of the unrecorded deed had a specific equity. The avoidance of the deed did not affect this equity, as this equity was not within the statute. If, then, the purchaser at execution sale had notice of it at the time he purchased, the right thereby acquired was subordinate thereto, just as the purchasers' right in *Campbell v. Moseby* was subordinate to the outstanding equity of the holder of the title bond in existence at the time of the levy of the execution, of which he had notice when he purchased. He said that it seemed to have been the intention of the Legislature, not only to limit the statute to legal conveyances only, but "to leave untouched the equity of the parties." He said further:

"The conveyance or legal title may not be good, and yet the equity of the holder be unimpeachable."

And still further:

"And as a bond is evidence of a specific equity so a deed, though it is made to lose its legal priority by not being placed on the record in time, yet is evidence of a purchase for a valuable consideration, therefore evidence of an equity of as high a grade as a bond."

And still further:

"If the prior incumbrancer is merely deprived of his legal advantage, and thrown back upon his equity, the prior equity must prevail, unless the junior equity be united with the legal title acquired without notice of the prior equity. By well-established principles in a contest between mere equities the senior equity must prevail over the junior. But the junior equity coupled with the legal title fairly acquired without notice will prevail over the senior equity. And this is the only advantage which the general creditor may acquire under the recording statutes; namely, the privilege of arming himself with the legal title and with all the legal as well as the equitable advantages, which it may afford him in a contest with the prior equity. The general creditor has no right to the land sold or any specific lien upon it at the time when his debt is contracted. He has neither *jus in re*, nor *ad rem*, nor any claim in law or equity to the land attempted to be sold under execution. He has no claim to the thing until he has placed his execution in the hands of an officer, and perhaps not until he has levied it. And this lien is generally only a lien operating against the vendor and execution creditor, and not an outstanding senior equity in the hands of a stranger. So, if an attachment in chancery be levied on the property of a debtor, it will not overreach an outstanding equity in the hands of a stranger. Besides, the levy of an execution creates a mere lien, which may never be enforced; and the legal title to the property is never completed until a sale and conveyance. And in this case as all others the legal title being acquired with notice of a pre-existent equity will be made to yield to the prior equity in a court of chancery."

And finally he said:

"Though our statute postpones or annuls the legal title acquired by an unrecorded deed in favor of creditors, it gives to the creditors' demands no high-

er dignity or greater efficacy than they had before. It neither gives, nor was intended to give, to the creditor any lien or equity upon the property of the debtor which he had not by the terms of his contract. The statute could not, therefore, in the language of the court in the case of *Graham v. Samuel*, be said 'to palter' with him, and to 'cheat him with mere word of promise.' No promise is made to him that he shall have a lien, equitable or legal, on the specific property embraced in an unrecorded deed. Or that he shall have the privilege of making his debt out of the land thus conditional. This would be to promise him, what he had not secured by his own contract, and what the Legislature would, perhaps, have no constitutional power to afford. But that the statute has promised him to sweep away the legal obstruction which the holder of an unrecorded deed has placed in his way, and to enable him to gain the vantage ground which the legal title would afford him in a contest with the prior incumbrancer. And this, promise is redeemed by the construction which we have given to the act."

I have quoted thus fully from Judge Ewing's opinion in order that the exact basis of his position may be grasped. To repeat, it is that the holder of an unrecorded instrument of writing of the character called for by the statute has a specific equity apart from the writing, which is unaffected by the statute because it is limited to the writing. This equity is just as much unaffected by the statute as the outstanding equity of the holder of a title bond not covered by the statute who has nothing that is affected by the statute. If, then, the purchaser at execution sale has notice of this specific equity at the time of his purchase, he takes subject thereto, just as much as he does to the outstanding equity of the holder of the title bond.

The fallacy of this argument lies in the position that the holder of an unrecorded instrument of writing of the character called for by the statute has "a specific equity" apart from the instrument. As before, I submit that he had nothing apart from the writing. The writing represents all the right he has. This is so, even if it has been executed in performance of a previous executory contract, which by its execution comes to a final end. This specific equity arose out of the ashes of the unrecorded instrument of writing. It was a figment of Judge Owsley's brain, accepted by Judge Ewing. It had no objective existence like that of the holder of a title bond which has been unexecuted. The statement of Judge Ewing as to what the statute had not and had promised the creditor is correct, save in so far as he stated that it promised to "enable him to gain the vantage ground which the legal title would afford him in a contest with a prior incumbrancer." If a subsequent creditor without notice, he needed no such vantage ground. And, if an antecedent creditor, he had such vantage ground under the other part of the statute relating to a purchaser for a valuable consideration without notice. In thus creating such an equity and giving such effect to it he made the part relating to creditors of no effect. If his position was correct, in no event would the instrument of writing be void against creditors as such. It would be void against purchasers at sales to subject the property to their debts only, and against them only in case they purchased without notice, and this it would be under the branch of the statute relating to purchasers without notice.

Thereafter the position thus taken in *Morton v. Robards* continued to be the law until the decision in the case of *Wicks Bros. v. McConnell*. The conflict between the decisions in *Morton v. Robards* and those in the earlier cases of *Helm v. Logan's Heirs* and *Graham v. Samuel* was recognized. No attempt was made to think the matter out and determine where the truth lay, but *Morton v. Robards*, the latest of the three, was accepted without question as being sound. In *Halley v. Oldham* the controversy was between an execution purchaser and the holder of a title bond. It was therefore like *Campbell v. Moseby*, in that it did not involve the statute. It differed from that case in that the purchaser did not receive notice that the bond was outstanding until after he had paid or become bound for the purchase money, but before he had received his deed from the sheriff. It was held that it came too late, and that the execution purchaser had the prior right. In order to affect him, it was necessary that he should have received notice before paying or becoming bound for the purchase money. It was recognized that in case of ordinary purchases "a second purchaser is held bound by the prior equity, though he may have made his contract and fully paid the purchase money before he has notice of it, provided he has such notice before his own equity is clothed with the legal title." And the case in hand was differentiated from such a case on the ground that the execution purchaser had "an inchoate legal title" which when he obtained his deed related back to the time the execution was placed in the hands of the sheriff. Reference was made in Judge Marshall's opinion to the cases of *Helm v. Logan's Heirs*, *Graham v. Samuel*, and *Morton v. Robards*, though they had no relevance to the case. The first two were classed together, and the latter with that of *Campbell v. Moseby*, though this was right only in virtue of the dictum in that case.

In *Righter v. Forrester* the controversy was between an execution purchaser and the holder of a mortgage unrecorded at the time of the levy of the execution, but recorded before the sale. It does not appear whether the creditor in the execution was an antecedent or subsequent creditor. It was just as likely that he was one as the other. Nor does it clearly appear whether the purchaser was the creditor or a stranger, but he probably was the latter. It was held that the mortgagee had the prior right, though the execution purchaser had no actual notice of the mortgage at the time of his purchase. Constructive notice from its then being of record was held sufficient to charge him. Judge Hardin said that the sale and conveyance under the execution operated to transfer to the purchaser "such equitable rights as the creditors acquired by virtue of the issual and levy of their execution." "But," he continued, "whether the rights so acquired were superior or subordinate to that of the mortgagee would seem to depend on the legal effect of the mortgage before it was recorded. \* \* \* If, although it was inoperative as a legal conveyance of the title, it was effective to invest the mortgagees with an equity in the land, though liable to be defeated by a prior equity, or even a junior equity when united with the legal title, acquired without notice, as its creation was prior in date to the delivery to the sheriff of the execution under



which Troutman purchased the equity of the latter, it must be held to be subordinate to that of the mortgagee."

We find at work here again the idea of a "specific equity," first broached in *Campbell v. Moseby*, and emphasized in *Morton v. Roberts*, which had no objective existence as in case of that of the holders of the title bonds in *Campbell v. Moseby* and *Halley v. Oldham*, but had a subjective existence only; i. e., in the minds of the judges who gave expression to it. Judge Williams dissented. He drew a distinction between an unrecorded deed and an unrecorded mortgage, in that the latter only created a lien, and did not pass the legal title, and thought the case was governed by *Helm v. Logan's Heirs*. He considered the decisions in all the deed cases sound, but claimed that they rested on "different principles." There is nothing in this difference between a mortgage and a deed to lead to different decisions in such cases. But he was on the right track in putting the question:

"Is this statute requiring mortgages to be recorded before they shall affect creditors to have any effect?"

And in expressing himself thus:

"The execution creditor by his *fi. fa.* and levy, before the recording of the mortgage, gets a prior lien which the law secures to him, and, of course, must give him the means to effectuate and make it available, else it still amounts to nothing, but becomes a 'mere thing of delusion.' How is his lien to be effectuated but by carrying out the mandates of the execution by sale? If the creditor has the right to sell, some one must have the right to purchase, for there is no such anomaly and absurdity in the law as giving the right of sale to the creditor and at the same time prohibiting the world from purchasing. The right of sale to the execution creditor carries to the world the right of purchasing. If the conscience of the execution creditor remains untainted by the subsequent recording of the mortgage and he still has the right of sale, the purchaser under his execution remains untouched and has the right to purchase, else, as said in 4 Bibb, there would be the absurdity of sale in the execution creditor, but the right of purchase in no one, not even himself; for the world would not purchase, and, if he did, he loses his right as a prior lien execution creditor and becomes a purchaser with notice. His execution is satisfied and he gets nothing."

After this case all attempt to reason the matter out and determine where the truth lay ceased. In the remaining two cases of *Low v. Blincoe* and *Baldwin v. Crow* the sole effort was to extract from the earlier cases what should be accepted as presenting the then law on the subject. The controversy in *Low v. Blincoe* was between an execution purchaser and the holder of a deed unrecorded at the time of the levy of the execution, but recorded at the time of the sale. The execution purchaser had actual notice of the deed at the time of the sale, and was the creditor in the execution. It does not appear whether he was an antecedent or subsequent creditor, but it is not likely that he was the former. It was held that the holder of the deed had the better right. Judge Lindsay said:

"The question thus raised has frequently been before this court for consideration, and the decisions thereon are singularly inconsistent with each other."

He referred to *Helm v. Logan's Heirs* and *Graham v. Samuel* as "the earlier cases," and stated that they had held "that a deed not

lodged for record within the prescribed time was absolutely void as to any creditor." "In *Morton v. Robards*," he said, "this construction of the statute was repudiated, the court holding that the Legislature intended only to regulate legal conveyances and to leave untouched the equities of the parties, and that while the legal title of a party not lodging his deed for record \* \* \* was not good, yet his equity was unimpeachable, and that a title acquired under an execution sale with notice of such equity would be made to yield to it in a court of chancery." He then said that "the correctness of the doctrine in *Morton v. Robards* was doubted in *Halley v. Oldham*," and that in the latter case it was "conceded that, if the execution creditor was himself the purchaser, then notice of the existence of the unrecorded deed would deprive him of its fruits, and that a court of equity might compel him to relinquish any legal advantage he might have acquired under it." His statement that the decisions were "singularly inconsistent with each other," if true, left no room for reconciliation. The situation presented a case for determining where the truth lay, yet he made an effort at reconciliation. He said:

"Reconciling as far as practicable the various reported cases, we deduce from them the following views:

"(1) A purchaser at an execution sale who has no notice of a title bond or deed that has not been recorded within the prescribed time will be protected in his title even in a court of equity.

"(2) A purchaser with notice will also be protected in case the execution creditor acts in good faith and without notice. Under such circumstances, the creditor has the right to sell, and the purchaser necessarily takes all the title that the creditor can require the sheriff to sell.

"(3) That notice to the purchaser after his purchase does not affect him. He is by his purchase invested with the inchoate legal title which he has the absolute legal right to perfect by procuring a conveyance from the sheriff, and this right does not depend upon his being a stranger to the execution. In such cases the execution creditor is as much entitled to protection as a stranger.

"(4) That notice to the creditor at any time before he may purchase affects his conscience and he may be compelled in obedience to the equity evidenced by the bond or unrecorded deed to transfer the legal title to the party against whom he ought not in good conscience to hold it"

—citing in support of the last proposition *Halley v. Oldham* and *Righter v. Forrester*.

As to these views I would say the law as thus presented is purely artificial. Four distinct rules are presented with no principle at the back of them necessitating their existence. Title bonds and deeds are classed together when the principles applicable to them are distinct. Title bonds are not included in the statute, and hence are not affected by it. The law as to them, therefore, is determined by general principles applicable to such cases. Deeds are included in it. Hence the law as to them is to be found in the true meaning of the statute. Then, on principle, there is no room for any difference between the case where the execution creditor is the purchaser and the one where a stranger or third party is.

In *Baldwin v. Crow* the controversy was between the execution creditor and the holder of an unrecorded mortgage. The sheriff in whose hands the execution had been placed had levied on the mortgaged

piano and the mortgagee had sued him for it. The execution creditor defended the suit. The case, therefore, was like *Graham v. Samuel*, in that the controversy was directly between the creditor and the holder of the instrument of writing not lodged for record. It was held that the mortgagee had the better right. The decision might have been based on the ground that the creditor was an antecedent creditor, which was the case, and therefore not included by the statute, but it was not. Judge Lewis said:

"If the inquiry whether, by that section, creditors generally were intended to be affected by notice of such conveyances and transfers of property to debtors in the same way and to the same extent as purchasers was an original one, there would, looking alone to the language used, be some difficulty in reaching a satisfactory conclusion. But there is no reason whatever that a creditor whose debt has been created prior to the conveyance, as was that of appellee, Crow, and who has not been defrauded or injured, should occupy a better attitude than a purchaser with notice."

But he did not rest his decision on that ground. He surveyed the earlier decision, and then said:

"The radical and irreconcilable difference between the two cases of *Helm v. Logan's Heirs* and *Morton v. Robards* is that in the former it was decided that the unrecorded conveyance was as to a creditor of the grantor or mortgagor to be held fraudulent and void, whereas in the latter the principle was announced that, though such an instrument did not operate to pass the legal title, it was evidence of an equity paramount to that acquired by a levy or sale with notice to the creditor and purchaser. In every case decided by this court since the opinion was rendered in *Morton v. Robards* where the question arose \* \* \* the distinction taken in that case between the legal character and effect of an unrecorded conveyance and the equity of the holder thereof has been recognized and applied."

As to the statute itself he thus expressed himself:

"The clear and necessary implication from the language \* \* \* is that deeds of trust and mortgages of real and personal estate, though unrecorded, are not void, but valid against purchasers at sale under execution as well as private sale when notice has been given. And, that being the case, it would seem to be the intention that creditors should be likewise though indirectly affected by notice; for their attempt to collect debt by execution would be generally abortive, if notice to those about to purchase could prevent a sale. But, be that as it may, by the uniform ruling of this court for many years, creditors and purchasers have in that respect been placed on the same footing."

So it was and in the way that I have indicated that the Court of Appeals practically eliminated the words "or against creditors" from the statute. The elimination began with the dictum of *Campbell v. Moseby*, and was established by the four cases of *Morton v. Robards*, *Righter v. Forrester*, *Low v. Blincoe*, and *Baldwin v. Crow*. The conflict which resulted in this elimination was between these cases and that dictum on the one hand and the earlier cases of *Helm v. Logan's Heirs* and *Graham v. Samuel* on the other. In it there was no question as to whether the statute included all creditors—i. e., antecedent and subsequent creditors with notice—as well as subsequent creditors without notice or was limited to the latter. The sole question was whether it included all creditors or none. *Helm v. Logan's Heirs* and *Graham v. Samuel* presupposed that it included all. The dictum in

Campbell v. Moseby and the other four cases in effect held that it included none. There was a hint in *Graham v. Samuel* that the statute might be limited to subsequent creditors without notice, and in *Baldwin v. Crow* that it did not include antecedent creditors. But the one was never taken, and the latter not until *Wicks Bros. v. McConnell*.

Such then was the situation when the case of *Wicks Bros. v. McConnell* arose. It cannot be said that there was then any confusion as to what the law on the subject was or any basis therefor. The court had simply been diverted from the path of truth, and seemingly was not conscious of the fact that it was not in that path. And it is clear that under the law as then declared it would have to be held that the mortgage in question herein would not have been invalid as against the attachments of the creditors on whose behalf the ground of attack now under consideration is urged. The confusion that now exists to which reference has been made has grown out of the decisions since *Wicks Bros. v. McConnell*. In that case the controversy related to certain machinery. It was between a creditor who had brought suit and obtained an attachment and the holder of an unrecorded mortgage in existence at the time of the creation of the debt in suit and the issuance and levy of the attachment. The creditor, therefore, was a subsequent creditor. He became so without notice. And he had through his attachment a hold or lien on the machinery. The holder of the mortgage brought suit to enforce his mortgage, and the two suits were consolidated and disposed of together. It was held that the attaching creditor had the better right. This decision was in direct conflict with the cases of *Morton v. Robards*, *Righter v. Forrester*, *Low v. Blincoe*, and *Baldwin v. Crow*; for, according to them, had no controversy arisen between the attaching creditor and the holder of the unrecorded mortgage, and the property been adjudged sold in furtherance of the attachment, the purchaser at the sale, at least if he were the creditor, would have acquired no title as against the mortgage if he purchased with notice of its existence. This could have been the case only on the ground that by the levy of the attachment the creditor acquired no absolute right as against the holder of the mortgage. Judge Durelle, who delivered the opinion, recognized the conflict that existed between the previous decisions. He said that the statute had "been frequently construed by this court, and as said by Judge Lindsay in *Low v. Blincoe*, 10 Bush (Ky.) 334, the decisions therein are singularly inconsistent." He did not so express himself, but it is clear that he thought that *Morton v. Robards*, *Righter v. Forrester*, *Low v. Blincoe*, and *Baldwin v. Crow* were wrong, in so far as they subordinated a subsequent creditor without notice who had acquired a hold or lien on the property or a purchaser at a sale in furtherance of such hold or lien to the holder of an instrument in writing of the kind covered by the statute not lodged for record in any contingency. It would seem that he accounted for those decisions, at least for *Baldwin v. Crow*, by the fact that the creditors therein were antecedent creditors. He said:

"Without reviewing those cases, which has been done in the case last referred to (i. e., *Low v. Blincoe*) and in *Baldwin v. Crow*, 86 Ky. 680 [7 S. W.



146], it may be said that in the case last named, which is the latest authoritative utterance of this court upon the subject, a distinction was clearly recognized between the position of an execution or attachment creditor without notice of an unrecorded mortgage lien whose debt was created antecedent to the creation of the lien and the position of one whose debt was created subsequently."

And again:

"It may be said that in that opinion is to be found the first intimation of such a distinction; but, on the other hand, the distinction is there clearly indicated, and is in our judgment right and equitable. The holder of an antecedent debt is in no wise defrauded by not being permitted to subject to the payment of his debt property subsequently acquired by his debtor which is subject to a lien."

It is not true that the first intimation of the distinction to which reference is made is to be found in *Baldwin v. Crow*. The first hint of it is to be found in *Graham v. Samuel*. It is found there in that Judge Nicholas noted the fact that the creditor there was a subsequent creditor without notice; the intimation in *Baldwin v. Crow* arising from Judge Lewis noting the fact that the creditor there was an antecedent one. But in neither case was the fact noted made the basis of the decision. In the one case the reference was made in answer to the argument from analogy and in the other as a portion of a reason why the creditor in that case should not be favored. As to the other decisions he said:

"Moreover, in none of the cases to which we have been referred in which the holder of a pocket lien has been held to have a claim superior to an execution or attachment creditor does it appear that the latter's debt was created subsequent to the creation of the lien."

That is true. But there is no reason to believe that, had it appeared, the fact would have made any difference in the result. The doctrine of specific equity which was at the bottom of those cases would have subordinated the right of the subsequent creditor without notice to that of the holder of the pocket lien as much so as the right of an antecedent one.

None of the cases giving such holder superiority therefore were really distinguishable from the case in hand on the basis on which the attempt to distinguish them was made. The thing to do was not to distinguish them, but to overrule them as a departure from the path of truth. But it was not appreciated wherein the departure had been made, and hence the attempt to distinguish them.

The reasoning upon which the decision of the case was based was thus put:

"If this be not the construction, then the language of the statute 'or against creditors' is entirely nugatory. There must be some class of creditors to which this language applies. The law gives to the execution or attachment creditor a lien. The law also provides that a mortgage shall not affect him, except from its recording, and equity and good conscience do not require the court to disregard the will of the Legislature, and inflict upon creditors whose equity is superior to that of the mortgagee the evils which the statute was designed to restrain."

The true doctrine in such cases he then set forth in these words:

"On the one hand, the unrecorded lien is upheld as against creditors who cannot be presumed to have given credit upon the faith of the property held in lien. On the other hand, creditors who may be presumed on such faith to have given credit are protected as against the secret lien in the rights which they secure by their diligence in the levy of their execution or attachment."

It was in this case, then, that it was clearly and definitely laid down for the first time that the creditors had in view by the statute were subsequent creditors without notice. In no prior case had this been done. It so happened in this case that the creditor was not merely a subsequent creditor without notice, but one who had secured a hold or lien by his own activity by the issuance and levy of an attachment. Possibly in view of this it cannot be said that the case is an authority against the proposition that such a creditor who has not thus or in some way by his own activity acquired a hold or lien is not had in view by the statute, or, putting it affirmatively, in support of the proposition that the only creditor which the statute has in view is such a creditor who has by his own activity acquired a hold or lien. But the court thought of no other creditor than such creditor as being included by the statute. In stating the doctrine of such cases, it limited the protection of the statute to such creditors as have secured rights "by their diligence in the levy of their execution or attachment." Of course, creditors who had secured rights by their diligence in bringing suit in equity on a return of nulla bona to subject the property to their debts would also be included. And such should be accepted as the position of the court until held otherwise in a case involving the question. In each of the cases thus far considered, where the creditor's right has been upheld, to wit, *Helm v. Logan's Heirs*, *Graham v. Samuel*, and *Wicks Bros. v. McConnell*, he had by his own activity acquired a hold or lien—in *Helm v. Logan's Heirs* by the issuance and levy of an execution; in *Graham v. Samuel* by a suit in equity on a return of nulla bona; and in *Wicks Bros. v. McConnell* by issuance and levy of an attachment. In each of the cases where the creditor's right has been denied, it was denied notwithstanding he had by his own activity acquired a hold or lien by the issuance and levy of an attachment or execution. It would be going to an extreme, with this history behind it, for the court now to hold that the creditor's right should be upheld, though he has obtained no hold or lien in any of these three ways. And the statute itself is not without an indication that such is its true construction. It includes two classes of persons—purchasers for a valuable consideration without notice and creditors. Though it is not so expressed, the purchasers included are subsequent purchasers. It is expressly required that they be without notice. A purchaser has a hold on the property purchased, and he has acquired it by his own activity. In connection with this class of persons then we find the four qualifications, subsequent, without notice, having a hold on the property, and that acquired by their own activity. Placed in the same category with them is another class of persons, to wit, creditors. Applying the maxim, "*Noscitur a sociis*," is it not to be

‘aken that the creditors called for are not the creditors generally, but subsequent, without notice, and who have acquired a hold on the property by their own activity? The trustee suggests that the purchaser does not acquire the better right until he has paid the purchase money without notice, the mere fact of purchase not being sufficient, and argues therefrom that the creditor from the mere payment without notice becomes like the purchaser, and entitled to the better right. But the purchaser has a hold on the property, and such creditor has not. It is not until he acquires a hold that he becomes in all respects like a purchaser. The underlying thought, then, of the statute is that, when a person subsequent to the execution of an unrecorded instrument of writing of the character called for acquires a hold on the property covered thereby, either as purchaser or creditor, and parts with his money without notice thereof, he shall have the better right.

The confusion that exists as to just what is to be taken as the position of the Court of Appeals on the question under consideration heretofore referred to has arisen since the case of *Wicks Bros. v. McConnell*, and that mainly from a dictum of that court in the last case that has been before it involving the statute, to wit, the case of *Swafford v. Asher* (Ky.) 105 S. W. 164. Before dealing with it, reference should be made to certain cases intervening between it and *Wicks Bros. v. McConnell*, to wit: *Clift v. Williams*, 105 Ky. 559, 49 S. W. 328, 51 S. W. 821; *Cin. Leaf Tob. Wh. Co. v. Combs*, 109 Ky. 21, 58 S. W. 420; *Bowles v. Jones*, 123 Ky. 395, 96 S. W. 1121. In *Clift v. Williams* the creditors had not acquired a hold or lien on the property by their own activity, and it was held that their rights were subordinate to the rights of the holder of the instrument of writing, not lodged for record. But the basis of the decision was not that such hold had not been acquired. It was that the creditors were antecedent creditors. But no inference can be drawn therefrom that, had the creditors been subsequent creditors without notice, the decision would have been otherwise. The debtor had died, and in a suit to settle his estate the general creditors relied on the statute to defeat an unrecorded lien asserted by the holder thereof as against a portion of the property left by the decedent. In the decision the doctrine as laid down by Judge Durelle in *Wicks Bros. v. McConnell* was quoted with approval. In *Cincinnati Leaf Tobacco Warehouse Co. v. Combs* the debtor had made an assignment for the benefit of creditors, and the controversy was between the holder of an unrecorded mortgage and the assignee. It did not appear whether the creditors or any of them were antecedent or subsequent creditors. It was held that the holder of the mortgage took the prior right. The basis of the decision was that, as the mortgage was enforceable against the assignor, it was enforceable against the assignee. Judge Hobson said:

“Under the rule laid down in these cases any equity which may be enforced against the assignor is equally available against the assignee.”

And again:

“Appellant, therefore, stands on the plane of a mortgagee holding an unrecorded mortgage, and as against the assignee for the benefit of creditors its older equity must prevail.”

In answer to the suggestion that section 496 applied and invalidated the mortgage he said:

"But as the assignee for the benefit of the creditors, being neither a purchaser for a valuable consideration, nor a creditor, is not protected by the statute."

According to these expressions, therefore, an assignee for the benefit of creditors takes subject to an unrecorded instrument of writing of the character called for by the statute, and cannot in any case claim that it is invalid, because he is neither a purchaser for value nor a creditor, and hence is not included by the statute. He cannot do so, even though certain of the general creditors may be subsequent creditors without notice and on their behalf. It cannot be that it was thought that in such a case such creditors on their own behalf could claim the benefit of the statute. If so, they could only do so by repudiating any benefit under the assignment which places them on an equality with the other creditors. There is not the slightest hint that they had any such right. It does not appear that there were any such creditors in the case. It is likely that they were all antecedent creditors. I gather this from this statement immediately following that last quoted:

"Even as to creditors, the rule is well settled in this state that the oldest equity prevails, and that an unrecorded mortgage will have preference over an attachment or an execution lien of at least antecedent creditors if notice is given before a sale of the property."

In support thereof he cited the cases of *Baldwin v. Crow*, *Wicks Bros. v. McConnell*, and *Clift v. Williams*. From the reference to antecedent creditors therein it is likely that the creditors were antecedent. The leaning, however, of the case is against the position that a subsequent creditor without notice who has acquired no hold or lien by his own activity has the better right as against an unrecorded instrument of writing. In *Bowles v. Jones* the controversy related to a crop of tobacco, and was between subsequent creditors without notice who had sued and obtained attachments which had been levied on the tobacco and the holder of an unrecorded mortgage. It was held that the creditors had the better right. This makes the fourth and last case where the creditor has been given the better right; the other three being *Helm v. Logan's Heirs*, *Graham v. Samuel*, and *Wicks Bros. v. McConnell*. In each one of the four the creditor had acquired by his own activity a hold or lien, and in all but *Helm v. Logan's Heirs* he was certainly a subsequent creditor without notice. And in no case has it ever been held that a subsequent creditor without notice who had not by his own activity acquired a hold or lien had the better right. But in the dictum in *Swafford v. Asher*, heretofore referred to, there is an intimation, at least, that such a creditor who had not by his own activity acquired a hold or lien might have a better right. The controversy related to certain teams, and was between the personal representative of the debtor and the holder of an unrecorded mortgage. It was like *Clift v. Williams*, in that with one exception the creditors of the decedent were antecedent creditors, and he, though a subsequent creditor, was such with notice, but differed therefrom,



in that there the controversy arose in a suit to settle the estate of the decedent, and was between the creditors directly and the holder of the unrecorded mortgage, whereas here it was between the latter and the personal representative in a suit between them. It was held that such holder had the better right. Judge Barker said:

"There is no doubt that, as between Swafford and Asher, the latter had a lien upon the teams for the advances made, and we perceive no reason why the creditors, none of whose debts are shown to have been subsequent to the mortgage, should stand in a better attitude than the principal, Swafford, would have done if he were alive."

He continued in these words:

"As the mortgage was not recorded, it would, of course, not be valid as to creditors whose debts were subsequently created; but as to those whose debts were created prior to the purchase of the teams and the mortgage upon them the lien is valid, although not recorded as required by section 496 of the Kentucky Statutes of 1903, and, as said before, there is nothing to show that any debt of the estate was created after the purchase of the teams, except that of appellant who had actual notice."

It is in the intimation that, if there had been any subsequent creditors of decedent without notice, they would have had the better right, that Judge Barker went beyond the requirements of the case, and pronounced a dictum, and, in view of the presentation I have made, I cannot accept that the Court of Appeals will ever hold in a case involving the question in accordance with this dictum.

The question here involved has frequently been before the appropriate federal courts. It first arose before me in the case of *In re Sewell* (D. C.) 111 Fed. 791. I there held that the holder of an unrecorded mortgage had the better right as against the trustee in bankruptcy because none of the creditors represented by him had by their own activity acquired a hold on the property covered by the mortgage. It then arose before Judge Evans in the case of *In re Ducker* (D. C.) 133 Fed. 771, and he took the opposite position. His judgment on appeal was affirmed, and it was held that I was wrong. *In re Ducker*, 134 Fed. 43, 67 C. C. A. 117. Subsequently a case came before the appellate court from Ohio whose statute is substantially similar to the Kentucky statute. That court adhered to its opinion in the *Ducker Case*. *Dolle v. Cassell*, 135 Fed. 52, 67 C. C. A. 526. This case was carried to the Supreme Court, and that court reversed the appellate court. *York v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. Subsequently another case arose before Judge Evans. The *York v. Cassell Case* was urged upon him as overthrowing the *Ducker Case*. He did not think so, on the ground that the Ohio statute differed from the Kentucky statute. *In re Doran* (D. C.) 148 Fed. 327. The appellate court on appeal reversed his judgment. *In re Doran*, 154 Fed. 467, 83 C. C. A. 265. Yet another case arose before Judge Evans, and he adhered to his position in the *Doran Case*. The judgment in this case was reversed by the appellate court. *Crucible Steel Co. v. Holt*, 174 Fed. 127, 98 C. C. A. 101. The judgment of the appellate court was carried to the Supreme Court, and affirmed by it. *Holt v. Crucible Steel Co.*, 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756. In this case that of *Swafford v. Asher* and an earlier case, not heretofore referred to and not of

sufficient consequence to call for comment, were cited and relied on, and the claim was made according to Judge Severens "that the Court of Appeals has finally settled the law to be that the general creditors who have become such while the mortgage remained unfiled are to be protected." He seems to have thought that there was a possible justification for the claim, as he said:

"The court below seems to have so held, and some of the language of the judges who delivered opinions in those cases seem to favor that construction."

And he stated the position of the court thus:

"We think we ought not to overrule our decision without a more positive demonstration that the law of Kentucky is to the contrary of what we there (i. e., in the Doran Case) held."

In the Supreme Court Judge Van Deventer said:

"What was said in *Wicks Bros. v. McConnell* should be accepted as reflecting the true construction of section 496, in the absence of some more positive and direct ruling upon the subject by the Court of Appeals of the state. Such was the view of the Circuit Court of Appeals, and we are at least unable to say that it was wrong."

It is largely because of this uncertainty on the part of these two courts as to just what the law of this state in this particular is that I have devoted so much time and space to the matter. The result is that I feel driven to the conclusion that the only creditors included by the statute are such subsequent creditors without notice as have acquired by their own activity a hold or lien on the property. The decisions of the appellate court for this circuit and the Supreme Court are sufficient in themselves to require me to so decide. But I would so decide if these decisions were out of the way. I cannot conceive that it is possible that the Court of Appeals of Kentucky in view of its previous decisions under the statute, an account of which has been fully set forth herein, will ever hold otherwise.

This brings me to the other question, whether the creditors included by the statute as already determined must acquire a hold or lien before the instrument of writing involved is recorded. Is it sufficient that they acquire such hold or lien after it is recorded? I think that it follows from the fact that they must acquire such hold or lien that they must acquire it before the instrument of writing is recorded. The statute provides that the instrument of writing shall be "invalid" until it is recorded; i. e., up to its being recorded, or as late as it is recorded. This implies that, as soon as it is recorded, it is valid. It is invalid, therefore, only against those who become such creditors as the statute calls for before the instrument is recorded. As to those who so become after it is recorded it is valid. In this an additional reason is to be found for the position that the statute includes only such subsequent creditors without notice as have acquired a hold or lien. The statute seems to contemplate that the creditors must be in a position to question the validity of the writing before it is recorded, and that they cannot do so unless they have acquired a hold or lien. It is contended by the trustee that the decision in *Graham v. Samuel* is an authority against this. In giving the facts of that case I noted

that the mortgage, an absolute deed on its face, involved in that case, had been recorded long before the creditor brought his suit in equity on a return of nulla bona attacking it and seeking to subject the property to his debt; and in considering the case I ignored this circumstance for the time being. Its significance must now be dealt with, for it was held therein, as we have already found, that, notwithstanding it, the creditor had the better right. This decision is not an authority against the position here taken. I have heretofore stated that the statute, substantially as it is now, has been in existence from an early period in the history of the state. This statement needs to be qualified. At the time of the decision in *Graham v. Samuel* the statute differed in an important particular from what it is now. In those days it prescribed that the instrument should be recorded in a definite time, and that it would not be valid unless recorded within that time. As to deeds the provision was that they should not be good against a purchaser for a valuable consideration not having notice thereof, or any creditor, "unless" acknowledged within eight months and lodged for record, and, as to deeds of mortgage or deeds of trust, that they should not be good or valid against any creditor or a purchaser for valuable consideration without notice thereof "unless such deed shall within sixty days after its execution" be acknowledged and lodged for record. In *Graham v. Samuel* the deed had been executed in August, 1819, and recorded in July, 1820. Not having been recorded within the required time, it was as if it had never been recorded at all. When executed, it was intended as a deed, and was so held until the time when recorded. At that time the contract of purchase under which it had been delivered or held was canceled, and it was thereafter held as a mortgage to secure a certain indebtedness. As a mortgage it was not withheld from record for any length of time, but was at once recorded. In view of this circumstance possibly there was room to hold that it was recorded in time, and hence that it was valid. But no notice was taken of this, and it was assumed that it had not been recorded within the required time. The statute, as it was when the mortgage in question herein was executed, prescribed no time within which it should be recorded. It provided merely that until recorded it should not be valid, implying that as soon as recorded it should be. In view of this difference in the statutes, the decision in *Graham v. Samuel* is not an authority against the position here taken. On the other hand, the decisions of the Supreme Court of Ohio under its statute and that of the appellate court for this circuit, following those decisions in the case of *In re Shirley*, 112 Fed. 301, 50 C. C. A. 252, are persuasive of the soundness of that position. The Ohio statute provides that a mortgage "shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers and mortgagees in good faith, unless the mortgage or true copy thereof be forthwith deposited for record." The construction so placed on the statute is that, although it says that the mortgage shall be absolutely void unless it be forthwith deposited for record, the mortgage is good even as against subsequent creditors without notice, unless the creditors acquire or hold on the property before it is deposited for record. Judge Day in the *Shirley* Case set forth the

decision of the Supreme Court of Ohio in the case of *Wilson v. Leslie*, 20 Ohio, 161, in these words:

"In that case it was held that the statute declaring the mortgage absolutely void as against the creditors of the mortgagee and as against subsequent purchasers of the mortgage in good faith, unless the mortgage or a true copy thereof shall be deposited forthwith as directed in the act, did not make the mortgage void as between the parties thereto, but only avoided the instrument as to those creditors who, between the time of the execution of the mortgage and the filing thereof, had taken steps to fasten upon the property for the payment of their debts. As against such as had in the interim secured liens by attachment, execution or otherwise, the mortgage would be void. When filed with the recorder, the instrument became valid as against all persons except those whose rights have attached upon the property before the recording of the instrument. Judge Spalding, delivering the opinion, gives weight to mere delay in the filing of the mortgage only as important in determining the rights of the parties where it has been so great as to taint the transaction with fraud."

He said further:

"Applying the law thus settled to the finding of facts in the present case, we find a mortgage which as against the contesting creditors had no force and effect until filed with the proper officer. It was as ineffectual to create a lien as against them as a mere agreement for a mortgage would have been, but, where properly executed and duly filed, it became operative as against creditors who had not, before its filing, fastened some valid lien or right upon the property. It could only be avoided after such filing by proof of fraud in the making or withholding it from record."

The fact that by the construction placed by the Ohio Supreme Court on its statute its benefits are not limited to subsequent creditors without notice, but belong to creditors generally, in this particular, therefore, differing from the Kentucky statute, does not differentiate the *Shirley Case* and those which it follows from this case as to the matter now in hand. Both statutes as construed are limited to creditors—in the one case generally and in the other subsequent without notice—who have acquired a hold or lien; i. e. fastened on the property. These cases arising under the Ohio statute decide that this fastening must take place before the instrument is recorded. This is persuasive that it must so take place under the Kentucky statute. I think, then, that the position of the Court of Appeals of Kentucky as to the meaning of this portion of the statute must now be taken to be that it applies only to subsequent creditors without notice who by their own activity have acquired a hold or lien on the property covered by the instrument of writing before it is lodged for record, and that, where such a creditor has acquired such a hold or lien, notice to the purchaser at a sale in furtherance thereof, whoever he may be, of the existence of the writing before his purchase, will not affect his right thereby acquired. This ground of attack on the mortgage, therefore, is not well taken.

[4] This brings us to the matter of the meritoriousness of the debt and mortgage. It is at least doubted whether the debt is as large as claimed, and whether the mortgage was executed simultaneously with the debt, and claimed that it was fraudulently withheld from record until the bankrupt's failure. The facts, more in detail than heretofore stated, as to the execution of the notes and mortgage, as claimed



by the mortgagee, should now be set forth. Before the purchase of the property, the bankrupt was occupying this saloon as her tenant. He was a customer of the Christian Moerlein Brewing Company in the purchase of his beer. When he bargained for the property, that company had agreed to furnish him \$4,500 upon a first mortgage of the property, out of which he could pay her the cash payment of \$4,000, she to take the second mortgage for the balance, to wit, \$6,800. Accordingly, on January 20, 1909, a reputable lawyer and notary public named Glenn prepared the deed to be executed by her to the bankrupt and the mortgage to be executed by him and his wife to her to secure the \$6,800. In the latter it was recited that it was "subject to a payment of the mortgage of the grantors to the Christian Moerlein Brewing Company upon the above described property of date ——— day of January, 1909, and of record in Mortgage Book ———, page ———, of said records with the understanding that if any payment herein provided for or in said Moerlein Brewing Company's mortgage remains unpaid for sixty days after the same becomes due and payable, as provided, then and in that event, grantee may elect to have all said payments become due and payable as though by lapse of time."

The deed was that day signed by the claimant, and sent to Memphis for the signature of her husband, who signed and acknowledged it on January 22, 1909, and returned at once. Things were held thus in abeyance until shortly before February 16, 1909, because of the neglect of the Moerlein Brewing Company to comply with its agreement. Upon its still neglecting, if not actually refusing, to do so, the bankrupt applied to Wm. Reidlin, hereinbefore mentioned, president of the Bavarian Brewing Company, a rival concern, for a loan of the \$4,500 on the same terms, the bankrupt thereafter to become its customer and drop the Moerlein Brewing Company. He agreed to make the loan. Thereupon on February 15, 1909, the claimant acknowledged the deed to the bankrupt before Glenn, and that day or the next morning delivered it to him. It was lodged for record on the morning of February 16, 1909, and at the same time the bankrupt and his wife executed the mortgage to Reidlin to indemnify him as surety of the bankrupt to the Farmers' & Traders' National Bank on the loan of \$4,500, out of which he paid the claimant the cash payment of \$4,000, which mortgage was also lodged for record at that time. That same day in the afternoon the bankrupt executed his five notes to the claimant for \$6,800, the balance of the purchase price, and he and his wife executed and acknowledged the mortgage to secure same which had been prepared on January 20, 1909, at the same time the deed from claimant to the bankrupt was prepared. The notes were prepared by, and the mortgage was acknowledged before, Glenn, who had prepared the deed and mortgage and taken the claimant's acknowledgment to the deed. Glenn had nothing to do with the preparation and acknowledgment of the Reidlin mortgage, and it is likely that he was not informed of the change from the Moerlein Brewing Company to the Bavarian Brewing Company. I infer this from the fact that the mortgage executed by the bankrupt and his wife to the claimant was, as it had been originally prepared, except that the date "——— January, 1909," was

changed by Glenn to the "16th day of February, 1909," no change being made in the reference to the Christian Moerlein Brewing Company. At the time this controversy arose Glenn had become mentally unbalanced, and he subsequently died so that no testimony could be obtained from him as to why no change was made in this reference. On the morning of the 16th—i. e., when the deed was lodged for record and the mortgage executed to Reidlin—the claimant had a talk with him over the telephone, in which she told him that she wanted a mortgage for the balance of the purchase money subject to his mortgage, and he advised her not to record it as she would have "to pay double taxation" if she did, and in the afternoon, when the mortgage was executed and acknowledged, she told Glenn of this advice, and he approved it. It was pursuant to this advice that she did not record the mortgage, but put it away with the notes in her trunk where it remained until after the bankrupt fled. This he did on Saturday August 13, 1910. She lodged the mortgage for record on Tuesday, August 16, 1910. The basis for the doubt as to whether the mortgage was executed on February 16, 1909, simultaneously with the delivery of the deed is two things:

One is that on August 13, 1910, the bankrupt caused to be prepared, executed, and acknowledged a mortgage from himself and wife to the claimant to secure the \$6,800, and left it with his attorney to lodge for record after he was gone which he did on Monday, the 15th. He also left a letter for her in which he informed her what he had done, which she probably received and read before lodging the mortgage of date February 16, 1909, for record. She knew nothing of his contemplated flight, and had nothing to do with the preparation and lodging for record of the mortgage of August 13, 1910. It was entirely his own conception. She knew something was wrong on Sunday, the 14th, but did not ascertain that he had fled until Tuesday, the 16th, the day she lodged the mortgage of February 16, 1909, for record.

The other thing is testimony on the part of the bankrupt and of his wife that they had never executed any other mortgage to the claimant than that of August 13, 1910. On October 26, 1910, the claimant filed before the referee her claim consisting of her notes and the mortgage of February 16, 1909. This disclosed to the trustee that she was claiming under this mortgage, if he had not already ascertained its existence from the records, which was probably the case. Thereupon the trustee, because of the mortgage of August 13, 1910, conceived the idea that, if he could obtain the testimony of the bankrupt and his wife without his having any communication beforehand with the claimant, they might testify that they never executed the mortgage of February 16, 1909. They were then living in Detroit, Mich. Without notice to the claimant, the trustee appeared in Detroit on November 14, 1910, and obtained an order of reference from the United States District Court for that district to the referee in bankruptcy, which required the bankrupt and his wife to appear before him forthwith for examination. They were served that evening with subpoena to

appear the next morning, which they did, and they were then examined. The bankrupt and his wife on that occasion testified as above stated, though the wife was not as positive as the bankrupt. The fact of the execution of the mortgage of August 13, 1909, and this testimony on the part of the bankrupt and his wife, show, at least, that on both occasions they had forgotten about the execution of the mortgage, and perhaps it is difficult to account for their forgetting it if it had been executed as claimed. Possibly, so far as the bankrupt is concerned, it is due to the fact that he understood from the talk over the telephone between claimant and Mr. Reidlin on the morning of February 16th that the claimant was not to take any mortgage, not that he was not to have it recorded, and this made a deeper impression on him than the fact of the execution and acknowledgment of the mortgage. Mr. Reidlin's testimony is to the effect that he then understood that no mortgage was to be taken and that of the bankrupt at Detroit is to the same effect. But, however it is to be accounted for, I have not the slightest doubt that the mortgage was executed and acknowledged on February 16, 1909, as claimed, and that there is no want of genuineness in it. The bankrupt and his wife when they executed the mortgage of August 13, 1910, and when they testified in Detroit had forgotten about its execution, however their so forgetting is to be accounted for. The mortgage shows on its face that it was prepared at the same time that the deed from claimant to the bankrupt was prepared and by the same person. The typewriting therein is proven to have been done on Mr. Glenn's machine, and all the handwriting but the signatures is his. It is regularly certified by him, under seal, as having been executed and acknowledged on that date. And then the fact that no change was made in the reference to the Christian Moerlein Brewing Company is a clear indication of genuineness. A mortgage gotten up for the purposes of this case would not have contained this mistake. Besides, the bankrupt's wife in her testimony at Detroit made statements that cannot be accounted for except on the basis that the mortgage of February 16, 1909, is genuine. She stated that at the time of the purchase of the property she did nothing whatever only to sign the papers—a paper that she supposed the wife had to sign, but which she did not just know what it was. This might have referred to the Reidlin mortgage, but she did not stop here. She stated, further, that the paper was signed when Lawyer Glenn was up at claimant's and when no one was present except her husband, the claimant, lawyer Glenn and herself. This could not have had reference to the Reidlin mortgage. It could only have referred to claimant's mortgage of February 16, 1909. It would have been fair to have submitted that mortgage to the bankrupt and his wife, and to have asked them directly about it, but this course was not pursued. Besides these facts and circumstances, the execution of the mortgage is proven by the testimony of the claimant and that of the bankrupt and his wife taken on their behalf after the Detroit examination. Possibly the testimony of the bankrupt on this occasion shows a better recollection than one would expect after the Detroit testimony.

The basis of the doubt as to whether the debt is as large as claimed is the testimony of certain real estate men that the property was not worth more than \$7,000 or \$8,000 at the time the bankrupt bought it and the testimony of a number of reputable witnesses that the bankrupt had said to them after his purchase and before he fled that he had purchased the property for \$8,000. The latter testimony is denied by the bankrupt, but the weight of the testimony is against him, and the evidence gives no indication as to why he should make such statements if not true. But it is inadmissible as against claimant. The former testimony is of but little value. I am clear, however, that the debt as well as the mortgage is genuine. It is proven by the testimony of the claimant and that of the bankrupt and his wife. The testimony of the bankrupt and his wife to this effect is not only that given by them in their depositions on behalf of claimant, but that given at Detroit. The circumstances under which that testimony was taken gives distinct value to it. There was no opportunity given to the bankrupt or his wife to make up a false story. What they testified to was their then recollection. Besides, the matter is put beyond question by a circumstance. That circumstance is that the mortgage when first prepared specified the notes to be secured by it, and they amounted to \$6,800. This represented the balance to be due the claimant after she received \$4,000 from the cash to be loaned the bankrupt by the Christian Moerlein Brewing Company and subsequently loaned by the bank with Reidlin as surety on a first mortgage on the property. Clearly the \$4,000 was not a payment on the \$6,800 as has been intimated by the trustee. It was in addition thereto, and the whole purchase price must have been \$10,800 as claimed.

[5] This brings me to the contention that the mortgage was fraudulently withheld from record, and is therefore void. What are the facts in regard to this matter? It is certain that it was not through neglect that the mortgage was not lodged for record. It was purposely not so lodged sooner than it was; i. e., it was withheld from record until then. It is just as certain that its being withheld is directly chargeable to Mr. Reidlin, who and his company hold more than two-thirds of the indebtedness incurred subsequent to the execution of the mortgage. If it had not been for his advice, the mortgage would have been lodged for record as soon as it was executed. I make this out from his testimony. There is some contrariety in the testimony as to the talk over the telephone between him and the claimant on the morning of February 16, 1909, to which reference has heretofore been made. But such differences as exist are readily reconcilable. There is a difference for instance as to how the talk came about. The claimant testified that on the morning of the 16th she learned that the bankrupt and his wife had gone to Covington, the county seat, to lodge the deed for record, and to execute and lodge for record the Reidlin mortgage; that she thought she should have been advised that they were going, so that she could have gone with them, and had her mortgage fixed up at the same time; and that thereupon she called up the bankrupt over the telephone, and, after complaining of his action, at her request he called up Mr. Reidlin to the telephone, so that she might talk



with him. He testified that the talk was at his instance. The deed expressed the consideration to be "\$1.00 and other consideration paid and to be paid," and under advice he had the bankrupt call her up in order that he might understand as to the consideration to be paid. There is a difference, also, as to where Mr. Reidlin and the bankrupt were stationed at the time of the talk. The claimant has it that they were at the county clerk's office, and he that they were at the German National Bank, to which place they went from the county clerk's office. And there is a difference in a substantial degree as to the substance of the talk. They agree that she told him that she wanted a mortgage, but was willing that he have the first mortgage, she to take the second. They agree that he thereupon gave her advice as to her mortgage, and as to the reason he gave for the advice. She has it that he advised her not to record her mortgage, and she told him she would not do this, and he that he advised her not to take a mortgage, and she told him that she would not do this. The reason given for the advice as to which they agree was that otherwise she would have to pay double taxation. But I think these several differences are easily reconcilable. The claimant called up the bankrupt at the county court's office after the party had left for the bank, and, upon being told where they had gone, she called him up at the bank. They were there when the talk took place. The bankrupt testified that it happened this way, and it had simply escaped claimant that she did not have the talk with Mr. Reidlin whilst he was at the county court's office, where she called up the bankrupt. Then as to the one at whose instance the talk was had, it may have been a coincidence that at the time claimant expressed a desire to talk to Mr. Reidlin he indicated a desire to talk to her. The fact perhaps that he knew she was talking to the bankrupt may have led him to want to talk to her about the unpaid consideration. Then as to the substance of the talk, it is likely that Mr. Reidlin understood from the claimant that she would not take a mortgage. This could have happened without her intending to be so understood. That he so understood is supported by the bankrupt's Detroit testimony. It is a possible view of the matter that she did in fact tell him that she would not take a mortgage and that Glenn caused her to change her mind by advising her to take it but to withhold it from record, upon being told by her what Mr. Reidlin had advised her, which would accomplish the same thing as not taking it. But I am strongly inclined to the view that the advice he gave her was not to record the mortgage, and that what she said was that she would not do so, though he may have understood her to say that she would not take a mortgage. He testified distinctly that she told him that she wanted a mortgage. The withholding it from record would accomplish as much in the way of saving taxes as not taking it. Not taking it would not save her from having to pay taxes on the debt if it became known to the assessing officer that she held it. If known, that was as much liable to taxation without a mortgage as with it. The only possible way to save taxes was to keep it from being known, and that would be accomplished by withholding it from record. The reason for the advice which he gave her, therefore, called for no more than

that the mortgage which she told him she wanted should be withheld from record. She testified that that was what he advised and what she said she would do. The bankrupt, in his testimony on her behalf, testified to the same effect, but in view of his Detroit testimony not much weight is to be attached thereto. Then, whilst he did testify that what he advised was not to take a mortgage and that she told him that she would not, this question was asked him on cross-examination:

"And didn't you say to her, in substance, if not in exact words, 'Mrs. Watson, if you have confidence in your boy, it is not necessary to have your mortgage recorded,' or 'it is not necessary for you to take a second mortgage?' Didn't you say that to her in substance, if not in those precise words?"

To this question he answered:

"That was about the substance of the conversation."

Then, again, it is to be noted that Mr. Reidlin testified after the Detroit testimony of the bankrupt, when he and his wife had testified that no mortgage was given, and that what the claimant had said in the telephone talk was that she would not take a mortgage. This testimony may, to some extent at least, have affected his. But, however this may be, the testimony requires that I should hold that the sole reason why the mortgage was withheld from record was that the claimant might not have to "pay double taxation"; that this idea of saving taxes and withholding the mortgage from record to this end was put in her head, at least, by Glenn, if not Mr. Reidlin, backed up by Glenn; and that it would not have been withheld but would have been put to record as soon as executed and acknowledged if Mr. Reidlin after he had been told by her that she wanted a mortgage, had not undertaken to advise her in regard to the matter. It is to be noted further in this connection that the mortgage was so withheld from record, not because of any agreement with the bankrupt. He was not consulted about it. Nor was it withheld to give him credit. Its withholding was solely on her own account, and not to favor him. The testimony leaves no room for doubt as to this. The only moral obliquity of which she was guilty was in trying to evade the taxes due from her on account of the indebtedness. And this is somewhat lessened by the low moral tone that pervades the community in such matters, by the advice of a reputable business man and a reputable lawyer, and by the thought that, if she paid taxes on the unpaid purchase money and the bankrupt on the property, there would be a payment of double taxes.

[8] Did, then, the withholding of the mortgage from record under these circumstances and for this reason render it void? The answer to this question depends upon what is the essential thing to render the withholding of a mortgage or deed from record void. I do not understand it to be essential that the withholding be pursuant to an agreement with the mortgagor or grantor. A mortgage or deed that is withheld from record may be void though there may be no such agreement. Nor is it sufficient to render it such that others may have given credit to the mortgagor or grantor on the faith that the existence of

a mortgage or deed is not shown by the record. In 20 Cyc. p. 447, it is said:

"Where it is either found that all the acts of the parties were done honestly and in good faith, or it is not found that they were dishonest or fraudulent, a deed or mortgage cannot be adjudged fraudulent or void solely on the ground that it was not recorded, and that in ignorance of the existence of the instrument assailed credit was given to the grantor upon the faith of his supposed ownership of the property. Where the deed is withheld from record merely to gratify the feelings of a proud debtor, the omission is not a fraudulent act."

The essential thing as I understand it is that there should be fraud in the withholding. The withholding must have been fraudulent. It should have been withheld for the conscious purpose of giving the mortgagor or grantor credit, and thereby enabling him to deceive others. The matter was put succinctly by Mr. Justice Brown in the case of *Davis v. Schwartz*, 155 U. S. 631, 639, 15 Sup. Ct. 237, 39 L. Ed. 289, when he said that the mortgage should be "withheld from record in order to give the mortgagor a fictitious credit."

The statement heretofore given of the circumstances under which the mortgage here was withheld and of the reason for withholding it negatives the existence of any such fraudulent purpose on the part of the claimant. In her account of the talk with Reidlin over the telephone and of her subsequent talk with Glenn, she testified that Reidlin said to her that she need not put the mortgage to record as long as she had confidence in her son, and that Glenn, upon being told by her what Reidlin had said, confirmed it, and added: "But, if there should come a change, I should put my deed (mortgage) to record."

Point is made by the trustee of this advice of Glenn. It is taken to mean that, if a change should come in the financial condition of her son and he should become involved in debt, then she should put the mortgage to record. But it meant no more than that if a change should come in her confidence in her son, which she had expressed, then she should act. And, were its meaning as claimed, it did not follow that the withholding of the mortgage pursuant thereto was in order to give her son fictitious credit. So doing was entirely consistent with the purpose being solely to save double taxation. Undoubtedly the withholding might give him fictitious credit, and she must have known that it might do so. But such knowledge did not necessarily involve that the withholding was in order to that end. The statute, as we have construed it, contemplates that credit may be given to the maker of an unrecorded recordable instrument of writing on the faith that he is the owner of the property covered by it and that it is unincumbered, and yet, if the writing is recorded before the creditor acquired a hold or lien thereon, it will prevail over him. In view of this, it is difficult to see how an instrument of writing withheld, in presumed reliance on this right but with the risk involved, can be held fraudulent and void when it is withheld not in order to give fictitious credit to the maker thereof but solely in order to save double taxation, as it is termed.

The subsequent indebtedness incurred by the bankrupt was mainly for the purpose of making improvements on the property. The ne-

cessity for these arose from competition from a rival establishment near by backed by the Christian Moerlein Brewing Company, which was set up shortly after the bankrupt changed from it to the Bavarian Brewing Company, and no doubt to some extent at least because of the change. It was quite natural for the latter company and Mr. Reidlin, its president, to encourage such expenditures on the part of the bankrupt in order that he might successfully meet this competition, and it is reasonable to take it that they did so. It was the indebtedness so incurred, in connection possibly with some incurred in the conduct of the business, that finally caused the bankrupt's failure. The bulk of this indebtedness, more than two-thirds of it, as heretofore stated, arose from advances made by the Bavarian Brewing Company and Mr. Reidlin, its president. And they are behind the attack on the mortgage. It may be assumed, for the sake of the argument, that they made the advances upon the idea that the property had no other mortgage on it than the first one, but they knew the bankrupt was indebted to the claimant on account of the purchase price. Because of the bankrupt's representations they thought the amount of this indebtedness was less than it really was. But the claimant to no extent misled them in this. There is no reason to doubt that at the time they could have ascertained the true amount upon inquiry of her. There is no evidence that she knew that this subsequent indebtedness had been incurred except from her knowledge of the making of the improvements. If she so inferred, she most likely inferred, also, that the Bavarian Brewing Company and Mr. Reidlin, who were backing the bankrupt, had furnished the money to make them. And according to her understanding they knew that she had a mortgage on the property for a balance of purchase money. In no particular do I find evidence of any unfair conduct on her part towards the bankrupt's creditors. There is certainly none as to those behind the attack on her mortgage. And if it had not been for the advice, volunteered by Mr. Reidlin, according to his own evidence, her mortgage would have been put to record immediately upon its execution. Harsh criticism of her conduct and testimony has been indulged in, but I do not find any warrant therefor in the evidence.

An order will be entered overruling the motion to reconsider.

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In re SIMON.

(District Court, W. D. New York. January 11, 1913.)

**1. BANKRUPTCY (§ 407\*)—DISCHARGE—OBJECTIONS—FALSE STATEMENT MADE TO SECURE CREDIT—INTENT.**

The bankrupt having ordered a large quantity of goods from a manufacturer in December, 1909, in response to a commercial agency's request for a statement which had been applied for by the seller, gave to the agency a statement which largely overestimated the value of stock on hand, also overestimated the amount of cash on hand and in banks by \$6,281.85, and included large values for leaseholds on stores in various cities which were of no value. This statement having been forwarded to

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



the seller, credit to the amount of \$21,000 was extended, and in October, 1910, the concern failed with liabilities of \$809,801.54, and assets of \$441,219.82. *Held*, that such facts showed that the bankrupt made the statement which was materially false for the purpose of obtaining property on credit, and was therefore not entitled to a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.\*]

**2. BANKRUPTCY (§ 407\*)—DISCHARGE—FALSE STATEMENT IN WRITING.**

Ordinarily statements given by merchants to commercial agencies to continue a business rating are regarded merely as a basis for continued credit, and not as a medium through which particular credit is given or obtained, in which case a statement, though false, is not a bar to the merchant's discharge in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.\*]

**3. BANKRUPTCY (§ 407\*)—FALSE STATEMENT—DISCHARGE—KNOWLEDGE.**

Where a bankrupt, active in the business of his firm, signed and delivered a statement of assets and liabilities of the firm, grossly overstating the cash on hand, investments, merchandise, items, and accounts payable, with knowledge that inquiries were being made concerning the firm's credit, participating in the advantages obtained by the deception, he could not successfully assert, in order to obtain his discharge, that he did not know that the statement was false.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.\*]

**4. BANKRUPTCY (§ 407\*)—DISCHARGE—MATERIALLY FALSE STATEMENT—DELIVERY—TIME.**

It is not necessary that a materially false statement made by a bankrupt to obtain goods on credit should have been made or the goods delivered within four months prior to bankruptcy in order to bar his discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.\*]

**5. BANKRUPTCY (§ 409\*)—DISCHARGE—GROUNDS—FAILURE TO KEEP BOOKS.**

An objection to a bankrupt's discharge that there had been a failure to keep books of account, etc., was not sustained, where an expert book-keeper testified that he was able substantially to ascertain from the books and records delivered to the trustees the financial condition of the firm.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752-757; Dec. Dig. § 409.\*]

**6. BANKRUPTCY (§ 409\*)—DISCHARGE—DENIAL—KEEPING BOOKS.**

A bankrupt is not bound to keep books in the most scientific manner, and a discharge will not be denied for failure to keep books, if the bankrupt's financial condition can be substantially ascertained from the books and records kept.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752-757; Dec. Dig. § 409.\*]

**7. BANKRUPTCY (§ 414\*)—DISCHARGE—CONCEALMENT OF BOOKS AND PAPERS.**

In proceedings for a bankrupt's discharge, evidence *held* insufficient to warrant a finding that the bankrupt had concealed books and papers relating to the firm's business.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-722; Dec. Dig. § 414.\*]

**In Bankruptcy.** In the matter of bankruptcy proceedings of Michael C. Simon, individually and as surviving partner of the firm of

\*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ely Meyer & M. C. Simon, bankrupts. On petition to review a referee's finding overruling specifications of objection to the bankrupt's discharge. Reversed and specifications sustained in part.

See, also, 197 Fed. 102, 105.

Louis W. Severy, of New York City, for International Trust Co. Werner & Harris, of Rochester, N. Y. (Hugh J. O'Brien, of Rochester, N. Y., of counsel), for American Woolen Co.

Clarence W. McKay, of Rochester, N. Y., for Traders' National Bank.

HAZEL, District Judge. The special master found that the bankrupt Simon did not, in contemplation of his bankruptcy, fail to keep proper books of account with intent to conceal his true financial condition, or the financial condition of the firm of Meyer & Simon of which he was a member; that, even assuming that the books were improperly kept, Simon had nothing to do with keeping them; that he did not obtain money or property on credit based upon a materially false statement made by him in writing; that he did not, as claimed by the objecting creditors, destroy certain books and records of the partnership by which its true financial condition could have been ascertained; and that he did not make a false oath in the bankruptcy proceeding. The specifications of objection to the discharge of the bankrupt embodying the various grounds of opposition with the evidence in their support are submitted for consideration upon the ground that the special master erred in his conclusions. Claim is also made by the trustees that it was proven before the referee in bankruptcy that the bankrupt had concealed from his creditors assets amounting to \$250,000; and that he should be required to surrender to his trustees the amount concealed. Upon this phase of the controversy the special master found that no assets whatsoever were concealed, to which determination exceptions have been filed, and an appropriate question is presented for review. The involuntary petition was filed on the 7th day of October, 1910, and the adjudication followed on October 25th. The liabilities were \$809,801.54, and the assets \$441,219.82. A brief description of the nature of the business of the bankrupt and the status of the firm at the time of filing the petition in bankruptcy follows.

[1] The partnership of Meyer & Simon engaged in 1897 in the business of manufacturing men's clothing at Rochester, N. Y., for the retail trade. The business started with a capital of \$6,000 contributed by Meyer, who died just before the petition in bankruptcy was filed, nothing in the way of property or money having been contributed by Simon, a practicing lawyer, who after Meyer's death conducted the business as surviving partner. The venture foreshadowed success as is indicated by the fact that quite soon after organization the firm located retail stores at Detroit, Boston, Chicago, Kansas City, Minneapolis, and St. Paul, and formed and controlled corporations for the sale of clothing at Atlanta, Indianapolis, Birmingham, Los Angeles, Louisville, and Evansville. In 1909 and 1910 the firm borrowed extensively from banks and obtained merchandise on credit

from the American Woolen Company. Statements in writing were made purporting to show the financial condition of the firm, and the trustees and objecting creditors claim that they made loans and advances, and gave credit to the firm in reliance thereon. The statements delivered to the Traders' National Bank, the National Bank of Commerce, and to R. G. Dun & Co., and thence transmitted to the American Woolen Company, were alike and read as follows:

Inventory taken December 31st, 1909.

Assets.	
Stock on hand.....	\$302,187 85
Cash on hand and in bank.....	15,729 30
Book accounts.....	21,598 75
Investments .....	424,180 70
Fixtures .....	12,500 00
	\$776,196 60
Liabilities.	
Merchandise .....	\$ 68,822 40
Banks .....	180,000 00
	\$248,822 40
Net worth.....	\$527,374 20
Insurance .....	\$250,000 00
[Signed] .....	Ely Meyer & M. C. Simon.

The statements were untrue in various important particulars. For instance the cash on hand and in banks was \$6,281.85 less than claimed in the statement. That such was the fact appears clearly enough from the testimony of the accountant who examined the books at the request of the receivers in bankruptcy, and which testimony it seems to me was not successfully controverted. It is claimed by the trustees that the books of the bankrupt failed to show the true value of the merchandise on hand, though the statements gave such value as \$302,187.85. No inventory of merchandise on hand was kept, the bankrupt testifying to the customary destruction thereof at the end of the year. That the item of \$302,187.85 representing clothes and trimmings largely exceeded the real value thereof is not seriously controverted. The claim that there was no intention to overestimate such value, and that the bankrupt was unacquainted with the contents of the statements as they were not actually written by him or under his direction, is insufficient, as hereinafter more particularly stated, to justify holding that what he actually did was unaccompanied by a fraudulent intention or purpose. One of the statements was signed and delivered by him personally, and another was delivered by him and his partner. Circumstances arising in the conduct of a partnership or joint venture can readily be conceived which would justify holding one of the partners blameless for acts done by a partner with fraudulent intent, and under such circumstances a discharge should not be denied him, but it is inconceivable that the bankrupt Simon, having signed the statement and delivered the same, was ignorant of the purport of the statements and their falsity. Certain it is that he participated in the benefit of the loans from the banks and of the

credit obtained by the asserted false statements which were the open sesame by which the sums of \$15,000 from the National Bank of Commerce and of upwards of \$100,000 from the Traders' National Bank were obtained. It was his duty under the circumstances to have such familiarity with the statements of the firm's financial condition as would enable him to vouch for their accuracy.

It is also shown that in December, 1909, the American Woolen Company took an order from the bankrupt, and that, before making a delivery, inquiry was made of Dun & Co. as to the financial standing of the firm. At the request of the commercial agency, the bankrupt delivered to it a copy of the above-quoted statement signed by him in the name of the firm. Upon transmission of this statement to the American Woolen Company, credit was given the firm to the amount of \$21,000, the value of the merchandise previously ordered, but not delivered. In my mind there is no doubt that the credit was given in reliance upon the truthfulness of the representations contained in the statement, which, as has been said, was false in the particulars dwelt upon, and also in respect to the item of investment which was stated as amounting to \$424,180.70 and included \$240,000 purporting to be the value of leasehold interests in stores in different cities. That such values were overstated by approximately \$100,000 is undoubted. Nothing was paid outright for the leases, and their value was largely speculative and conjectural. Did the bankrupt intentionally falsify the claim of investments to deceive his creditors? Expert evidence was given to show that the lease in Boston had no distinct market value, the bankrupt having in fact agreed to pay too large a rental, and that efforts to dispose of such lease had failed before the making of the statement, yet \$20,000 was stated to be its value. The value of the leasehold in Chicago, which contained a restriction against subletting the premises without the consent of its lessor, was likewise overstated.

An analysis of the evidence indicates that in the year 1909 the firm sustained losses of upwards of \$300,000, losses of such magnitude that Simon may be presumed to have been aware thereof at the time of making the statements in question to the banks and to the commercial agency, statements which owing to the excessive values put upon the investment account and upon the stock on hand show a large increase of business and property. The bankrupt knew that statements were annually given to Dun & Co., Commercial Agency, for general circulation among the trade, and he thoroughly understood the purpose and usefulness thereof. He knew that further credit and the character of the firm's rating depended upon the representations made, and he also knew, as indicated by the exhibit Culver letter, that the trade was commenting unfavorably upon the firm's financial condition.

[2] Ordinarily statements are given by merchants to commercial agencies to continue a business rating, and are regarded merely as a basis for continued credit and not as a medium through which particular credit is given or obtained, and in such a case, even when the statement is false, the bankrupt is not debarred from a discharge in bankruptcy. In re Russell, 176 Fed. 253, 100 C. C. A. 77. In that



case Judge Lacombe in the opinion of the court called attention to subdivision 3 of section 14b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797), and which read as follows:

"(3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

After stating the history of the amendment and its wording as it left the House of Representatives and was afterwards changed in the Senate, the court said:

"It would seem from this that the ordinary statement of financial condition made to a mercantile agency for general circulation among its inquiring subscribers would not be within the statute."

Several cases were reviewed without an expression of opinion thereon by the court which substantially held that, where statements were made to commercial agencies with the intent that they should be shown to creditors or used to meet inquiries made for the special purpose of extending credit if satisfactory, the same rule applied as if the bankrupt had himself made the false statements and procured credit thereon. In 1910 subdivision 3 was again amended and broadened. It now reads:

"(3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person." Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (U. S. Comp. St. Supp. 1911, p. 1496).

And in *Re Petersen*, 10 Am. Bankr. Rep. 355, it is held that the right to a discharge is governed by the law at the time of filing the petition.

In this case Simon knew that inquiries were being made to the commercial agencies concerning the firm of which he was a member, and he no doubt made the objectionable statement to quiet such inquiries and to obtain credit from the American Woolen Company, and loans and advances from banks, and not simply for the purpose of continuing the previous rating. In *Re Kyte* (D. C.) 174 Fed. 867, it was held that the procurement of credit upon an intentionally false statement made to a mercantile agency to prevent the giving out of unfavorable reports to subscribers bars a discharge.

[3] To simply assert that he did not know that the statement was false in respect to cash on hand, investments, and merchandise items, or accounts payable does not excuse the bankrupt. His signature thereon and delivery thereof, his activity in the business, and his participation in the advantages obtained by the deception raise a presumption of an evil intention, which he has not overcome by reliable proof, to obtain the creditors' goods upon the strength of the misrepresentations. *Hardie v. Swafford Bros. Dry Goods Co.*, 21 Am. Bankr. Rep. 457, 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785; *In re Schwartz*, 28 Am. Bankr. Rep. 670, 201 Fed. 166. There are cases which hold intention to deceive on the part of the bankrupt as

wholly immaterial. In re Shaffer (D. C.) 22 Am. Bankr. Rep. 147, 169 Fed. 724; In re Terens (D. C.) 22 Am. Bankr. Rep. 895, 172 Fed. 938; In re Augspurger (D. C.) 25 Am. Bankr. Rep. 83, 181 Fed. 174.

[4] The contention by the bankrupt that to bar his discharge the merchandise obtained by means of the false statements must have been delivered within four months of bankruptcy is untenable. The Bankruptcy Act, as amended in 1910, does not prescribe any limitation of time within which the credit must have been given or the merchandise delivered, and the authorities cited by counsel for the bankrupt do not uphold him in his contention. See 3 Remington on Bankruptcy, § 2570; Loveland on Bankruptcy, § 730; In re Scott (D. C.) 11 Am. Bankr. Rep. 327, 126 Fed. 981; In re Terens, *supra*.

[5] The specification relating to the failure to keep books of account is claimed to be supported by the failure to keep an inventory of merchandise on hand and a more complete account of the transactions with the several subsidiary stores, but as the expert bookkeeper who testified for the trustees was able to substantially ascertain from the books and records which came into the possession of the trustees the financial condition of the firm, this objection is not proven. The evidence shows that journals, ledgers, cash books, and blotters were kept by a single bookkeeper of the firm who had been in its employ for a number of years; that such books contained the usual information; that the branch stores kept sets of books, duplicates of which were kept at Rochester; and that it was not customary to keep inventory books or private ledgers.

[6] In these circumstances I am of opinion that the principle applies which provides that books need not be kept in the most scientific manner, and that a discharge should not be denied the bankrupt on that ground. In re Rauchenplate, 9 Am. Bankr. Rep. 763. The destruction of the inventory upon which the statements were based was no doubt a suspicious circumstance, and it has been considered upon the question of their falsity.

[7] The third specification deals with the concealment and destruction of books, and evidence is given to show that on the night prior to the bankruptcy Simon was seen to leave his business clandestinely and late at night, bearing away with him what seemed to the witness Grover to be books and records. The theory of the trustees that such articles were the missing inventory books is not, however, sufficiently proven, and I am disinclined to give this item of testimony the weight claimed for it, especially as the witness Sullivan, the bookkeeper of the firm, swore that no inventory books were kept, and that all the firm books were delivered to the trustees when they entered into possession.

The fourth specification relates to concealment of assets. Inasmuch as it has already been found herein that the bankrupt misrepresented and exaggerated the value of the assets of the firm, I am unable to hold on this record that he also concealed assets from his trustee in the large amount claimed. If the bankrupt possessed the amount of money and property claimed to have been concealed from his trustees, the probabilities are that the affairs of the firm would not have

come into the bankruptcy court at the time they did. In support of this contention, stress is laid upon Simon's conduct subsequent to the bankruptcy with regard to his expenditures and plans to organize another company, but I am unable to perceive sufficient testimony that rises to the dignity of evidence to bear out the claim of concealment, and mere suspicion, conjecture, or surmise is not a basis for such a conclusion.

There were other reasons assigned for withholding the discharge, among which were omissions to schedule property, and the making of a false oath in this proceeding, but the specifications lack proof. Preliminary objection was made by the bankrupt to the sufficiency of the specifications because of improper verification, but I think such technical objection may be overruled.

My conclusion is that the trustees and the objecting creditors have proven by a fair preponderance of the evidence that the bankrupt by materially false statements in writing made with an intention of misrepresenting the value of his assets obtained money and property from the objecting creditors who relied upon such statements. The discharge will be withheld on that ground, and, as the evidence is insufficient to sustain specifications two, three, and four, they are dismissed. An appropriate order embodying this disposition of the specifications and of the question which was submitted for review and answered in the negative may be entered.



# PACIFIC BUILDING & LOAN ASS'N v. HARTSON.

(District Court, W. D. Washington, S. D. January 15, 1913.)

No. 1,132, in Equity.

(Syllabus by the Court.)

## INTERNAL REVENUE (§ 9\*)—CORPORATION TAXES—STATUTORY PROVISIONS.

Upon demurrer to complaint, asking the refunding of certain corporation taxes paid by complainant under Act Cong. Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), and that the collection of further taxes be enjoined. *Held* not within exception. Demurrer sustained.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.\*]

In Equity. Suit by the Pacific Building & Loan Association against Millard T. Hartson. Demurrer to complaint sustained.

B. S. Grosscup and W. C. Morrow, both of Tacoma, Wash., for complainant, cited *Flint v. Stone-Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; *U. S. v. Trinidad Coal Co.*, 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640; *Union Ins. Co. v. Hoge*, 62 U. S. (21 How.) 35, 16 L. Ed. 61; *Gibbons v. Mahon*,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525; *Latimer v. Equitable L. & Inv. Co.* (C. C.) 81 Fed. 776, 782; *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345-359; *Robison v. Wolf*, 27 Ind. App. 683, 62 N. E. 74-77; *Spruance v. Farmers' & Merchants' Ins. Co.*, 9 Colo. 73, 10 Pac. 285, 287; *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa, 31, 39; *Mygatt v. N. Y. Pro. Ins. Co.*, 21 N. Y. 52, 65; *Muller v. St. Life Ins. Co.*, 27 Ind. App. 45, 60 N. E. 958, 960; *Splawn v. Chew*, 60 Tex. 532-535; *Cook on Corporations* (3d Ed.) §§ 9, 12; *Fisher v. Essex Bank*, 5 Gray (Mass.) 373; *In re Stillwell's Est.* (N. Y. Sur.) 34 N. Y. Supp. 1123; *In re Birdsall's Est.*, 22 Misc. Rep. 180, 49 N. Y. Supp. 450-455; *Opinions Attorneys General for 1910*, page 194.

B. W. Coiner, U. S. Atty., of Tacoma, Wash., and C. F. Riddell, Asst. U. S. Atty., of Seattle, Wash., for defendant, cited 39 Cyc. 257; *Eversmann v. Schmitt*, 53 Ohio St. 174, 41 N. E. 139, 141, 142, 29 L. R. A. 184, 53 Am. St. Rep. 632; 6 Cyc. 120; 28 Cyc. 1781; 36 Cyc. 1304-1307; *Rhodes v. Mo. Sav. & Loan Co.*, 173 Ill. 621, 50 N. E. 998, 1000, 42 L. R. A. 93; *Opinions of Attorneys General for 1910*, page 189 and following.

CUSHMAN, District Judge. This case is brought, asking the refunding of certain corporation taxes paid by complainant to the defendant, collector of internal revenue, and that the collection of further taxes be enjoined. The tax is under section 38 of the act of August 5, 1909 (36 Stat. pt. 1, p. 112). Complainant claims that it does not fall within the act, and that, if it does, it comes within the exception therein. The act provides:

"That every corporation, joint-stock company or association, organized for profit and having a capital stock represented by shares . . . shall be subject to pay annually a special tax: . . . Provided, however, that nothing in this section contained shall apply . . . to domestic building and loan associations, organized and operated exclusively for the mutual benefit of the members, . . . no part of the net income of which inures to the benefit of any private stockholder or individual."

The cause is before the court upon defendant's demurrer to the complaint, which alleges that complainant is a Washington corporation, organized under the laws of that state relating to the incorporation of building and loan associations. The Washington statutes provide:

"Whenever any number of persons not less than ten desire to be incorporated as a building and loan association, for the purpose of accumulating the savings and funds of its members and lending its shareholders or others the funds so accumulated, they shall make and execute a written declaration to that effect in the form now provided by statute for the execution of deeds of real estate, to entitle the same to record. . . . Upon complying with the foregoing requirements, and upon filing an affidavit of proof of such publication in the office of the Secretary of State, the persons executing such declaration, their associates and successors, shall become a corporate body." Section 7123, *Pierce's Code*; section 3601, 2 *Rem. & Bal. Code*.

"The name 'building and loan association,' as used in this act, shall include all corporations, societies, organizations or associations doing a saving and loan or investment business on the building society plan, whether neutral [mutual] or otherwise, and whether issuing certificates of stock which mature



at a time fixed in advance or not." Section 7149, Pierce's Code; section 3622, 2 Rem. & Bal. Code.

"Any shareholder whose stock has not been declared forfeited in such association, and whose share or shares are not pledged upon a loan, may withdraw such share or shares from the association at any time after one year, by giving at least sixty days' notice in writing to the secretary of his intention to do so. \* \* \*" Section 7154, Pierce's Code; section 3627, 2 Rem. & Bal. Code.

"All corporations organized in this state and doing business in this or any other state as building and loan associations, shall comply with and be subject to all the provisions of this act within sixty days after its passage. \* \* \*" Section 7160, Pierce's Code; section 3633, 2 Rem. & Bal. Code.

"Each association shall adopt by-laws for its government, and therein describe the manner in which its business shall be transacted, which by-laws shall be in conformity with the provisions of this act, and the laws of this state. \* \* \*" Section 7130, Pierce's Code; section 3603, 2 Rem. & Bal. Code.

"For every loan made a note or bond secured by first mortgage on real estate shall be given, which security shall be double the value of the loan and satisfactory to the directors, and where the borrowers are shareholders of the association, the loan shall also be secured by a pledge of their shares as collateral security: Provided, that the directors in their discretion may loan upon the security of the association stock to the amount of its withdrawal value, and may also loan upon or invest in approved federal, state, county and municipal bonds and warrants." Section 7131, Pierce's Code; section 3604, Rem. & Bal. Code, vol. 2.

The articles of incorporation provide:

"We do desire to be incorporated as a building and loan association for the purpose of accumulating the savings and funds of the members of said association, and lending the shareholders of such association and others, the funds so accumulated. The business operations of this association are to be confined wholly to Pierce county and the counties adjacent thereto."

Provision is also made for 10 directors. The by-laws provide that the company—

"is entirely *mutual*, there being no preferred stock. No member shall hold more than *one hundred shares of stock*."

"The *authorized capital stock* of this company shall be four million (\$4,000,000.00) dollars, *divided into forty thousand (40,000) shares* of the par value of one hundred (\$100.00) dollars each."

It is further provided that the directors *shall be elected by the shareholders*, who vote by share, unless in arrears. The directors pass upon all loans, fix the rate of interest, and direct its investments. The by-laws provide:

#### "Article IV.

"Section 1. The stock issued by this association shall be of one kind, to wit:

"Investors' guaranteed dividend stock, which is payable in monthly installments of fifty cents (50¢) for each share, the par value of which shall be one hundred (\$100.00) dollars. If the payments on this stock are made regularly for a period of ninety-six (96) months, and not otherwise, the then legal holder may withdraw all payments so made with interest at the rate of seven per cent. (7%) per annum for the average time the payments have been on deposit, and all other profits that may have accrued to the credit of said shares: Provided, that the entire amount may be paid at any time, and the extra payments so made may be withdrawn on sixty days' notice with interest at the rate of five per cent. (5%) per annum. No interest will be allowed on a deposit withdrawn before six months. The payments on this stock are due and payable on the twentieth day of each and every month.

"The following table is the guaranteed loan and surrender values after one year, based on one share:—

			Paid-up Certificate for
12 months	Loan	\$3.08	\$10.00
24 months	Loan	8.32	21.00
36 months	Cash	18.00	32.00
48 months	Cash	24.35	42.50
60 months	Cash	31.80	53.00
72 months	Cash	39.33	63.00
84 months	Cash	48.71	72.00
96 months.	Return of all payments with 7% per annum for average time on deposit.		

"Not more than one-half of the money received in stock payments shall be used to pay withdrawing members, and such payments shall be made in the order in which certificates have been presented for cancellation."

#### "Article V.

"Section 1. The investment fund shall consist of all money received on stock payments and all profits earned, except such proportion thereof as belongs to the expense fund as provided in these by-laws, and shall be chargeable with all dividends declared, interest upon borrowed money, interest paid on the withdrawal of stock, and all taxes and fire insurance premiums or other sums necessarily expended to protect the investments or loans of the company.

"Sec. 2. The expense fund shall consist of membership fees and other premiums on stock, and one per cent. (1%) per annum on the par value of all stock issued by this company, and one per cent. (1%) per annum on all loans to nonmembers of the association. The expense fund shall be chargeable with all expenses of management.

"Sec. 3. A surplus fund shall be created by using twenty-five per cent. (25%) of the expense fund herein provided for which surplus fund shall be drawn on when necessary to fulfill any guaranty.

"During the month of January of each year, beginning with the January prior to the maturity of the first outstanding stock, the directors shall determine what amount of such accumulated surplus fund is necessary to meet the outstanding guaranties, and the balance of such fund shall be distributed to the stockholders whose stock matures during that calendar year.

"The moneys in said fund may be invested in the discretion of the board of directors in such forms of investment as other funds of the company are required *by law* and these by-laws to be invested.

"Sec. 4. Whenever the directors consider it advisable, they are authorized to borrow money temporarily for the company.

"Sec. 5. Whenever considered advisable by the executive committee, they are authorized to enter into a contract or to ratify any contract already made with one or more persons to develop the company's business: Provided, no further compensation be allowed than the amount set aside in these by-laws as an expense fund."

Section 1, art. 6, of the by-laws is the same as section 7131, Pierce's Code (section 3604, Rem. & Bal.) of the statute above set out.

#### "Article VII.

"Section 1. At any time, should the directors find that the income of the association cannot be loaned profitably, they may cancel any outstanding certificates of *general stock* not borrowed upon, and shall pay the legal holder thereof an amount equal to the book value of stock so cancelled, and the depositing of a copy of the resolution of the board of directors ordering the redemption of such stock, postage prepaid, in the postoffice at Tacoma, Washington, addressed to the last known address of each shareholder as furnished to the association and as shown by its books, shall be deemed a good and sufficient tender, and within thirty (30) days thereafter all the rights and

equities of any holder of any such stock in any further profits shall be terminated."

The injunctive relief herein asked must be denied under the plain provisions of section 3224, R. S. (Thomson, Federal Statutes Annotated, volume 3, page 600).

Complainant sues as a corporation. It is admitted that it is a corporation organized for profit under a law, but complainant contends that it has not a capital stock represented by shares. The "building and loan association" statutes cover, not only "mutual" companies, but those doing business planned on other lines. They also insure the shareholder, whose stock has not been forfeited and whose shares are not pledged, the right of withdrawal, and all of the provisions of the act are made applicable to those corporations organized and doing business in the state as building and loan associations.

The articles provide that the issued capital stock of the company shall be \$4,000,000, divided into 40,000 shares of the par value of \$100 each, that no member shall hold more than 100 shares of the stock, and that the shareholders shall vote for the corporate directors by the share. There are other provisions in the articles and by-laws concerning the shares of stock in this corporation, but the complainant contends that mere words should be disregarded and the character of the association examined.

In an ordinary corporation, the capital stock is fixed and the shareholder has a right to a voice in its management, a share in its profits, and to receive an aliquot part of the proceeds of its capital on the winding up of a corporation. It is contended that these are essentials which show that the shares issued by the complainant differ from corporate shares.

If this corporation were, at any particular time, dissolved, the assets of the corporation would, unquestionably, be distributed pro rata among the then shareholders. Therefore, as to its present members, it is a corporation having capital stock represented by shares, although, by the maturing of the stock and the retirement of shareholders, its shareholding membership is constantly changing.

A building and loan association differs in some respects from the ordinary corporation; but the federal statute itself shows, by the exception therein contained, that Congress intended to exempt what would otherwise have been included, but for the express exception. The exemption is not of all building and loan associations, nor those tested by the ordinary characteristics of corporation shares of stock, above pointed out, but the exemption is of—

"domestic building and loan associations \* \* \* organized and operated exclusively for the mutual benefit of the members, no part of the net income of which inures to the benefit of any private stockholder or individual."

A shareholder in the complainant corporation does not acquire with his shares a fixed aliquot part in the property of the corporation, but only such part of its authorized stock. With an increase in its membership, the fraction representing his interest in the whole has become smaller; but the total capital correspondingly is increased, so that the

actual value should not diminish, but it is not a fixed share of the whole.

The tax is not upon corporations "divided" into shares, but "represented" by shares. The former would imply more fixity than the latter. No matter how the stock issued in this corporation expands or contracts, it continues to be "represented" by shares until the last share is retired.

Only one kind of stock is provided for in the by-laws, designated as "investors' guaranteed dividend stock," and bearing interest at the rate of 7 per cent. for the average time the payments have been upon deposit. It has been argued that this guaranty feature does not destroy the mutuality of the shareholders in all of the profits; that, if all of the stockholders were to exercise the privilege of withdrawing at the same time, the guaranty would be of no value. In practice, such a thing would not likely occur. Those whose stock has matured, and who exercised the privilege, secure 7 per cent., under the guaranty, together with other profits that may have accrued to the credit of said shares. If the association had made less than 7 per cent. profit annually, when a sufficient number of its shareholders had exercised the privilege afforded by the guaranty, the remainder would be stripped of their profit.

There is a further provision in the by-laws (page 13 of the bill of complaint), which states:

"Not more than one-half of the money received in stock payments shall be used to pay withdrawing members, and such payments shall be made in the order in which certificates have been presented for cancellation."

Clearly the effect of this provision is to make two classes of stock. Assuming that a uniform profit of 7 per cent. is made upon investments and loans, then, under the guaranty above, the first half of the subscribing shareholders would have the absolute right of withdrawal; but the rest, the later subscribers, would be forced to remain in the company, which would make their stock "common stock." If the profits were less than 7 per cent., they would not receive as much as the early subscribers exercising the privilege of withdrawal, and if the profits were more than 7 per cent. their profits would be greater. In any event, the "mutuality" in the profits of the association is clearly destroyed by this provision.

In view of the provisions for the loaning of the funds of the corporation to nonmembers, for issuing preferred or guaranteed interest-paying stock, and that allowing the directors, upon finding that the income of the association cannot be loaned profitably, to "cancel any outstanding certificates of general stock not borrowed upon," paying the holder the book value of the stock so canceled, thereby being authorized to retire any and all stock in their discretion, it is clear that the complainant cannot be said to be—

"organized \* \* \* exclusively for the mutual benefit of the members, no part of the net income of which inures to the benefit of any private stockholders or individuals."

Demurrer sustained.



ROSCHYNIALSKI v. HALE.

(District Court, D. Nebraska, Grand Island Division. January 31, 1913.)

No. 19.

**1. COURTS (§ 344\*)—FEDERAL COURTS—PRIVILEGE FROM SERVICE OF PROCESS.**

In the absence of a state statute on the subject, the question of privilege of suitors and witnesses from service of process must be determined by the United States court as a question of general jurisprudence, by the exercise of its independent judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. § 344.\*]

**2. PROCESS (§ 118\*)—EXEMPTION FROM SERVICE—PERSONS EXEMPTED.**

The privilege of suitors and witnesses from service of process extends, not only to those who attend before the court on the trial, but also to those who attend as parties, or as witnesses, before masters in chancery, registers in bankruptcy, examiners, and commissioners to take depositions; and the mere fact that depositions are taken by agreement does not impair the privilege.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 146; Dec. Dig. § 118.\*]

**3. PROCESS (§ 118\*)—EXEMPTION FROM SERVICE—PERSONS EXEMPTED.**

The privilege of a suitor from service of process extends to his attendance before a notary public for the taking of his deposition, pursuant to agreement of the attorneys of the parties; for, though a notary taking deposition is not a tribunal having the powers of a master in chancery, a witness may, under Comp. St. Neb. 1911, c. 61, § 7, and Rev. St. § 863 (U. S. Comp. St. 1901, p. 661), be compelled by process to attend before a notary and to answer questions put to him.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 146; Dec. Dig. § 118.\*]

Action by Valentine Roschynialski against Johnson T. Hale. Plea to jurisdiction sustained.

A. Norman, of Ord, Neb., R. H. Mathew, of Loup City, Neb., and Claude A. Davis, of Ord, Neb., for plaintiff.

J. S. Pedler and W. A. Prince, of Grand Island, Neb., for defendant.

THOMAS C. MUNGER, District Judge. The defendant was served with a summons issued in an action begun in the state court. He removed the action to this court, and has presented a plea to the jurisdiction. The petition was filed in the state court in March, 1912, and the summons was issued and served on July 25, 1912, while the defendant was in the county where the action was begun. The defendant, at the date of filing the petition and ever since, has been a resident of another state. At the date of the issuance of the summons in this case there was pending in the same county an action in replevin, wherein the defendant in this action was plaintiff. That action was about to be tried. The defendant had come from another state, bringing the body of a deceased relative for interment in another county in this state, and as soon as that duty was performed he was induced to go to the county where this action was brought,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in pursuance of an agreement between the attorneys for the parties in the replevin action that his deposition should be taken there, before a notary public, as a witness on his own behalf in the replevin action. His deposition was so taken, and the summons in this action was served on defendant, within a few minutes of the time he concluded his testimony, and before he had a reasonable time to depart for his home. Under the Civil Code of Nebraska, the defendant was not exempt from service of summons, on the ground that he was a non-resident of the state or of the county, as he was in the county when the summons was issued and served, although the petition was filed before he came into the county. *William Mosher v. August Huwaldt et al.*, 86 Neb. 686, 126 N. W. 143.

[1] Was the defendant privileged from service of this process because of his attendance as a witness, to give his deposition in another action? There appears to be no decision by a United States court directly upon this point. The privilege of suitors and witnesses from service of process is not founded upon any statute of this state, and, as it is a question of general jurisprudence, a definition of the common-law privilege, it is the duty of this court to decide the question by the exercise of its independent judgment. *Hale v. Wharton et al.* (C. C.) 73 Fed. 739-746; *Skinner & Mounce Co. v. Waite et al.* (C. C.) 155 Fed. 828-831; *Kaufman v. Garner* (C. C.) 173 Fed. 550-552.

[2] The reason why this privilege is extended to suitors and witnesses has often been stated. It is to secure to them the right to give testimony and assistance in the trial of an action, unhindered by exposure to suits by reason of their presence upon the court. The rule is founded in public policy, and is for the benefit of the court, as well as of the parties. Its application has been illustrated by many decisions of the United States courts, exhibiting a liberal interpretation in favor of the privilege. *Parker v. Hotchkiss*, 1 Wall. Jr. 269, Fed. Cas. No. 10,739; *Lyell v. Goodwin*, Fed. Cas. No. 8,616; *United States v. Bridgman et al.*, Fed. Cas. No. 14,645; *Brooks et al. v. Farwell et al.* (C. C.) 4 Fed. 166; *Bridges v. Sheldon* (C. C.) 7 Fed. 17, 44; *Plimpton v. Winslow* (C. C.) 9 Fed. 365; *Atchison v. Morris* (C. C.) 11 Fed. 582; *Larned v. Griffin* (C. C.) 12 Fed. 590; *Nichols v. Horton* (C. C.) 14 Fed. 327; *Wilson Sewing Machine Co. v. Wilson* (C. C.) 22 Fed. 803; *Small v. Montgomery* (C. C.) 23 Fed. 707; *Ex parte Schulenburg* (C. C.) 25 Fed. 211; *Kauffman v. Kennedy* (C. C.) 25 Fed. 785; *Holyoke & South Hadley Falls Ice Co. v. Ambden* (C. C.) 55 Fed. 593; *Kinne et al. v. Lant* (C. C.) 68 Fed. 436; *Hale v. Wharton et al.*, supra; *Morrow v. U. H. Dudley & Co.* (D. C.) 144 Fed. 441; *Skinner & Mounce Co. v. Waite et al.*, supra; *Peet v. Fowler* (C. C.) 170 Fed. 618; *Kaufman v. Garner*, supra.

The privilege has been extended, not only to those who attend before the court upon the trial, but also to those who attend as parties, either as defendant or plaintiff, or as witnesses, before masters in chancery, registers in bankruptcy, examiners, and commissioners to take depositions. 1 Gr. on Ev. § 317; *Bridges v. Sheldon*, supra; *Plimpton v. Winslow*, supra; *Larned v. Griffin*, supra; *Morrow v. U. H. Dudley & Co.*, supra; *Parker v. Marco*, 136 N. Y. 585, 32

N. E. 989, 20 L. R. A. 45, 32 Am. St. Rep. 770; *Miller v. Dungan*, 37 N. J. Law, 182; *First Nat. Bank of St. Paul v. Ames et al.*, 39 Minn. 179, 39 N. W. 308. The fact that the depositions were taken by agreement, rather than upon notice and by service of subpoena, does not impair the privilege. 1 Gr. on Ev. § 316; *Plimpton v. Winslow*, supra; *Parker v. Marco*, supra.

[3] It is contended that the defendant was not privileged from service of process in this case, because his attendance before the notary was not an attendance before the court, nor before any tribunal vested with the authority of the court. The decisions in the cases of *Greer v. Young*, 120 Ill. 184, 11 N. E. 167, and *Cassem v. Galvin*, 158 Ill. 30, 41 N. E. 1087, support these conclusions. In those cases the exemption from service of process in such cases was denied, because the defendant had ample time to prepare his defense, and also because the depositions were not taken before a tribunal such as a master, referee, or commissioner, acting under an order of the court. It was also said that the notary could not rule upon the admission of evidence, nor was such officer within the control of the court. The first reason would deny the privilege to any suitor or witness, even if he were attending the trial under subpoena, because he would have the same length of time to prepare for his defense. That a notary, taking depositions, is not a tribunal having the powers, for example, of a master in chancery, does not seem important. The witness may be compelled by process or rule to attend before such officer. He may be compelled to answer questions propounded. Section 7, c. 61, Comp. St. Neb. 1911; Rev. Stat. U. S. § 863 (U. S. Comp. St. 1901, p. 661). While the officer taking the depositions may not rule upon the admissibility of evidence, the same limitation of power applies to an examiner, or commissioner to take depositions; but it has been held that witnesses before such officers are privileged from service of process. *Bridges v. Sheldon et al.* (C. C.) 7 Fed. 17, 42, 46; *Plimpton v. Winslow* (C. C.) 9 Fed. 365. The reasons for giving testimony by deposition, in a place other than the residence of the witness, are often of importance; and it appears inequitable to allow actions to be brought against one who is present for the bona fide purpose of giving such testimony, when he is privileged from service of process in giving the same testimony before the court or some other officer of the court. The right to be present at the hearing of his case is not more essential to a suitor than the right to give testimony by deposition in a case where he cannot be present. In *Parker v. Marco*, 136 N. Y. 585, 32 N. E. 989, 20 L. R. A. 45, 32 Am. St. Rep. 770, it is said:

"No good reason can be perceived why the privilege should not be extended to a party appearing upon the examination of his adversary's witnesses, where the testimony is taken pursuant to the authority of law, and can be read upon the trial with the same force and effect as if it had been taken in open court. It is a proceeding in the cause, which materially affects his rights; and the necessity for his attendance is quite as urgent as it would be if the examination was had at the trial. But we do not think that the question of the necessity of his presence is material. It is the right of the party, as well as his privilege, to be present whenever evidence is to be taken

in the action, which may be used for the purpose of affecting its final determination. It is essentially a part of the trial, and should be so regarded so far as it may be necessary for the protection of the suitor."

The same principle has been applied in *Powers v. Arkadelphia Lumber Co.*, 61 Ark. 504, 33 S. W. 842, 54 Am. St. Rep. 276, and in *Partidge et al. v. Powell*, 180 Pa. 22, 36 Atl. 419. A fortiori, this reasoning would apply to a case such as this, where the suitor's own deposition was being taken before the officer. These decisions are in harmony with the liberal interpretation in favor of the privilege evidenced by the numerous cases cited from United States courts, and state the better rule, and the plea to the jurisdiction will therefore be sustained.

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### MEMORANDUM DECISIONS.

**ALLEN et ux. v. UNITED STATES.** (Circuit Court of Appeals, Ninth Circuit. February 3, 1913.) No. 2,146. Appeal from the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge. B. C. Mosby, of Spokane, Wash., for appellants. Oscar Cain, U. S. Atty., and E. C. MacDonald, Asst. U. S. Atty., both of Spokane, Wash. Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The government was awarded judgment by the court below in this suit, which was brought for the annulment of a patent theretofore issued by it to the appellant Charles F. Allen for a quarter section of land under the act of Congress known as the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]); the ground of the suit being the alleged fraud of the patentee in the procurement of the patent. We think it clear from a perusal of the evidence that we would not be justified in reversing the judgment appealed from. The judgment is affirmed.

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**H. G. HASTINGS & CO. et al. v. MALONE.** (Circuit Court of Appeals, Fifth Circuit. January 28, 1913. On Petition for Rehearing, March 4, 1913.) No. 2,433. In Error to the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge. O. T. Brown, of San Marcos, Tex., and S. W. Fisher, of Austin, Tex., for plaintiffs in error. Will G. Barber, of San Marcos, Tex., for defendant in error. Before SHELBY, Circuit Judge, and FOSTER, District Judge.

PER CURIAM. We find no error in the record. The rulings of the trial court were not in conflict with the opinion of this court when the case was here before. 193 Fed. 1, 113 C. C. A. 329.

The judgment is affirmed.

On Petition for Rehearing.

PER CURIAM. The evidence offered required the case to be submitted to the jury. We find no reversible error in the rulings or charge of the court on the trial. The petition for a rehearing is overruled.

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**HOUSTON OIL CO. OF TEXAS et al. v. MIDDLESWORTH et al.** (Circuit Court of Appeals, Fifth Circuit. February 4, 1913.) No. 2,384. In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge. Chas. T. Butler, of Beaumont, Tex., for plaintiffs in error. Oliver J. Todd, of Beaumont, Tex., for defendants in



error. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. We adhere to our decision in this case (184 Fed. 857). When this suit was brought, the property involved was in the possession of the court under the ancillary bill then pending in the Circuit Court for the Eastern District of Texas, and that possession has not been ended by any order of court discharging the receiver or releasing custody of the property; therefore the jurisdiction was not ousted by the allowance of petitions of intervention of other parties claiming an interest in the property, although some, if not all, of the interveners were citizens of the same state as the defendant. In the rulings of the trial court in the progress of the case we find no reversible error. The judgment appealed from is affirmed.

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JOHNSTON et al. v. SOUTHERN WELL WORKS CO. et al. (Circuit Court of Appeals, Fifth Circuit. February 4, 1913.) No. 2,362. Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge. F. D. Minor, of Beaumont, Tex., and L. L. Morrill, of Washington, D. C., for appellants. Wm. G. Henderson, of Washington, D. C., for appellees. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. We have doubts as to the validity of the patent sued on in this case; but, conceding that the claimants below made a prima facie case as to their patent rights, we are clear that no infringement has been proved. The decree of the lower court dismissing the bill is affirmed.

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LEE v. BROCKETT et al. (Circuit Court of Appeals, Eighth Circuit. December 11, 1912.) No. 3,711. In Error to the Circuit Court of the United States for the Eastern District of Missouri. W. C. Russell, of Charleston, Mo., for plaintiff in error. D. A. Ball, of Louisiana, Mo., for defendants in error. Before ADAMS and SMITH, Circuit Judges, and WILLARD, District Judge.

PER CURIAM. The only assignment of error mentioned in the brief is as follows: "The only error assigned to which we now desire to direct the attention of the court is that the court erroneously charged the jury as to the law in the case." The assignment then quotes that part of the charge complained of. An examination of the record shows that the plaintiff in error, the defendant below, presented no requests to charge, and took no exceptions to the charge as given. The judgment of the court below is affirmed, with costs.

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MCCOACH v. PRATT et al. (Circuit Court of Appeals, Third Circuit. January 21, 1913.) No. 86. In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge. Action by Dundas F. Pratt and others, as executors of the last will of Ferdinand J. Dreer, against William McCoach, Collector of Internal Revenue for the First Collection District of Pennsylvania. Judgment for plaintiffs, and defendant brings error. Affirmed. Jasper Yeates Brinton, of Philadelphia, Pa., for plaintiff in error. Ezekiel Hunn, Jr., of Philadelphia, Pa., for defendants in error. Before GRAY and BUFFINGTON, Circuit Judges, and RELLSTAB, District Judge.

PER CURIAM. In the court below the defendants in error, as executors of the last will and testament of Ferdinand J. Dreer, deceased, brought their action against the plaintiff in error, as collector of internal revenue for the First district of Pennsylvania, to recover certain taxes claimed under sections 29 and 30 of the so-called "War Revenue Act" of June 13, 1898 (30 Stat. 464, 465, c. 448 [U. S. Comp. St. 1901, pp. 2307, 2308]), and paid to the plaintiff in error, collector as aforesaid, under protest. The learned counsel for the government in the opening paragraph of his brief says: "The govern-

ment frankly concedes that on its facts the present case falls within the decision of this court in the case of *Disston v. McClain*, 147 Fed. 114, 77 C. C. A. 340 (1906)." And the court below in rendering judgment for the plaintiffs for want of sufficient affidavit of defense makes the same statement. It is contended, however, by counsel for the government that the opinion of the Supreme Court of the United States in the recent case of *United States v. Fidelity Trust Co.*, 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed. 137, rendered since the decision above referred to, "invites a reconsideration and modification of the views heretofore expressed by this court in respect to the single point now in controversy." The suit in the case just referred to was brought to recover a portion of a succession tax paid under Act June 13, 1898, c. 448, 30 Stat. 448, 464, the action being based on Act June 27, 1902, c. 1160, § 3, 32 Stat. 406 (U. S. Comp. St. Supp. 1911, p. 983), which provides for refunding "so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July 1st, 1902." The question before the court was whether a legacy to pay over net income to the legatee in periodical payments during the legatee's life, on which the legatee had received several payments of income, was or was not a contingent beneficial interest, or a vested life estate, within the meaning of the Refunding Act.

In the case of *Disston v. McClain*, supra, as in the present case, this court was concerned with what was to be considered a "legacy" or "distributive share" under sections 29 and 30 of the War Revenue Act of June 30, 1898, and not with the interpretation of "contingent beneficial interests which shall not have become vested prior" to a certain date, as in the case lately before the Supreme Court. The *Disston* Case was the subject of a petition by the government to the Supreme Court for a writ of certiorari, which petition was refused. Though the questions in the two cases are not unrelated, a careful reading of the opinion of the Supreme Court does not convince us that they are identical, either in form or substance. We do not feel called upon, therefore, to reconsider or modify the opinion expressed by us in *Disston v. McClain*, and in conformity with our opinion in that case we affirm the judgment of the court below.

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**OLSSON v. UNITED STATES.** (Circuit Court of Appeals, Ninth Circuit. February 13, 1913.) No. 2,166. Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Cornelius H. Hanford, Judge. J. W. A. Nichols and J. H. East-erday, both of Tacoma, Wash., and Geo. W. McKay and R. Winsor, both of Seattle, Wash., for appellant. W. G. McLaren, Louis E. Shela, and C. F. Rid-dell, all of Seattle, Wash., for appellee. Charles A. Enslow, of Seattle, Wash., in pro. per.

**PER CURIAM.** Pursuant to stipulation of counsel for respective parties, ordered decree of District Court reversed, and cause remanded for a new trial. 196 Fed. 562.

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**ST. LOUIS UNION TRUST CO. v. GALLOWAY COAL CO. et al.** (Cir-cuit Court of Appeals, Fifth Circuit. January 14, 1913.) No. 2,431. Ap-peal from the District Court of the United States for the Southern Divi-sion of the Northern District of Alabama; Win. I. Grubb, Judge. Edw. H. Cabaniss, of Birmingham, Ala., for appellant. Jno. P. Tillman, of Birming-ham, Ala., for appellees. Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

**PER CURIAM.** After a careful examination of the voluminous tran-script and evidence therein, in the light of the exhaustive briefs filed, we are of opinion that the case was correctly and justly ruled in the court below. The decree appealed from (193 Fed. 106) ought to be affirmed, and it is so ordered.

**SHIPP v. TEXAS & P. RY. CO.**† (Circuit Court of Appeals, Fifth Circuit. February 18, 1913.) No. 2,379. In Error to the District Court, of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. Chas. Louque, of New Orleans, La., for plaintiff in error. Chas. Payne Fenner, of New Orleans, La., for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. The petition in this case states no case of liability under the Employers' Liability Act of 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) as amended by act of 1910 (Act April 5, 1910, c. 143, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1324]). Under the Louisiana law applicable, the case does not show that the defendant was guilty of negligence, but shows that the plaintiff's decedent was guilty of contributory negligence in the matter resulting in his death. The judgment of the District Court is affirmed.

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**STOUGHTON WAGON CO. v. COWAN.** (Circuit Court of Appeals, Fifth Circuit. January 7, 1913.) No. 2,424. Appeal from the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge. G. R. Harsh and Wm. C. Fitts, both of Birmingham, Ala., for appellant. Wm. K. Brown, of Birmingham, Ala., for appellee. Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

PER CURIAM. A majority of the judges being of opinion that this case was correctly ruled in the court below, the decree (198 Fed. 336) appealed from is affirmed.

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**WALKER v. UNITED STATES.** (Circuit Court of Appeals, Fifth Circuit. February 4, 1913.) No. 2,386. In Error to the District Court of the United States for the Northern District of Texas; Edw. R. Meek, Judge. F. M. Etheridge and Jos. M. McCormick, both of Dallas, Tex., for plaintiff in error. Wm. H. Atwell, U. S. Atty., of Dallas, Tex. Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. The evidence was sufficient to warrant the submission of the case to the jury, and we find no reversible error in any of the rulings of the trial judge. The judgment is affirmed.

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**WRIGHT v. LOUISVILLE & N. R. CO. et al.** (Circuit Court of Appeals, Fifth Circuit. January 14, 1913.) No. 2,417. Appeal and Cross-Appeal from the United States District Court for the Northern District of Georgia; Wm. T. Newman, Judge. Thos. S. Felder, of Atlanta, Ga., and Jno. C. Hart and Samuel Sibley, both of Union Point, Ga., for appellant and cross-appellee. Alex C. King, of Atlanta, Ga., and Jos. B. Cumming and Bryan Cumming, both of Augusta, Ga., for appellees and cross-appellants. Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

PER CURIAM. For the reasons given in the opinion of the trial judge found in the transcript, the decree appealed from (199 Fed. 454) is affirmed, the costs of appeal to be divided equally between the parties.

† Rehearing denied March 18, 1913.

END OF CASES IN VOL. 201

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